KUMARASENA

v.

DATA MANAGEMENT SYSTEMS LTD.

COURT OF APPEAL.
RAMANATHAN, J. AND GOONEWARDENA, J.
C. A. REV. APPLICATION No. 188/87
WITH C. A. (L.A.) No. 22/87
D. C. COLOMBO No. 2513/SPL.
JUNE 1,2,3, 15 AND 16, 1987.

Interim Injunction–Application for dissolution of interim injunction taken up together with trial–Enhancement of security–Compensation–Civil Procedure Code, section 667.

Bias–Transfer of case to another judge for disposal.

Code of Intellectual Property Act, No 52 of 1979–Patent–Complaint of infringement by registered owner of Sinhala Word Processor.

In an action for the infringement of a patent the plaintiff who was the registered owner, registered by the Registrar of Patents and Trade Marks in respect of a Sinhala Word Processor moved for and obtained an interim injunction on the deposit of Rs. 10,000 as cash security. The defendant filed an application for dissolution of the interim injunction and it was agreed that the trial and the application for dissolution could be had together. At the inquiry he complained that as his losses were very high and the plaintiff was not a man of means, the security ordered was insufficient. The District Judge refused the application to discharge the interim injunction but enhanced the security to Rs. 750,000

Held–

(1) Security is ordered against compensation that may be ordered under S. 667 C.P.C.

(2) Section 667 C.P.C. contemplates two situations: (1) When the injunction was applied for on insufficient grounds whatever the result of the case may be; (2) In the court's view there was no probable ground for applying for it where the result of the action is against the party obtaining the injunction.

(3) Compensation can be awarded firstly on the application of the party affected by the injunction and secondly by the Court's decree.

(4) Where the question of the interim injunction was kept back for decision along with the trial it was wrong to have enhanced the security because it is only after an assessment of all the material that the court could have come to the conclusion that the injunction had being applied for on insufficient grounds.

(5) Re bias it is not only that the Judge should be impartial, he must appear impartial. In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself but at the impression which would be given to other people. Even if he was as impartial as could be nevertheless if right minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit. There must appear to be a real likelihood of bias. Surmise or conjecture is not enough. Will reasonable people think the judge favoured one side unfairly?

Cases referred to:

(1) *Don Mathes v. Dissanayake –[1919] 6 C. W.R. 358.*
(2) *Marikar v. Bastian – (1916] 3 C.W.R. 154.*
(3) *R (Ellis) & Co Dublin J J –[1894] 2 I R 526.*
(4) *Ranagiri and others v. Piyadasa and others –C. A. Application No. 2026/79 C.A. minutes of 28.5.1980.*
(5) *Perera and others v. Hasheem and others – 1 Sri Kantha Law Reports 133.*
(6) *Marcus v. Attorney-General–C.A. Application No. 9/84, CA Minutes of 4.4.84.*
(7) *Hannam v. Badford C. C –[1970] 1 WLR 937, 945.*
(8) *Lesson v. General Medical Council –[1889] 43 Ch. D. 366, 384.*

(9) *R. v. Sussex JJ ex p. M.C. Carthy–[1924] 1 KB 256, 259.*
(10) *Frome United Diaris v. Bath J J –[1926] AC 586, 618.*
(11) *Rex v. Camborne Justices ex P Pearce,–[1955] 1 OB 41, 53.*
(12) *Metropolitan Properties Co. (F G C Ltd.) v. Lannon –[1968] 3 All ER 304.*

APPLICATION for Revision from order of the District Judge of Colombo.

K. Kanag Iswaran with *S. Mahenthiran* and *Nithi Murugesu* for plaintiff-petitioner.

K. N. Choksy P. C. with *I. S. de Silva* and *N. Hatch* for defendant-respondent.

Cur. adv. vult.

July 16, 1987.

GOONEWARDENE, J.

The plaintiff came into the District Court complaining of an infringement of a patent of which he claimed to be the registered owner. Such patent was he averred one granted under the Code of Intellectual Property Act No. 52 of 1979 by the Registrar of Patents and Trade Marks and with respect to a Sinhala Word Processor. He sought a permanent injunction restraining the defendant from infringing this patent and an interim injunction in like terms. On his ex parte application the Court by its order of 6th December 1985 granted such interim injunction on deposit of a sum of Rs. 10,000 as security. Upon such injunction being issued and communicated to the defendant the latter filed petition and affidavit (with annexes) seeking a dissolution thereof and an Order Nisi was entered in terms of the prayer to such petition. The defendant also filed its answer with these papers. The plaintiff objected to the dissolution of the interim injunction and therefore to the Order Nisi being made absolute.

Moving on, without dwelling upon other proceedings had of no relevance to the present application, it would suffice to state that the trial of the action and the matter of the application of the defendant for a dissolution of the interim injunction were taken up for disposal together, the defendant in the meanwhile having filed an amended answer. That parties agreed to this course, counsel for both sides conceded at the hearing before us and this is independently borne out on an examination of the issues upon which the trial was to proceed (vide for example issue No. 22).

The trial commenced before the Additional District Judge of Colombo on 29th July 1986 with the plaintiff giving evidence. After some dates of hearing while the plaintiff was under cross examination there was a change of Judge as the proceedings show and on the 16th of October 1986 further proceedings commenced before the incoming Judge with the parties agreeing to adopt the earlier evidence recorded. On the same day and at the conclusion of the plaintiff's evidence Counsel for the defendant is seen to have raised two questions, firstly as to the maintainability of the interim injunction and secondly as to the adequacy of the security upon which such injunction had been granted. Oral submissions on these two questions had been made on 27th January 1987 followed by written submissions and on the 12th of February 1987 the District Judge made his order. He refused to dissolve, at that stage, the interim injunction and since that part of the order is not challenged, it need not concern us here. He however enhanced the security of Rs. 10,000 ordered initially as a condition for the issue of the interim injunction by an additional sum of Rs. 750,000, to be deposited on or before the 19th of February 1987 failing which the interim injunction was to stand discharged with immediate effect upon such failure. It is unclear whether this amount of Rs. 750,000 was to be furnished in cash or by hypothecation of property, but the use of the word 'deposit' in two places in the Judge's order would tend to suggest the former. Briefly, the reasons for the enhancement of the security as stated by the Judge were that the injunction obtained ex parte on the inadequate security of Rs. 10,000 had the effect of causing immense hardship to the defendant, that it was the duty of the Court to ensure that no injustice was caused to a party and that if the security was not enhanced section 667 of the Civil Procedure Code would be rendered nugatory and meaningless.

Consequently, the plaintiff has moved this Court in Application C. A. 188/87, *inter alia* to have this part of the District Judge's order revised. He has also made a parallel application C. A. L. A. 22/87 seeking leave of this Court to appeal against such order.

Although the objections filed by the defendant in the Revision Application C. A. No. 188/87 (in which the plaintiff successfully obtained an order staying the operation of the District Judge's order complained of relating to the enhancement of the security) challenged

the right of the plaintiff to seek relief by way of revision or to obtain any relief upon such application. At the hearing before us it was agreed that the application, for leave to appeal was to be treated as if leave has been granted and it and the revision application be taken up and disposed of together. Counsel agreed that the questions before this Court were thus reduced to two in number, that is, firstly whether the order enhancing security could be allowed to stand and secondly whether further proceedings in the District Court should continue before the same District Judge or alternatively be taken out of his hands, on both of which Counsel for the plaintiff contended he was entitled to succeed.

Counsel for the respondent sought to support the order of the District Judge and contended that the evidence of the plaintiff himself revealed that there was a sufficient basis to justify the enhancement of security. He contended that this evidence shows that the plaintiff had already sold and assigned his patent right thus depriving himself of a cause of action (if he had one) upon which he could have come to Court, but as he conceded at a later stage of his argument this was a matter properly the subject for decision at the conclusion of the trial. He also stressed that this evidence showed that while the plaintiff had not sold even a single word processor to which the patent related, the plaintiff's admission was that he, not being possessed of assets, would be unable to pay the massive compensation claimed by the defendant if so ordered by the Court. Counsel's contention therefore had to be understood to be that these items of evidence rendered it within the competence of the District Judge to enhance the security in the manner he did. He also contended that the decision in the case of *Don Mathes v. Dissanayake* (1) referred to by the District Judge justified this step. In that case the plaintiff who filed an action to partition a land sought and obtained an interim injunction upon filing his plaint supported by an affidavit, on the basis that the 11th defendant who was restrained by such injunction had been gemming on the land. The effect of such injunction which was issued without security was to restrain such gemming. The 11th defendant the incumbent of a Buddhist temple in that area together with the 12th defendant its trustee, filed an affidavit which stated that the land was the sole property of the temple and had been possessed by those in charge of it for over 50 years, and that the plaintiff and the other parties shown as co-owners had no interests whatsoever in the land. The affidavit stated that gemming by the temple had been going on

uninterruptedly for several years and stoppage of such operation would cause great loss to the temple. It was stated that the plaintiff was not possessed of any property and that he had filed the action at the instigation of others. On this application the 12th defendant moved that the plaintiff be ordered to furnish security in connection with the injunction. The District Judge after consideration of the application ordered security in Rs. 1,000 to be given by a certain date at the risk of the injunction being dissolved upon failure. In an appeal taken against this order it was conceded by counsel for the plaintiff that section 666 of the Civil Procedure Code would justify the Court requiring security if the injunction was to be continued. He however attacked the procedure by which this security was sought. De Sampayo, J. in holding that the procedure adopted was not of much consequence (at page 360) said ".....I think the District Judge was within his rights in requiring security to be given. I may add that the practice recognised in our Courts on injunctions being issued includes the requirement of security in a proper case, and as an instance of this Mr. Keuneman for the respondent referred us to the case of *Marikar v. Bastian Appuhamy* (2). As the order appealed from appears on the whole reasonable and in accordance with the practice, I think the appeal must be held to fail, and must be, therefore, dismissed with costs".

This case Counsel for the plaintiff contended can scarcely be considered, having regard to the circumstances there, as an authority for the course adopted by the District Judge in the circumstances of the instant case. It was one where the party affected sought not as appears from the judgment a dissolution of the injunction, but rather as sole relief the imposition of a condition upon which the injunction was to continue to be effective, namely an order for the deposit of security. The papers filed in the instant case do not reveal that any such relief was asked for. What was sought here was only a dissolution of the injunction and there is in those papers no complaint of any inadequacy of the security ordered. It is one thing for a person restrained by an injunction, to make the solitary complaint that the injunction issued without deposit of a security should not be allowed to remain unless some reasonable security is provided and for the Court to so order; it is a different thing for a person affected by the injunction issued on deposit of a stated sum as security to ask for its dissolution as the only relief, on the basis that such injunction should

not be allowed for reasons urged to stand and in such a case for the Court to enhance the security, the inadequacy of which never formed the subject of complaint upon the papers filed for dissolution. I am in agreement that that case constitutes no authority for the course adopted by the District Judge, taking into account the prevailing circumstances here.

The security, which De Sampayo, J, said is countenanced by practice upon the giving of which an interim injunction is granted, must in my understanding of the scheme of the sections contained in Chapter XLVIII of the Civil Procedure Code, be intended to be with respect to a possible award of compensation made under section 667 of the Civil Procedure Code. I do not think that it can have reference to anything else. The District Judge himself appears to have thought along similar lines and indeed Counsel for the defendant at the hearing before us also formulated his arguments on that basis. In that view such compensation is as section 667 spells out, that which the Court deems reasonable for the expense or injury caused to the party affected by the injunction obtained in circumstances where either it appears to Court that the injunction was applied for on insufficient grounds or if after the issue of the injunction the action is dismissed or judgment is given against the party obtaining such injunction by default or otherwise and it appears to the Court that there were no probable grounds for applying for the injunction.

Section 667 reads thus:–

"If it appears to the Court that the injunction was applied for on insufficient grounds, or if, after the issue of an injunction which it has granted, the action is dismissed or judgment is given against the applicant by default or otherwise, and it appears to the Court that there was no probable ground for applying for the injunction, the Court may, on the application of the party against whom the injunction issued, award against the party obtaining the same in its decree such sum as it deems a reasonable compensation for the expense or injury caused to such party by the issue of the injunction. An award under this section shall bar any action for compensation in respect of the issue of the injunction".

An examination of the section shows that compensation can be ordered in two situations, that is, either where in the Court's view the injunction was applied for on insufficient grounds (whatever the result of the case may be) or in the Court's view there was no probable

ground for applying for it, in cases where the result of the action is against the party obtaining the injunction. In either eventuality it is seen, such compensation can be awarded firstly on the application of the party affected by the injunction and secondly by the Court's decree (which is the formal expression of its final adjudication).

In the circumstances of this case where it was agreed that the question of whether the interim injunction should be allowed to remain or not was to be decided at the end of the trial I find it difficult to understand how the District Judge then came to make the order he did. The first situation contemplated by Section 667, a stage when an impression gets formed in the mind of the Court that the injunction was applied for on insufficient grounds could not have, I think, been reached when only the plaintiff had given evidence, in view of the agreement of parties that this a part of the larger question whether the injunction should be discharged could itself only have been reached at the conclusion of the trial and indeed after issue No. 22 had been answered. The second situation contemplated by section 667, in any event upon its terms, could have arisen only if the plaintiff's action failed and in the instant case as the stage of giving judgment against the plaintiff (if that were to happen) had not arisen, it is the first upon which one's focus must be. On the question whether it could have appeared to the Court that the injunction was applied for on insufficient grounds, the material relied upon by the defendant to justify the District Judge's order to increase the security, namely, the plaintiff's evidence that he could not pay compensation of the magnitude claimed by the defendant, that he was not a man of means, that he was financed in this litigation by his present employer a competitor of the defendant and that he had not yet sold any word processor in respect of which this patent had been issued, have no bearing. To my mind these items of evidence taken separately or in combination do not go towards fully answering the question whether the injunction was applied for on insufficient grounds. The answer to that question, I am of the view, could have been had only upon an examination of all the evidence bearing upon the larger question whether the injunction should be allowed to stand or not and in the circumstances of this case where the parties had agreed to have that matter taken up along with the trial, only at the conclusion of the trial. The District Judge in my view was over hasty in increasing the security the way he did and his order cannot be allowed to stand. Counsel for the defendant argued that the Court in ordering security for the issue

of an injunction exercises its inherent power and in the exercise of such power the Court could well increase the security ordered. Without going into that question and whether or not the ordering or increasing of security is referable to a Court's inherent power if the contention of Counsel be correct the Court may have been justified in increasing the security at a stage when it was in a position to arrive at a finding that the injunction was applied for on insufficient grounds. In the usual kind of case where the question of the dissolution or otherwise of the interim injunction is gone into and decided at a pre trial stage, that stage would be subsequent to such decision. In the instant case in view of the agreement of parties that such question of dissolution and the trial be taken up and decided together, that stage would be at the conclusion of the trial. That stage where the trial was concluded not having been reached here, in my view the District Judge proceeded to increase the security at a time when he could not have addressed his mind to this vital question but was influenced by the other considerations which he appears to have thought arose upon the evidence of the plaintiff.

To repeat therefore, the order enhancing the security could not have been made at any stage prior to that at which the Court could upon an assessment of all the material placed before it in that behalf, have been in a position to come to the conclusion that the injunction was applied for on insufficient grounds. That stage, having regard to the procedure adopted upon the agreement of parties, I think could only have been reached at the conclusion of the evidence.

Counsel for the defendant contended that in the amended answer filed the inadequacy of the security has been referred to. Material pleaded in an answer, or amended answer as the case may be, would come up for consideration only at the trial and decided after the trial. Upon the course adopted by the defendant itself in pleading this inadequacy, not in the papers filed for dissolution but in the amended answer, that question I think could have been resolved only at the conclusion of the trial. The order of the District Judge enhancing the security therefore cannot stand.

The next question is the somewhat troublesome one as to whether there should be a transfer of this case to be continued before another Judge and a good part of our anxiety has centered around the impact of an order of this kind, having regard to the circumstances here, on the mind and thinking not merely of this Judge, but of all others

engaged in exercising the judicial function, the content of which in any meaningful sense must assure to Judges the jurisdiction to decide any matter wrongly provided that such decision is taken honestly. The basis on which this other relief is sought is that in making the order he did the District Judge demonstrated that a fair and impartial trial cannot be had before him. It is contended in the papers filed by the plaintiff in this Court that the order of the District Judge is oppresive and causes manifest injustice to him and that the Judge has prejudged the case in the sense that he has come to conclusions on the facts which he himself has described as complicated, based solely on the submissions of Counsel before all the available evidence was before him. At the hearing before us Counsel for the plaintiff rested his argument upon the position he took that the conduct of the District Judge demonstrated that no fair and impartial trial was possible before him. He contended that in the mind of the plaintiff it was impossible to contemplate that he would have a fair and impartial trial before this particular Judge. That submission however must be understood to mean not that such impression in the mind of the plaintiff was sufficient to ask for this relief (Vide *R (Ellis) v. Co Dublin J.J.* (3)) where the Court was not prepared to accept that the feeling of the party complaining was the true test of this question but that the Court objectively examining the circumstances, would reach the conclusion that such fear could reasonably have been generated in the mind of the plaintiff or indeed of any average reasonable person. What is contended must be taken to be that the conduct of the District Judge in making this order on the first day on which he commenced to hear this case, an order which the evidence of the plaintiff himself should have made clear that he would find impossible to comply with taking into account the magnitude of the sum ordered, renders reasonable the belief engendered in the mind of the plaintiff that he cannot have a fair and impartial trial before this Judge.

Counsel for the plaintiff cited in support of his argument the case of *Ramagiri and Others v. Piyadasa and Others* (4) while opposing Counsel referred us to the judgment in *Perera and Others v. Hasheem and Others* (5). In both these cases and in the case of *Marcus v. Attorney-General* (6) the question of bias figured prominently and reference was made to English cases where two tests are said to have been formulated for disqualification on this ground, namely (*a*) the test of real likelihood of bias (*b*) the test of reasonable suspicion of bias. An effort must be made therefore to examine the basis of the claim of disqualification against its appropriate legal background.

Paul Jackson in his book 'Natural Justice' 2nd Edition (at page 48) ventures to state with respect to "real likelihood of bias" and "reasonable suspicion of bias" thus: "It will be suggested that the 'somewhat confusing welter of authority' (per Widgery L.J. in *Hannam v. Bradford C.C.* (7)) does not indicate a genuine difference of opinion on the correct test to apply but rather the existence of a confusing variety of ways of describing one test. The real difficulty is in applying the test to the facts of particular cases".

From a pecuniary interest in a litigation Paul Jackson says (in 'Natural Justice' – ibid) arises one kind of bias known to the English Common Law, this type sometimes being described as bias giving rise to an interest. In this kind, he points out, disqualification is automatic and "the law does not allow any further inquiry as to whether or not the mind was actually biased by the pecuniary interest" – per Bowen L.J. in *Lesson v. General Medical Council* (8). However it is not alleged here that the District Judge had this kind of interest.

Paul Jackson also points out in the same work that the English Common Law recognised a type of bias often described as a challenge to favour and arising from such causes as relationship to a party or a witness. It is in this class of case, where the allegation of bias arises from non-financial factors (which includes the challenge to favour type) that the test for bias (whether 'real likelihood' or 'reasonable suspicion' or as suggested, only one kind) has any application and it is here I think that the words of Lord Hewart, C.J. in *R. v. Sussex JJ ex p McCarthy* (9) that "It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done" have relevance.

The concept that justice must be seen to be done was placed in the forefront of the argument of Counsel for plaintiff, his contention being that the conduct of the District Judge clearly militates against this concept. Since the effect of argument in the case is to take us into this area, that is what must be examined, and I think that that task is simplified if approached from the point of view suggested by Paul Jackson that there is only one test or perhaps the simple test suggested by Lord Carson, whether there was " . . . . . such a likelihood of bias as entitled the Court to interfere" *Frome United Dairies v. Bath JJ* (10). In considering this concept it is well I think not to lose sight of the warning of Slade J. in *Rex v. Camborne Justices ex p Pearce* (11) with

respect to ". . . . . the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done".

Much assistance as to the approach to be adopted is I think to be found in the words of Lord Denning M. R. in *Metropolitan Properties* v. *Lannon* (12) (at page 599) which in the contention of Paul Jackson are those there that support his view that there is in reality only one test. "In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself..... It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right-minded persons would think that in the circumstances there was a real likelihood of bias on his part, then he should not sit..... There must appear to be a real likelihood of bias. Surmise or conjecture is not enough..... There must be circumstances from which a reasonable man would think it likely or probable that the justice..... would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did".

A narrative of certain of the facts as led up to the order complained of, even at the risk of repeating myself at places, is useful to facilitate their consideration in order to apply the single test set out above which commends itself to me. In adopting that test, I think, the confusion that would otherwise arise as to which of the two tests (reasonable suspicion of bias or real likelihood of bias) is applicable to this case (where the factual basis on which the ground of disqualification is based is difficult and somewhat unusual) is avoided.

The plaintiff obtained this injunction ex parte and upon the material averred it was allowed on deposit of Rs. 10,000 as security. The defendant in its amended answer contended that as a result of this injunction it was suffering damage at Rs. 500,000 per month. The plaintiff in giving evidence admitted that he did not have the means to pay compensation of this magnitude if ordered, that he had assigned his patent right to a competitor of the defendant and that he had not himself sold a single such unit. The District Judge upon application by the defendant, and not on his own initiative, examined two questions asked of him as to the maintainability of the injunction and the adequacy of security. He held against the defendant and refused to

discharge the injunction at that stage, thus in great measure dispelling a charge of lack of evenhandedness with respect to the two sides. He however enhanced the security. In doing so it may well have been that he misdirected himself as to the relevancy to the question before him of the facts on which he based his order and as to the correct position in law. That by itself to my mind does not demonstrate bias or anything else that suggests that a fair and impartial trial cannot be held before him.

To borrow certain of the words of Lord Denning, which also demonstrate the importance of the appearance of justice being done, I do not think there are circumstances from which a reasonable man (weighing these circumstances) would think it likely or probable that the Judge did on this occasion or would in the future favour one side unfairly at the expense of the other.

I would desist therefore from making the order asked for that further proceedings in this case should not be taken by this Judge upon a direction of this Court to that effect. Any other order it must also be observed could open the flood gates to a multitude of similar applications by parties dissatisfied with some incidental order made by a Judge or otherwise unhappy with the case continuing before him and anxious to take it elsewhere, although that is far from being what impels me to make this order.

It is however open to the District Judge, if he thinks it prudent to do so having regard to the lack of confidence in his impartiality expressed by one of the parties, to disqualify himself and direct that further proceedings he had before another, taking also into account that if he were to hold against the party so complaining at the conclusion of the trial, he could lay himself open to a further charge of prejudice against such party consequent upon such allegation being made.

The interim injunction ordered at the commencement will remain till the conclusion of the trial upon the security of Rs. 10,000 directed to be given.

The appeal is allowed to the extent set out above and the order enhancing security made on 12th February 1987 is set aside. This order will conclude both C.A. No. 188/87 and C.A.L.A. 22/87 but there will be one order for costs fixed at Rs. 525 payable by the defendant to the plaintiff.

RAMANATHAN, J.—I agree

Appeal allowed.

Order enhancing security set aside.