English appeals court considers application to remove advocate from appearing

By Alister Abadee

In *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 (noted 77(4) ALJ 221) the English Court of Appeal held that the court may, in exceptional circumstances, prevent an advocate from appearing for a party, if it is satisfied that there is a real risk of his or her participation leading to the situation where an order made at trial might be set aside on appeal. The court also found that if an advocate considered that there were matters that impinged upon the propriety of the advocate appearing, then those matters should be disclosed to the other party and then, if necessary, to the court.

'One of the provisions of Code of conduct of the Bar of England and Wales that received close attention in this decision was a very general provision to the effect that a counsel should not appear where he or she would be professionally embarrassed because by reason of some prior connection it would be 'difficult for him to maintain his professional independence or because the administration of justice might be or might appear to be prejudiced'

The factual context was an application by the debtor to a bankruptcy petition to remove the petitioner's counsel. The basis for such application was a social acquaintance between the petitioner's counsel and the bankrupt's wife during a period relevant to the proceeding. The main submission was that because of the barrister's acquaintance, he might consciously or unconsciously have obtained information about the debtor's family that might give rise in the mind of a lay observer to the view that justice might not be done, or be seen to have been done and thus undermine public confidence in the administration of justice. The application was dismissed before a judicial registrar whose decision was upheld by a judge on appeal. The English Court of Appeal dismissed an appeal from the judge's decision.

As it transpired, nothing ultimately turned on matters of principle: the barrister's acquaintance could only have been relevant to an issue upon which the debtor succeeded and orders were made on other grounds. What followed from the English Court of Appeal was strictly *obiter*. After enunciating the test referred to above, the Court of Appeal referred (at [42] - [43]) to some of the factors that a court should consider before acceding to an application to remove counsel from appearing, including:

- the existence of a personal connection between counsel and a witness (the connection may be insignificant for an expert witness);
- the type of case and length of hearing and any special role of the advocate (such as prosecutor, friend of the court and where counsel appears in child care proceedings); and
- that the choice of a party of its counsel should be respected; and the importance of the 'cab - rank rule'.

The English Court of Appeal laid down (at [46]) a number of steps for the advocate to consider in deciding whether to appear. First, a barrister affected by some 'personal factor' must himself or herself consider whether reasonable grounds exist for concluding that his or her appearance would prejudice the administration of justice, or result in a procedural irregularity. In that event, the barrister should not appear. Second, if he or she decides to appear, but the position can *reasonably* be regarded as open to objection, the barrister should disclose relevant facts to the other side as soon as practicable and (unless the party accepts the barrister's decision to appear) to the court at the opening of the hearing.

From the opponent's perspective, the Court of Appeal found (at [47]) that it should make it clear to the barrister of its objection without delay. Secondly, if it is necessary for the court to rule on the objection, such application should be made as soon as the circumstances giving rise to the objection are known. Thirdly, the opponent should, if possible, make a separate application in order to avoid the risk of an adjournment of the substantive hearing.

Several comments might be made about this decision, and how it might guide the conduct of counsel in New South Wales. First, as indicated above, the passages devoted to the issues were in *obiter*, which detracts to some degree from their persuasive value. Secondly, in this state, barristers' ethical obligations are substantially governed by the *New South Wales Barristers' Rules*, the breach of which may expose the barrister to disciplinary sanction[1]. Whilst not exclusive[2], those Barristers' Rules are very prescriptive in detailing exceptions to the 'cab-rank rule': in defining what briefs a barrister must not accept[3] and briefs that a barrister may refuse to accept[4]. Complementary to those Barristers' Rules are Rules of Court that impinge upon a barrister's conduct, some of which are couched in general terms. Part 1 r 3(4) of the *Supreme Court Rules*, for example, mandates that a barrister must not cause his or her client to be in breach of the duty of parties to civil proceedings to assist the court to further the overriding purpose (of facilitating the just, quick and cheap resolution of real issues). Barristers in this state are thus are faced with detailed ethical guidelines and more broadly expressed Rules of Court which set out the circumstances in which they can, or continue to, appear.

One of the provisions of the *Code of conduct of the Bar of England and Wales* that received close attention in this decision was a very general provision to the effect that a counsel should not appear where he or she would be professionally

embarrassed because by reason of some prior connection it would be 'difficult for him to maintain his professional independence or because the administration of justice might be or might appear to be prejudiced'. The English Court of Appeal in its decision focused on the second part of that formulation. It may be seen that such a provision is cast in very broad terms, in contrast with the more specific ethical rules proscribing barristers from appearing in this state.

Specifically, in New South Wales, a barrister must not appear if he or she has reasonable grounds to believe that:

- there is a real possibility that he or she will be a witness in the case[5];
- his or her own professional conduct may be attacked in the case[6];
- where he or she has information confidential to any person, including the opponent of his or her client, with different interests to those of the client, where such information would be advantageous to the client and the other person has not consented to its use[7].

Detailed provision is made to prevent barristers appearing before judicial officers who are related to the barrister[8] and impose time restrictions upon barristers, who were former judicial officers, from appearing before the court in which they served[9]. A barrister may also refuse to appear if there is a real possibility that he or she will be required to cross-examine or criticise a friend or relation[10]. In the criminal law domain, prosecutors must attempt to act 'impartially'[11] and are subject to other obligations[12]. It may be seen, therefore, that where there are 'personal factors' that might intuitively inhibit a barrister from deciding to appear, the Barristers' Rules provide very specific guidance.

The Barristers' Rules in this state do not, however, contain an equivalent provision to the English *Code of conduct*, which has some express overriding obligation to limit or prevent a barrister from appearing because of the interests of the administration of justice. Is such a general legal rule necessary? In light of the potential disciplinary sanctions that might be imposed for their breach, it would be surprising if a barristers went on to appear in contravention of the Barristers' Rules. This result would be even more so especially if such appearance might cause a proceeding to be aborted, since on top of the potential disciplinary sanction, the barrister might also be subjected to a wasted costs order[13]. If a barrister appeared in contravention of the Barristers' Rules and/or Rules of Court, it is submitted that a court would be fully justified, and would be so empowered, in restraining a barrister from appearing, or continuing to act.

On the other hand, it is submitted that a court should not readily accede to an application to remove a barrister who appears in accordance with the Barristers' Rules and rules of court on the general basis that such participation could prejudice the administration of justice. To do so would not only effectively add another exception to the 'cab rank rule', but would also undercut a barrister's reliance upon the Barristers' Rules themselves. Whilst it may be conceded that such rules are not exhaustive, arguably barristers should not have to apprehend that their decisions to appear would be second - guessed by the courts on a generalised basis. It is, with respect, difficult to reconcile the Court of Appeal's propositions that:

(a) a barrister affected by a 'personal factor' where there are reasonable grounds for concluding would prejudice the administration of justice should *not* act, even if he or she feels he or she is not professionally embarrassed; and

(b) if he or she considers he or she *can* act, he or she should disclose all relevant facts to the opponent and the court.

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Surely if there is any doubt at all about proposition (a), according to this view, proposition (b) does not come into it. It is also difficult to see why barristers should have to worry about how a decision in accordance with ethical and other court rules is 'reasonably regarded', particularly by their opponents. Further, it is difficult to draw the line at where the court may intervene: what would happen, for example, if the barrister conducted himself or herself incompetently: would the court view that as an affront to the administration of justice that would justify a direction (of its own motion) that the barrister no longer act for the client?

Perhaps one solution is to modify the Barristers' Rules so that when a barrister is in genuine doubt as to whether he or she is able to appear in accordance with the provisions of the rules, he or she is generally able to obtain the approval of a member (being a senior counsel) of a professional conduct committee; as presently applies to the situation where the barrister apprehends he or she may be attacked or otherwise be the subject of criticism. If there is to be such a general jurisdiction, it is arguably better that a provision similar to the one analysed in the English *Code of conduct* is added to the Barristers' Rules. It is better, it is submitted, for barristers to know where they stand than to have new and vague obligations created for them by the courts.

It is noteworthy that in the recent decision of the Western Australian Supreme Court of *Westgold Resources v St Barbara Mines* [2003] WASC 29, which considered (inter alia) *Geveran Trading*, the judge suggested (at [24]) that there had to be

some identifiable right, obligation or interest that was imperiled or infringed by the barrister's appearance before the court would intervene to restrain the advocate from acting. It is submitted that the courts should follow this more focused approach, in preference to the approach in *Geveran Trading*, which seems to empower courts to restrain at large.

As to the requirement of disclosure, if the premise is accepted that a barrister should not appear on the generalised basis referred to in *Geveran*, it is submitted that it would be prudent practice to follow the steps set out therein: with disclosure, in the first instance, being made to the barrister's opponent; then, if necessary, to the court. One would hope that a quiet word to the barrister's opponent might resolve the problem; although of course there may be limits to this when the opponent is unrepresented.

1 *Legal Profession Act 1987* (NSW), sec 57D(4)

2 *New South Wales Barristers*' Rules, Rule 9

3 Ibid., Rules 87 - 90

4 Ibid., Rules 91 - 92

5 Ibid., Rule 87(c) and (d)

6 Ibid., Rule 87(e). In this case a barrister need not refuse to act in the circumstances set out in Rule 88, which include the approval of senior counsel on a professional conduct committee.

7 Ibid., Rules 87(a) and 89

8 Ibid., Rule 87(i)

9 Ibid., Rule 87(j)

10 Ibid., Rule 91(d)

11 Ibid., Rule 62

12 Ibid., Rules 63 - 66A

13 For example: Part 52A r 43A of the *Supreme Court Rules*