

## Legal Briefing

### Had interventions by the judge during the evidence made a fair trial impossible?

Shaw v Grouby & Anor [2017] EWCA Civ 233

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May 2017

Before: The Chancellor of the High Court and Lord Justice Patten in the Court of Appeal.

Judgment delivered 6 April 2017.

#### The facts

Ms Shaw owned a house in Swindon. Access was provided by means of a right of way over a driveway owned by Mr Grouby. In 2008 Ms Shaw constructed a new entrance gate at a different location along the driveway and built a brick wall across the original access point. Mr Grouby objected to the new entrance gate and contended that the brick wall amounted to a trespass. Ms Shaw's negotiations to purchase the driveway outright were unsuccessful and in September 2013 Mr Grouby placed two large plastic bins full of concrete and stone in front of Ms Shaw's new entrance gate. Ms Shaw commenced proceedings seeking an injunction. Mr Grouby moved the bins but left them obstructing the driveway. Ms Shaw therefore continued the proceedings claiming in nuisance and Mr Grouby counter-claimed for a declaration that Ms Shaw had no right to open up a new gateway and that the brick wall constituted a trespass.

Following a trial in summer 2015 judgment was handed down on 21 July 2015 in favour of Ms Shaw. The judge found that there was no trespass nor was there any restriction on where Ms Shaw might place the entrance gate.

Mr Grouby appealed challenging the judge's findings on these two issues and also on the basis of procedural unfairness. Mr Grouby contended that at the trial, the judge's constant interjections during the evidence had turned the trial into an inquisitorial rather than an adversarial process. Analysis of the transcript showed that the judge had asked as many questions as Ms Shaw's counsel and had at one stage put 52 consecutive questions to Mr Grouby in the witness box. Mr Grouby also complained that the judge had intervened in the evidence of the experts and at one point had answered a question put to Ms Shaw's expert before the latter had an opportunity to reply. Mr Grouby contended that the judge became so involved in the evidence that it became impossible to conduct his case and that the judge thereby lost the ability to reach a balanced and objective conclusion on the evidence.

#### The issue

Had the judge's interventions prevented a fair trial and a proper judicial determination of the issues?

#### The decision

Having upheld the trial judge's decisions regarding the entrance gate location and the trespass, the Court of Appeal considered the principles of procedural fairness, as set out in the leading case of *Southwark LBC v Kofi-Adu*. In *Kofi-Adu* a trial judge's constant, dismissive and at times heated interventions had rendered him unable to subject the evidence to proper scrutiny and evaluation, a conclusion borne out by his irrational findings in relation to a number of issues, by his complete failure to address questions of credibility and by his unjustifiable rejection of some of the evidence.

Here, whilst acknowledging that the trial judge's interventions during Mr Grouby's evidence had been excessive, the Court of Appeal did not think that a fair trial and a proper judicial determination of the main issues had been prevented. The trial judge's ultimate findings in favour of Ms Shaw had not been influenced by his questioning of Mr Grouby. Despite the interruptions, at the trial Mr Grouby's counsel had been allowed to ask all of the questions he wanted to. Where the judge had approached the issues that were relevant to the outcome in an appropriate and judicial manner, there was no strong impression of lack of objectivity as had been the case in *Kofi-Adu*.

#### Commentary

This judgment is pertinent to any proceedings in which it appears that the judge (or arbitrator) has formed a prejudicial view in advance. Whilst the Court of Appeal noted the modern tendency for judges to be more proactive and interventionist, a judge must remain impartial and may not, by apparently partisan behaviour, "descend into the arena" and thereby risk losing the essential requirement of objectivity.

An adjudicator is usually entitled to assume a more inquisitorial role – for example paragraph 13 of the Scheme empowers the adjudicator to take the initiative in ascertaining the facts and the law necessary to determine the dispute. Nevertheless, if in an adjudication that inquisitorial role manifests itself in the form of repeated and aggressive questioning of one side's evidence or representatives then the test for apparent bias – i.e. if an informed and fair minded observer, with knowledge of all the relevant circumstances, would conclude that there was a real possibility that the tribunal was biased – may be satisfied and the decision not enforced.