Sheku Bayoh Public Inquiry

Conduct and Procedure Hearing - 12 and 13 June 2025

Volume 3 [of 4]
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RE: APPLICATION FOR RECUSAL ON BEHALF OF (1) THE SCOTTISH POLICE FEDERATION; (2) PC CRAIG WALKER; and (3) Ms. NICOLE SHORT

LIST OF AUTHORITIES

on behalf of

The Chief Constable, Police Service of Scotland ('Police Scotland')

1. *Jordan v United Kingdom* (2003) 37 EHRR 52 at [109]
2. *Dring v Cape Intermediate Holdings Limited.* [2020] AC 629 at [1]
3. *Howell and others v Lees-Millais and others [2007] EWCA Civ 720* at para 6
4. *Re Medicaments and Related Classes of Goods (No.2)* [2001] 1 WLR 700
5. *Locabail v Bayfield* [2000] QB 451
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7. *Ablyazov v JSC BTA Bank* [2012] EWCA Civ 1551 at [89]
8. *Porter v Magill*, [2002] 2 AC 357 at [103].
9. *Alan Bates v Post Office Limited [2019] EWHC 871 (QB)* at [27]-[77]
10. *Otkritie International Investment Management Ltd & Others v Urumov [*2014] EWCA Civ 1315
11. *Steadman-Byrne v Amjad* [2007] EWCA Civ 625
12. *Helow v Secretary of State for the Home Department* [2008] UKHL 62
13. *Millar v Dickson* 2002 SC (P.C.) 30 at [65]
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17. *Kanda v Government of the Federation of Malaya 1962* A.C. 322 at [337]
18. *Dorman and others v Clinton Devon Farms Partnership* [2019] EWHC 2988 (QB), at [10]
19. *Morrison v AWG Group Ltd* [2006] EWCA Civ 6 at paragraph [29]

*52 Jordan v United Kingdom

Positive/Neutral Judicial Consideration

Court
European Court of Human Rights

Judgment Date
4 May 2001

Report Citation
(2003) 37 E.H.R.R. 2

Application No.24746/94

Before the European Court of Human Rights

(The President , Judge Costa ; Judges Fuhrmann , Loucaides , Tulkens , Jungwiert , Bratza , Traja)

May 4, 2001

H1. Relying on Arts 2, 6(1), 13 and 14 of the Convention , the applicant alleged that his unarmed son had been unjustifiably shot and killed by an officer of the Royal Ulster Constabulary and that there had been no effective investigation into, or redress for, his death. He also claimed just satisfaction under Art.41 .

H2. Held, unanimously

(1) that there had been a violation of Art.2 in respect of failings in the investigative procedures concerning the death of Pearse Jordan;

(2) that there had been no violation of Art.6(1) ;

(3) that there had been no violation of Art.14 ;

(4) that there had been no violation of Art.13 ;

(5)

(a) that the respondent State was to pay the applicant, within three months from the date on which the judgment became final according to Art.44(2) , the following amounts, plus any VAT chargeable;

(i) £10,000 in respect of non-pecuniary damage;
(ii) £30,000 in respect of costs and expenses;

(b) that simple interest at an annual rate of 7.5 per cent be payable from the expiry of the above-mentioned three months until settlement;

(6) that the remainder of the applicant's claims for just satisfaction be dismissed.

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1. **Right to life: use of lethal force by State agents; State responsibility; fact-finding; procedural obligations; duty to carry out prompt and effective investigation; independence; duty to give reasons for decision not to prosecute; inquests; access to documents (Art.2).**

H3. (a) Article 2 , which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Art.15 . Together with Art.3 , it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual **53* human beings also requires that Art.2 be interpreted and applied so as to make its safeguards practical and effective. [102]

H4. (b) In the light of the importance of the protection afforded by Art.2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. [103]

H5. (c) The text of Art.2, read as a whole, demonstrates that it covers not only intentional killing but also situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paras (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paras 2 of Arts 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims. [104]

H6. (d) The obligation to protect the right to life under Art.2 , read in conjunction with the State's general duty under Art.1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. [105]

H7. (e) For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence. [106]

H8. (f) The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective **54* analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard. [107]

H9. (g) A requirement of promptness and reasonable expedition is implicit in this context. It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. [108]

H10. (h) For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.

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In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. [109]

H11. (i) It is undisputed that Pearse **Jordan** was shot and killed by a police officer while he was unarmed. This use of lethal force falls squarely within the ambit of Art.2 , which requires any such action to pursue one of the purposes set out in the second paragraph and to be no more than absolutely necessary for that purpose. A number of key factual issues arise in this case, in particular whether Sergeant A acted on the basis of an honest belief perceived for good reasons to be valid at the time but which turned out subsequently to be mistaken, namely, that he or any other police officer was at risk from Pearse **Jordan** in the circumstances of the case. Determining this issue would involve *inter alia* an assessment of whether Sergeant A's view was blocked by any vehicle as alleged, whether Sergeant A gave a warning shout, whether Pearse **Jordan** was facing him or whether in fact his back was already turned at the moment when Sergeant A decided to open fire. The evidence of the police officers at the scene are on a number of these points in direct conflict with statements given by civilian eye witnesses. Assessment of the credibility and reliability of the various witnesses would play a crucial role. [110]

H12. (j) These are all matters which are currently pending examination in two domestic procedures—the civil proceedings brought by the applicant alleging death by wrongful act and the inquest into the death. In the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention for the Court to attempt to establish the facts of this case by embarking on a fact-finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact-finding tribunals. While the Commission has previously embarked on fact-finding missions in cases from Turkey where there were pending proceedings against the alleged security force perpetrators of unlawful killings, these proceedings were criminal and had terminated, at first instance at least, by the time the Court was examining the applications. In those cases, it was an essential part of the applicants' allegations that the defects in the investigation were such as to render those criminal proceedings ineffective. [111]

H13. (k) In the present case, the Court does not consider that there are any elements established which would deprive the civil courts of their ***55*** ability to establish the facts and determine the lawfulness or otherwise of Pearse **Jordan's** death. [112]

H14. (l) Nor is the Court persuaded that it is appropriate to rely on the documentary material provided by the parties to reach any conclusions as to responsibility for the death of the applicant's son. The written accounts provided have not been tested in examination or cross-examination and would provide an incomplete and potentially misleading basis for any such attempt. The situation cannot be equated to a death in custody where the burden may be regarded as resting on the State to provide a satisfactory and plausible explanation. [113]

H15. (m) The Court is not prepared to conduct, on the basis largely of statistical information and selective evidence, an analysis of incidents over the past 30 years with a view to establishing whether they disclose a practice by security forces of using disproportionate force. This would go far beyond the scope of the present application. [114]

H16. (n) Conversely, as regards the Government's argument that the availability of civil proceedings provided the applicant with a remedy which he has yet to exhaust as regards Art.35(1) and, therefore, that no further examination of the case is required under Art.2 , the obligations of the State under Art.2 cannot be satisfied merely by awarding damages. The investigations required under Arts 2 and 13 must be able to lead to the identification and punishment of those responsible. The Court will therefore examine whether there has been compliance with this procedural aspect of Art.2. [115]

H17. (o) Following the death of Pearse **Jordan**, an investigation was commenced by the RUC. On the basis of that investigation the DPP decided not to prosecute any officer. An inquest was opened on January 4, 1995 and is still pending. The applicant has made numerous complaints about these procedures. The Court finds little substance in his criticisms. It appears that the investigation started immediately after the death. While the scene of the incident was not maintained intact, this has not been shown either to have obstructed the investigation or to have been unjustified in the circumstances. Nor was this measure of such a nature as to undermine any possibility of reconstructing events. There were numerous eyewitnesses who were able to give their version. In so far as the applicant referred to a failure to seek out civilian witnesses, it was not unreasonable for the police to concentrate on clearing the immediate scene of traffic and bystanders, where in a busy road there would be considerations of highway safety. It has not been shown that the RUC failed to look for or find civilian witnesses. Appeals were made to the public and it is apparent that, for whatever reason, some witnesses were reluctant to come forward. Civilian witnesses have made statements and appeared at the inquest. There is no fundamental defect shown in this regard. Similarly, the Court does not consider that there is sufficient evidence to establish that there was intimidation of the witnesses who did come forward. [118]

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H18. (p) The investigation included the appropriate forensic examinations. While the gun of Sergeant A was not taken immediately, it appears that it was handed in when he returned to the police station at the conclusion of the operation and that satisfactory evidence is available concerning the number of bullets discharged. If there *56 were aspects of the investigation that could have been more efficiently performed, it cannot be said that these undermined its overall effectiveness. [119]

H19. (q) It must be noted, however, that the investigation into the killing by a RUC police officer was headed and carried out by other RUC officers, who issued the investigation report on the file. The Government has pointed out that this investigation was supervised by the ICPC, an independent police monitoring authority. A member of the ICPC was present during the interviews of Sergeant A. Their approval was required of the officer leading the investigation. There was nonetheless a hierarchical link between the officers in the investigation and the officers subject to investigation, all of whom were under the responsibility of the RUC Chief Constable, who plays a role in the process of instituting any disciplinary or criminal proceedings. The power of the ICPC to require the Chief Constable to refer the investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those under investigation. [120]

H20. (r) As regards the lack of public scrutiny of the police investigations, the disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Art.2 . The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures. [121]

H21. (s) The Court does not doubt the DPP's independence. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision. [123]

H22. (t) Pearse **Jordan** was shot and killed while unarmed. This is a situation which cries out for an explanation. However, the applicant was not informed why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Art.2, unless that information was forthcoming in some other way. This however is not the case. [124]

H23. (u) In Northern Ireland, as in England and Wales, investigations into deaths may be conducted by inquests. Judicial review lies from procedural decisions by coroners and in respect of any mistaken directions given to the jury. There are thus strong safeguards as to the lawfulness and propriety of the proceedings. In the McCANN case the inquest held into the deaths of the three IRA suspects shot by the SAS on Gibraltar satisfied the procedural obligation contained in Art.2, as it provided a detailed review of the events surrounding the killings and provided the relatives of the deceased with the opportunity to examine and cross-examine witnesses *57 involved in the operation. However, there are a number of differences between the inquest as held in the McCANN case and those in Northern Ireland. [125]–[126]

H24. (v) In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence. In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. At the inquest in the present case, Sergeant A informed the Coroner that he would not appear. He has therefore not been subject to examination concerning his account of events. The records of his two interviews with investigating police officers were made available to the Coroner instead. This does not enable any satisfactory assessment to be made of his reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force, and thereby to achieve one of the purposes required by Art.2 . [127]

H25. (w) It is also alleged that the inquest in this case is restricted in the scope of its examination. The procedure is a fact-finding exercise and not a method of apportioning guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances. This was the standard applicable in the *McCann* inquest and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of Art.2. Those courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged

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conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined. [128]

H26. (x) Notwithstanding the useful fact-finding function that an inquest may provide in some cases, in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Art.2. [130]

H27. (y) While the public nature of the inquest proceedings is not in dispute, the applicant complained that his ability to participate in the proceedings as the next-of-kin was significantly prejudiced as legal aid was not available in inquests and documents were not disclosed in advance of the proceedings. However, he has been represented by a solicitor and counsel throughout the inquest, even though legal aid only became available for inquests in Northern Ireland from July 25, 2000. He has also been granted legal aid for the judicial review applications associated with the inquest. Nevertheless, it appears that the proceedings were adjourned for almost two years while developments were awaited in a pending case concerning the availability of legal aid for families at inquests. While it cannot therefore be said that the applicant has been prevented, by the lack *58 of legal aid, from obtaining any necessary legal assistance at the inquest, this has contributed significantly to prolongation of the proceedings. The Court will consider this further in the context of the delay. [131]–[132]

H28. (z) As regards access to documents, until recently the applicant was not able to obtain copies of any witness statements until the witness concerned was giving evidence. This was also the position in the *McCann* case, where the Court considered that this had not substantially hampered the ability of the families' lawyers to question the witnesses. However, the inquest in that case was to some extent exceptional when compared with the proceedings in a number of cases in Northern Ireland. The promptness and thoroughness of the inquest in the *McCann* case left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants' experienced legal representative. The non-access by the next-of-kin to the documents did not, in that context, contribute any significant handicap. However, since that case, the Court has laid more emphasis on the importance of involving the next-of-kin in the procedure and providing them with information. [133]

H29. (aa) Further, the Court notes that the practice of non-disclosure has changed in the **United Kingdom** in the light of the Stephen Lawrence Inquiry and that it is now recommended that the police disclose witness statements 28 days in advance. Disclosure of the documents has now been made to the applicant in advance of the next stage of the inquest procedures. This development must be regarded as a positive contribution to the openness and fairness of the inquest procedures. The Court is not prepared to reach any findings concerning the alleged incompleteness of the disclosure at this stage. There is nothing to suggest that materials necessary to the examination of the facts have been withheld. It may be observed, however, that lack of access to witness statements was the reason for several adjournments in the inquest. The previous inability of the applicant to have access to witness statements before the appearance of the witness must also be regarded as having placed him at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the RUC who had the resources to provide for legal representation and full access to relevant documents. The right of the family of the deceased to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces. Prior to the recent development in disclosure of documents, the Court is not persuaded that the applicant's interests as next-of-kin were fairly or adequately protected in this respect. [134]

H30. (bb) Reference has also been made to the allegedly frequent use of public interest immunity certificates in inquests to prevent certain questions or disclosure of certain documents. In this case, certificates were issued to prevent the disclosure of certain categories of information on the grounds of national security. There is no indication that these certificates have prevented examination of any circumstances relevant to the death of Pearse **Jordan**. [135]

H31. (cc) Finally, the Court has had regard to the delay in the proceedings. The inquest opened on January 4, 1995, more than 25 months *59 after Pearse **Jordan's** death. The Coroner had been informed on November 29, 1993 that no prosecution would occur, but the RUC failed to pass on the case papers until almost a year later. No explanation has been forthcoming for this delay. The inquest has still not concluded, more than eight years and four months after the events in issue. There have been a series of adjournments. These adjournments were requested by, or consented to, by the applicant. They related principally to legal challenges to procedural aspects of the inquest which he considered essential to his ability to participate—in particular access to the documents. It may be noted that the judicial review proceedings which resulted in an adjournment from June 2, 1995 to March 20, 1997 concerned access to witness statements which have now been disclosed voluntarily due to developments in what is perceived as desirable practice vis-à-vis a victim's relatives. Nor can it be regarded as unreasonable

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that the applicant consented to an adjournment to await a case which might have resulted in making legal aid available for his representatives. [137]

H32. (dd) While it is therefore the case that the applicant has contributed significantly to the delays, this has to some extent resulted from the difficulties facing relatives in participating in inquest procedures. It cannot be regarded as unreasonable that the applicant made use of the legal remedies available to him to challenge these aspects of the inquest procedure. The Coroner, who is responsible for the conduct of the proceedings, acceded to these adjournments. The fact that they were requested by the applicant does not dispense the authorities from ensuring compliance with the requirement for reasonable expedition. If long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family. [138]

H33. (ee) Nor has the inquest progressed with diligence in the periods outwith the adjournments. There was delay in commencing the inquest and in scheduling the resumption of the inquest after the adjournments. [139]

H34. (ff) Having regard to these considerations, the time taken in this inquest cannot be regarded as compatible with the State's obligation under Art.2 to ensure that investigations into suspicious deaths are carried out promptly and with reasonable expedition. [140]

H35. (gg) Civil proceedings would provide a judicial fact-finding forum with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is, however, a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Art.2. [141]

H36. (hh) In conclusion, the Court finds that the proceedings for investigating the use of lethal force by the police officer have been shown in this case to disclose the following shortcomings:

(i) a lack of independence of the police officers investigating the incident from the officers implicated in the incident; *60

(ii) a lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute any police officer;

(iii) the police officer who shot Pearse **Jordan** could not be required to attend the inquest as a witness;

(iv) the inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed;

(v) the absence of legal aid for the representation of the victim's family and non-disclosure of witness statements prior to their appearance at the inquest prejudiced the ability of the applicant to participate in the inquest and contributed to long adjournments in the proceedings;

(vi) the inquest proceedings did not commence promptly and were not pursued with reasonable expedition. [142]

H37. (ii) It is not for the Court to specify which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing for all requirements. If the aims of fact-finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the requirements of Art.2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance. [143]

H38. (jj) The shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. [144]

H39. (kk) There has been a failure to comply with the procedural obligation imposed by Art.2 and, in this respect, a violation of that provision. [145]

2. **Right to a fair hearing (Art.6(1)).**

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H40. The lawfulness of the shooting of Pearse **Jordan** is pending consideration in the civil proceedings instituted by the applicant. In these circumstances and in the light of the scope of the present application, there is no basis for reaching any findings as to the alleged improper motivation behind the incident. Any issues concerning the effectiveness of criminal investigation procedures fall to be considered under Arts 2 and 13 of the Convention. There has, accordingly, been no violation of Art.6(1) . [149]–[150]

3. **Prohibition of discrimination: indirect discrimination (Art.14).**

H41. Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it **61* appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Art.14 . There is no evidence that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces. Accordingly, there has been no violation of Art.14. [154]–[155]

4. **Right to an effective remedy: arguable complaint; effective investigation; civil proceedings (Art.13).**

H42. (a) Article 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Art.13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Art.13 varies depending on the nature of the applicant's complaint. Nevertheless, the remedy required by Art.13 must be "effective" in practice as well as in law. [159]

H43. (b) In cases of the use of lethal force or suspicious deaths, given the fundamental importance of the right to the protection of life, Art.13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure. [160]

H44. (c) In a number of cases the Court has found a violation of Art.13 where no effective criminal investigation had been carried out, noting that the requirements of Art.13 were broader than the obligation to investigate imposed by Art.2 . These cases derived from the situation pertaining in south-east Turkey, where applicants were in a vulnerable position due to the ongoing conflict between the security forces and the PKK, and where the most accessible means of redress open to applicants was to complain to the Public Prosecutor, who was under a duty to investigate alleged crimes. In the Turkish system, the complainant was able to join any criminal proceedings as an intervenor and apply for damages at the conclusion of any successful prosecution. The Public Prosecutor's fact-finding function was often essential in that context to any attempt to take civil proceedings. In those cases, therefore, it was sufficient for the purposes of Art.35(1) that an applicant complaining of unlawful killing raised the matter with the Public Prosecutor. There was accordingly a close procedural and practical relationship between the criminal investigation and the remedies available to the applicant in the legal system as a whole. [161]

H45. (d) The legal system pertaining in Northern Ireland is different and any application of Art.13 to the factual circumstances of any case from that jurisdiction must take this into account. An applicant who claims the unlawful use of force by soldiers or police officers in the **United Kingdom** must as a general rule exhaust domestic remedies by taking civil proceedings by which the courts will examine the facts, determine liability and if appropriate award compensation. These civil proceedings are wholly independent of any criminal **62* investigation and their efficacy has not been shown to rely on the proper conduct of criminal investigations or prosecutions. [162]

H46. (e) In the present case, the applicant has lodged civil proceedings which are pending. The Court has found no elements which would prevent those proceedings providing the redress identified above in respect of the alleged excessive use of force. [163]

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H47. (f) As regards the applicant's complaints concerning the investigation into the death carried out by the authorities, these have been examined under the procedural aspect of Art.2. No separate issue arises. There has been no violation of Art.13. [164]–[165]

5. **Just satisfaction: damage; costs and expenses; default interest (Art.41).**

H48. (a) In contrast to the *McCann* case, the Court has made no finding as to the lawfulness or proportionality of the use of lethal force which killed Pearse **Jordan**, or as to the factual circumstances, including the activities of the deceased which led up to the killing. Accordingly, no award of compensation falls to be made in this respect. On the other hand, the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. He sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention. Assessment is on an equitable basis. [170]–[171]

H49. (b) With regard to costs and expenses, this case has involved several rounds of written submissions and an oral hearing, and may be regarded as factually and legally complex. Nonetheless, the fees claimed are on the high side when compared with other cases from the **United Kingdom** and the Court is not persuaded that they are reasonable as to *quantum* . Assessment is on an equitable basis. [174]

H50. (c) The statutory rate of interest applicable in the **United Kingdom** is 7.5 per cent per annum. [175]

H51 Representation

Mr C. Whomersley (Agent), Mr R. Weatherup Q.C. , Mr P. Sales , Mr J. Eadie , Mr N. Lavender (Counsel), Mr O. Paulin , Ms S. McClelland , Ms K. Pearson , Mr D. McIlroy , Ms S. Broderick , Ms L. McAlpine , Ms J. Donnelly , Mr T. Taylor (Advisers) for the Government.
Mr S. Treacy Q.C. , Ms K. Quinliven (Counsel), Ms P. Coyle (Solicitor) for the applicant.

H52. The following cases are referred to in the Court's judgment:

1. *Aksoy* ***v*** *Turkey: (1997) 23 E.H.R.R. 553* .
2. *Aydin* ***v*** *Turkey: (1998) 25 E.H.R.R. 251* .
3. *Çakici* ***v*** *Turkey: (2001) 31 E.H.R.R. 5* .
4. *Ergi* ***v*** *Turkey: (2001) 32 E.H.R.R. 18* .
5. *Gül* ***v*** *Turkey: (2002) 34 E.H.R.R. 28* .
6. *Güleç* ***v*** *Turkey: (1999) 28 E.H.R.R. 121* .
7. *Ilhan* ***v*** *Turkey: (2002) 34 E.H.R.R. 36* .
8. *Kaya* ***v*** *Turkey: (1999) 28 E.H.R.R. 1* .
9. *McCann* ***v*** ***United Kingdom****: (1996) 21 E.H.R.R. 97* .
10. *McKerr* ***v*** ***United Kingdom****: (2002) 34 E.H.R.R. 20* .
11. *Ögur* ***v*** *Turkey: (2001) 31 E.H.R.R. 40* .
12. *Salman* ***v*** *Turkey: (2002) 34 E.H.R.R. 17* . ****63***
13. *Scopelliti* ***v*** *Italy: (1994) 17 E.H.R.R. 493* .
14. *Tanrikulu* ***v*** *Turkey: (2000) 30 E.H.R.R. 950* .
15. *Timurtas* ***v*** *Turkey: (2001) 33 E.H.R.R. 6* .
16. *Yasa* ***v*** *Turkey: (1999) 28 E.H.R.R. 408* .
17. *Application No.20764/92, Ertak* ***v*** *Turkey, Dec.04.12.95* .
18. *Application No.24520/94, Caraher* ***v*** ***United Kingdom****, Dec.11.01.00* .
19. *Application No.30054/96, Kelly* ***v*** ***United Kingdom****, Dec.04.04.00* .
20. *Application No.37715/97, Shanaghan* ***v*** ***United Kingdom****, Dec.04.04.00* .

The Facts

I. The circumstances of the case

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11. The facts of the case, in particular concerning what happened when Pearse **Jordan** was shot on November 25, 1992, are in dispute between the parties.

A. Events relating to the death of Pearse Jordan

12. On November 25, 1992, the applicant's son, Pearse **Jordan**, aged 22, was shot and killed in Belfast by an officer of the Royal Ulster Constabulary (the RUC), later identified as Sergeant A.

13. The official statement issued by the RUC to the media indicated that an RUC unit had pursued a car on the Falls Road and brought it to a halt. On stopping the car, the officers had fired several shots at the driver, fatally wounding him a short distance from where his car had been abandoned. No guns, ammunition, explosives, masks or gloves had been found in the car and the driver, Pearse **Jordan**, had been unarmed.

14. The post-mortem report found two entry wounds in Pearse **Jordan's** back and one in the back of the left arm, and noted a bruise on the face and shin. It concluded that he had been struck by three bullets which had come from behind and to the left. There was nothing to indicate the range.

15. The shooting was witnessed by four civilians, who on November 26, 1992 made statements to the Committee for the Administration of Justice (CAJ), an independent non-governmental human rights organisation based in Belfast. The four witnesses gave the following account of the shooting, which is not accepted by the Government.

16. The four civilians were walking together along the Falls Road and passed Andersontown RUC station at 5pm approximately. They noticed two unmarked police cars parked with their headlights dimmed, each containing three RUC officers: one car was red and the second dark blue/green.

16. As they proceeded along the road, they heard a crash behind them and turned to see on the opposite side of the road the red police car pulling alongside a car (Pearse **Jordan's**) and ramming it up onto the footpath. The red police car came to a halt in front of the car while the dark blue/green police car pulled up behind hitting it in the rear. The **64* four civilians stopped and had an unobstructed view across the road. Pearse **Jordan** emerged from the immobilised car, and appeared shaken. He staggered across the road towards the four men followed by four police officers. As Pearse **Jordan** reached the white line in the centre of the road, an officer about 12ft away fired a number of shots. The civilians heard no warning shout or challenge given by any of the officers and saw nothing in Pearse **Jordan's** hands or anything threatening in his actions. Some of the shots struck Pearse **Jordan**. He staggered a little further then turned to face the police who, when they caught up with him, verbally abused him and pushed his face into the ground where he was kicked and searched. The police carried out a search of the car.

16. The four witnesses followed the ambulance which took Pearse **Jordan** to hospital where they stated that they were subjected to hostile and threatening remarks by members of the security forces.

17. According to the applicant, prior to the release of the official RUC statement, [1] there were a number of unofficial reports widely circulated in the media to the effect that gloves, masks, guns and bombs had been found in the car, and one report to the effect that Pearse **Jordan** was a former Republican prisoner who had been charged in 1991 with possession of explosives. This information was not correct. Pearse **Jordan** did however receive an IRA funeral and, in the Republican News, he was described as a Volunteer of the Belfast Brigade of the IRA and it was said that he had died on active service.

18. An official RUC statement stated that a deputy superintendent of the RUC from outside Belfast would investigate the shooting. In a later statement, it was announced that the Independent Commission for Police Complaints (the ICPC) would supervise the RUC investigation.

19. On November 26, 1992, at 10.55pm, a detective chief inspector of the RUC criminal investigation department interviewed Sergeant A, in the presence of his solicitor and a representative of the ICPC. Sergeant A, member of an HMSU unit, [2] stated as follows.

19. He had been at a briefing at 11am the day before concerning reports of a planned distribution of kit and munitions, including weapons, explosives and mortars, by the Provisional IRA in West Belfast. A surveillance operation was to be mounted and he was in charge of the teams on the ground which were going to intervene if possible to intercept the munitions. He was carrying a

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Smith and Wesson 59 pistol and a MP5 Heckler & Koch. At about 3.20 to 3.30pm, following reports of a car acting suspiciously at White Rock leisure centre, he and his teams left Woodbourne police station to wait at Andersontown police station. They heard reports there of a build up of activity at the back of two houses in Arizona street, which were under surveillance. The red *65 car from the leisure centre arrived in Arizona street. Sergeant A thought that this was possibly the re-supply of terrorist equipment taking place. He was told by radio to gather his people together—car crews with call signs 8, 9, 3 and 12. When the red Orion left Arizona street, he and his crews left the police station but were called back almost immediately to allow the red Orion to make its run. A red Cavalier left Arizona street and they were told to allow that to run. News arrived that the red Orion had come back to Arizona street. Sergeant A was told on the radio that the next time the red Orion came out they were to intercept it. He split his crews in two, his own team (call signs 8 and 12) to approach from the city side and the crews with call signs 3 and 9 to approach from the country side.

19. When the red Orion came past the two police cars, Sergeant A saw that there was one driver. They pulled out behind it. His driver flashed his lights at it. They switched on their police klaxon but had no blue flashing light on the car and none of them were wearing their police caps. Sergeant A's car drew level with the Orion and he signalled for it to pull over. The Orion slowed falling behind and then shot past on the passenger side, accelerating down the Falls Road in the direction of the city. Sergeant A told his driver to pursue him and force him off the road. The car possibly reached the speed of 60, maybe 70 miles per hour at the fastest. They were in a built up area, in traffic so it was difficult to judge. Their klaxon was going throughout. They drew parallel with the red Orion and nudged it once. The impact was hard enough to force the Orion partly up on the pavement and stop it. Sergeant A's own car stopped partly on the pavement in front of the Orion. The lock of his door had broken on the impact. He burst out of the door onto the pavement moving towards the Orion. He saw the driver running across the road from left to right at an angle away from him. He was looking over his right shoulder in Sergeant A's direction as he ran. Sergeant A said that he called out “Police. Halt.” or “Halt. Police.”

19. The driver of the Orion turned around towards him. He could not see the man's hands which were below his waist. His vision was either obscured by the roof of the police car in front of him or the arrival of the other black car (crew 12) on the scene. As he could not see the man's hands, he thought that his own life or the life of his own driver might be at risk. He feared the man was armed as he had spun round so quickly. He fired a short burst from his MP5 at the trunk of the man. When he made the split second decision to fire, the man was facing him but he could not say whether he had turned or moved in some other way. He was aware of other police officers shouting. He ran towards the driver who ran towards the footpath on the far side of the road. Constable F was shouting at him to get down on his knees. The driver fell flat, toppling over. It was realised at that stage that he was seriously injured.

19. Sergeant A quickly searched the car, while other security force *66 personnel administered first aid to the driver. Either base, or he himself, suggested that the police officers move to Arizona street. The military took over the first aid. He had directed most of the police officers to leave the scene as soon as they had arrived, including crew 12 in their car. He did not know that car 12 had come into contact with the Orion or the deceased. He arrived back at the station at about 5.30 to 6.00pm. There was a 20 to 30 minute debriefing in which he participated. He also discussed the matter casually with the others who were there. He was instructed to hand in his weapon at about that time.

20. On March 30, 1993, a detective inspector carried out a second interview of Sergeant A, in the presence of his solicitor. Further questions were put about his position and actions at the time of the shooting. He recalled that he had had a clear view of the deceased from the waist up. When the deceased turned to face him, he did not make any movements towards him. His arms remained down though. When asked to explain precisely why he had considered that his life was in danger, given that he could not confirm that the deceased was armed, Sergeant A replied that it had been a prolonged operation lasting several hours involving serious terrorist activity. The red Orion had reacted in a very aggressive manner in driving at excessive speed on a busy road. When the Orion was stopped, the driver ran away and when he was ordered to stop, he turned towards the Sergeant in what the Sergeant interpreted as an aggressive manner. His arms were down and his hands out of sight. In that short space of time, he formed the opinion that the deceased was a threat to his life. The man's actions had not been of someone about to surrender. He was certain that there were no viable alternatives to discharging his own weapon.

21. Forensic examinations of the cars involved in the incident were carried out. Interviews were conducted with the other police officers and army personnel involved in the incident.

21. According to the statements of police officers D, E and F in the car call sign 12, they had been pursuing the red Orion car close behind the red police Sierra in which Sergeant A was driving. When the Orion stopped, their car pulled up behind. As they were stopping, the driver was running from the car and either he ran into them or their car struck him, clipping him on the right thigh. The driver span round towards call sign 8. At that point, there was a short burst of gunfire. Their car had also

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at some point made contact with the red Orion in the rear. Only officer D heard shouting coming from the call sign 8 direction before the shooting. Shortly after moving their car to facilitate the flow of traffic, they had been directed to Arizona street.

21. In his statement of December 6, 1992, Sergeant H, from the car call sign 11, stated that on arrival at the scene he had instructed car 12 to be moved to facilitate the movement of a bus which had stopped very close to the injured man. He was not aware that car 12 might have struck the red Orion car or the deceased. The car was only moved back *67 slightly and he was not involved in directing its complete removal from the scene.

21. Inspector M gave a statement on December 7, 1992 that, on being satisfied that the injured man was receiving first aid and that the red Orion had been secured, he gave directions for all the HMSU police teams to go to Arizona street for searches. Some sort of device has been located there.

22. During the investigation, appeals were made by the police in newspapers and broadcast media for potential eyewitnesses to come forward. A number of civilians made statements to the police and subsequently gave evidence at the inquest. In May 1993, the RUC concluded its inquiry. Its report on the investigation was submitted to the Director of Public Prosecutions on May 25, 1993.

23. On June 3, 1993, the ICPC wrote to the applicant's family expressing the view that the RUC report of May 25, 1993 concerning the criminal investigation into the shooting was satisfactory. On June 15, 1993, the RUC wrote to the applicant advising him that the papers had been sent to the DPP. The applicant and his family were not however provided with any indication as to the nature of the RUC's findings.

24. On November 16, 1993, the DPP's department issued to the Chief Constable of the RUC a direction of "no prosecution" in respect of the fatal shooting of Pearse **Jordan**. It had been concluded that the evidence was insufficient to warrant the prosecution of any person.

25. On November 22, 1993, having considered a submission by the CAJ, the DPP notified the CAJ that the direction of "no prosecution" should stand.

26. On February 11, 1994, the RUC Complaints and Discipline Department wrote to the applicant to inform him that the report on the shooting had been sent to the ICPC.

27. On August 31, 1994, the ICPC wrote to the applicant to inform him that after careful scrutiny of all the details it was of the opinion that the evidence was insufficient to warrant the preferment of disciplinary charges against the police officers concerned.

B. The inquest

28. On November 29, 1993, the RUC notified the Coroner that the DPP had directed "no prosecution". Following that decision, the Coroner decided to hold an inquest.

29. On November 4, 1994, the Coroner received the case papers from the RUC.

30. On or about November 13, 1994, the Coroner wrote to interested parties informing them that the inquest would begin on January 4, 1995.

31. Prior to the commencement of the inquest, the Secretary of State for Defence issued a certificate in which he identified information whose disclosure at the inquest he believed would be contrary to the public *68 interest on grounds of national security, and made an application that the identities of certain military witnesses be withheld and that they should give their evidence from behind a screen.

32. On December 20, 1994, the Coroner held a preliminary hearing at which he decided to:

(a) protect certain categories of information from disclosure on the grounds of national security;
(b) protect the identity of three military witnesses, soldiers **V**, W and X by withholding their names and screening them from all except the Coroner, the jury and the legal representatives of the interested parties; and

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(c) protect the identity of certain RUC officers, including Sergeant A (the officer who fired the shots which killed Pearse **Jordan**) by withholding their names.

33. On January 2, 1995, the Secretary of State for Northern Ireland issued a certificate in which he identified information whose disclosure at the inquest he believed would be contrary to the public interest as compromising the integrity of RUC intelligence operations.

34. On January 4, 1995, the Coroner's inquest commenced. The applicant and his family were represented by a solicitor and counsel. The RUC were represented. The Coroner sat for three and a half days, hearing evidence from 19 witnesses, including the applicant, eight civilians, soldiers **V**, W and X, seven police officers and a pathologist. These witnesses were subject to cross-examination. Sergeant A had informed the Coroner that he would not appear.

35. On or about January 8, 1995, the CAJ provided the Coroner with a statement which they had received from another civilian witness, a driver of a black taxi who had been at the scene.

36. On January 10, 1995, the Coroner rejected the request by the applicant's counsel to withdraw the protection of the identities of the RUC witnesses.

37. The proceedings were adjourned on January 16, 1995, at the request of Pearse **Jordan's** family, to enable the DPP, in the light of new evidence from the taxi driver, to reconsider the decision whether or not to bring a prosecution. The Coroner wrote to the DPP informing him that new evidence had come to light which should be considered.

38. On February 10, 1995, the DPP decided that the evidence remained insufficient to warrant the prosecution of any person in relation to Pearse **Jordan's** death. He requested that any further evidence adduced at the inquest relevant to his functions be reported to him.

39. On February 14, 1995, the applicant's legal representatives were informed by the DPP that his decision not to bring a prosecution still stood.

40. On March 10, 1995, the applicant's legal representatives made an application for the Coroner to discharge himself from the inquest on ***69*** the grounds that he was not conducting the inquest fairly. The Coroner refused the application.

41. On April 11, 1995, the Coroner wrote to the interested parties informing them that the inquest would resume on June 12, 1995.

42. On May 26, 1995, the applicant's legal representatives commenced judicial review proceedings seeking declarations that certain rulings given by the Coroner in the course of the inquest were wrong in law. Leave was granted on June 2, 1995. The applicant sought orders of certiorari to quash *inter alia* (a) the Coroner's refusal to give the next-of-kin access to the statements of the witnesses before they gave evidence at the inquest and (b) the decision of the Coroner to grant anonymity to RUC witnesses. Legal aid was granted to the applicant for this purpose. The Coroner adjourned the inquest pending these proceedings.

43. Leave was granted to bring judicial review proceedings against the Coroner on June 2, 1995.

44. The judicial review application was heard on November 9 and 10, 1995. By judgment of December 11, 1995, Carswell L.J. refused the applicant's claims. In doing so he had regard to the inquisitorial nature of inquest proceedings. He referred to the remarks of Griffiths J. in *Ex P. Peach* :

> A coroner's inquest is an inquisitorial procedure with a very limited objective indeed. The objective is set out in r.26 of the Coroners Rules 1953 . It is limited to ascertaining the following matters: who the deceased was; how, when and where the deceased came by his death. There is a further specific limitation provided by the Coroners (Amendment) Rules 1977 . These provide by r.7 that no verdict shall be framed in such a way as to appear to determine any question of criminal liability on the part of a named person or of civil liability.

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> It is quite true that the coroner may allow interested parties to examine a witness called by the coroner. But that must be for the purpose of assisting in establishing the matters which the inquest is directed to determine. It is not intended by r.16 to widen the coroner's inquest into adversarial fields of conflict.

45. Carswell L.J. also referred to the statutory background governing the procedure at inquest: s.31(1) of the Coroners Act (Northern Ireland) 1959 providing that the jury shall give their verdict in the form prescribed by rules,

> setting forth, so far as such particulars have been proved to them, who the deceased person was and how, when and where he came to his death.

and r.16 of the Coroners (Practice and Procedure) Rules 1963 providing:

> neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability …

46. On January 8, 1996, the applicant appealed against the decision of Carswell L.J. The appeal was dismissed by the Court of Appeal of Northern Ireland on June 28, 1996. The applicant's application for *70 leave to appeal to the House of Lords was refused on October 4, 1996. The House of Lords also refused leave on March 20, 1997.

47. The inquest was due to recommence on December 1, 1997. However, it was adjourned on November 19, 1997 by the Coroner, after consultation with the parties, pending the outcome of a judicial review application in the High Court concerning the availability of legal aid for legal representation for the family of the deceased at inquests.

48. On March 16, 1999, final judgment was given in the case of *Lavery* **v** *Secretary of State and the Legal Aid Department* , in which a challenge concerning the unavailability of legal aid for inquests was dismissed.

49. On July 1, 1999, the Coroner informed the interested parties that he intended to resume the inquest on November 1, 1999.

50. On October 13, 1999, the Coroner adjourned the inquest pending the applicant's application for the disclosure of documents by the Chief Constable of the RUC in the wake of the Home Office Circular issued on April 28, 1999 on deaths in police custody which recommended, *inter alia* , that material supplied by the police to the Coroner should be made available to the families of deceased persons. [3]

51. On February 2, 2000, the applicant was informed that the Chief Constable would provide copies of the statements of the witnesses who were to appear at the inquest and copies of any statements which the Coroner proposed to read out.

52. On March 3, 2000, the applicant was granted leave to bring judicial review proceedings against the Chief Constable, challenging his decision not to provide further documents to the applicant.

53. When the inquest resumed, the Coroner proposed to call, in addition to the witnesses who gave evidence in January 1995, 12 police officers and soldier Y involved in the anti-terrorist operation in which Pearse **Jordan** died, forensic experts and three police officers involved in the RUC investigation into the shooting.

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54. On a date unspecified between April 4, and October 2, 2000, the applicant was provided with the witness statements of persons whom the Coroner has decided should be called to give evidence at the inquest.

C. Concerning the civil proceedings

55. The applicant was granted legal aid to pursue a civil action for compensation in the High Court. On December 7, 1992, the applicant instituted civil proceedings, alleging death by wrongful act.

56. On October 5, 1995, the applicant served a statement of claim in the civil proceedings. On October 24, 1995 the Ministry of Defence served their defence, together with a request for further and better particulars *71 of the statement of claim. The applicant did not reply to this request until a date unspecified subsequent to August 27, 1998.

57. On October 8, 1999, the Crown Solicitor wrote to the applicant seeking consent to a remittal of the civil action to trial.

58. The applicant stated that the case is currently at the discovery stage but that this cannot be concluded until the inquest is terminated.

II. Relevant domestic law and practice

A. Use of lethal force

59. Section 3 of the Criminal Law Act (Northern Ireland) 1967 provides *inter alia* :

> 1. A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting the arrest or assisting in the lawful arrest of offenders or suspected offenders or persons unlawfully at large.

59. Self-defence or the defence of others is contained within the concept of the prevention of crime. [4]

B. Inquests

1. *Statutory provisions and rules*

60. The conduct of inquests in Northern Ireland is governed by the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963. These provide the frame-work for a procedure within which deaths by violence or in suspicious circumstances are notified to the Coroner, who then has the power to hold an inquest, with or without a jury, for the purpose of ascertaining, with the assistance as appropriate of the evidence of witnesses and reports, *inter alia* , of post mortem and forensic examinations, who the deceased was and how, when and where he died.

61. Pursuant to the Coroners Act, every medical practitioner, registrar of deaths or funeral undertaker who has reason to believe a person died directly or indirectly by violence is under an obligation to inform the Coroner. [5] Every medical practitioner who performs a post mortem examination has to notify the Coroner of the result in writing. [6] Whenever a dead body is found, or an unexplained death or death in suspicious circumstances occurs, the police of that district are required to give notice to the Coroner. [7]

62. Rules 12 and 13 of the Coroners Rules give power to the Coroner to adjourn an inquest where a person may be or has been charged with murder or other specified criminal offences in relation to the deceased.

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63. Where the Coroner decides to hold an inquest with a jury, persons are called from the Jury List, compiled by random computer selection *72 from the electoral register for the district on the same basis as in criminal trials.

64. The matters in issue at an inquest are governed by rr.15 and 16 of the Coroners Rules :

> 15. The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:
>
> (a) who the deceased was;
> (b) how, when and where the deceased came by his death;
> (c) the particulars for the time being required by the Births and Deaths Registration (Northern Ireland) Order 1976 to be registered concerning his death.
>
> 16. Neither the coroner nor the jury shall express any opinion on questions of criminal or civil liability or on any matters other than those referred to in the last foregoing Rule.

65. The forms of verdict used in Northern Ireland accord with this recommendation, recording the name and other particulars of the deceased, a statement of the cause of death (for example bullet wounds) and findings as to when and where the deceased met his death. In England and Wales, the form of verdict appended to the English Coroners Rules contains a section marked "conclusions of the jury/coroner as to the death" in which conclusions such as "lawfully killed" or "killed unlawfully" are inserted. These findings involve expressing an opinion on criminal liability in that they involve a finding as to whether the death resulted from a criminal act, but no finding is made that any identified person was criminally liable. The jury in England and Wales may also append recommendations to their verdict.

66. However, in Northern Ireland, the Coroner is under a duty [8] to furnish a written report to the DPP where the circumstances of any death appear to disclose that a criminal offence may have been committed.

67. Until recently, legal aid was not available for inquests as they did not involve the determination of civil liabilities or criminal charges. Legislation which would have provided for legal aid at the hearing of inquests [9] has not been brought into force. However, on July 25, 2000, the Lord Chancellor announced the establishment of an Extra-Statutory Ex Gratia Scheme to make public funding available for representation for proceedings before Coroners in exceptional inquests in Northern Ireland. In March 2001, he published for consultation the criteria to be used in deciding whether applications for representation at inquests should receive public funding. This included *inter alia* consideration of financial eligibility, whether an effective investigation by the State was needed and whether the inquest was the only way to conduct it, whether the applicant required representation to be able to participate effectively in the inquest and whether the applicant had a sufficiently close relationship to the deceased. *73

68. The Coroner enjoys the power to summon witnesses who he thinks it necessary to attend the inquest [10] and he may allow any interested person to examine a witness. [11] In both England and Wales and Northern Ireland, a witness is entitled to rely on the privilege against self-incrimination. In Northern Ireland, this privilege is reinforced by r.9(2) which provides that a person suspected of causing the death may not be compelled to give evidence at the inquest.

69. In relation to both documentary evidence and the oral evidence of witnesses, inquests, like criminal trials, are subject to the law of public interest immunity, which recognises and gives effect to the public interest, such as national security, in the non-disclosure of certain information or certain documents or classes of document. A claim of public interest immunity must be supported by a certificate.

2. *The scope of inquests*

70. Rules 15 and 16 [12] follow from the recommendation of the Brodrick Committee on Death Certification and Coroners:

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> … the function of an inquest should be simply to seek out and record as many of the facts concerning the death as the public interest requires, without deducing from those facts any determination of blame … In many cases, perhaps the majority, the facts themselves will demonstrate quite clearly whether anyone bears any responsibility for the death; there is a difference between a form of proceeding which affords to others the opportunity to judge an issue and one which appears to judge the issue itself.

71. Domestic courts have made, *inter alia* , the following comments:

> … It is noteworthy that the task is not to ascertain how the deceased died, which might raise general and far-reaching issues, but 'how … the deceased came by his death', a far more limited question directed to the means by which the deceased came by his death.
>
> … [previous judgments] make it clear that when the Brodrick Committee stated that one of the purposes of an inquest is 'To allay rumours or suspicions' this purpose should be confined to allaying rumours and suspicions of how the deceased came by his death and not to allaying rumours or suspicions about the broad circumstances in which the deceased came by his death. (Sir Thomas Bingham, M.R., Court of Appeal, *R. v the Coroner for North Humberside and Scunthorpe Ex P. Roy Jamieson, April 1994, unreported* .)
>
> The cases establish that although the word 'how' is to be widely interpreted, it means 'by what means' rather than in what broad circumstances … In short, the inquiry must focus on matters directly causative of death and must, indeed, be confined to those matters alone … (Simon Brown L.J., CA, *R. v Coroner for Western District of East Sussex, Ex P. Homberg (1994) 158 J.P. 357*)
>
> … it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it **74* should never be forgotten that there are no parties, no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial…
>
> It is well recognised that a purpose of an inquest is that rumour may be allayed. But that does not mean it is the duty of the Coroner to investigate at an inquest every rumour or allegation that may be brought to his attention. It is … his duty to discharge his statutory role—the scope of his enquiry must not be allowed to drift into the uncharted seas of rumour and allegation. He will proceed safely and properly if he investigates the *facts* which it appears are relevant to the statutory issues before him. (Lane L.J., CA, *R. v South London Coroner Ex P. Thompson (1982) 126 S.J. 625*)

3. *Disclosure of documents*

72. There was no requirement prior to 1999 for the families at inquests to receive copies of the written statements or documents submitted to the Coroner during the inquest. Coroners generally adopted the practice of disclosing the statements or documents during the inquest proceedings, as the relevant witness came forward to give evidence.

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73. Following the recommendation of the Stephen Lawrence Inquiry, Home Office Circular No.20/99 (concerning deaths in custody or deaths resulting from the actions of a police officer in purported execution of his duty) advised Chief Constables of police forces in England and Wales to make arrangements in such cases for the pre-inquest disclosure of documentary evidence to interested parties. This was to "help provide reassurance to the family of the deceased and other interested persons that a full and open police investigation has been conducted, and that they and their legal representatives will not be disadvantaged at the inquest". Such disclosure was recommended to take place 28 days before the inquest.

74. Paragraph 7 of the Circular stated:

> The courts have established that statements taken by the police and other documentary material produced by the police during the investigation of a death in police custody are the property of the force commissioning the investigation. The Coroner has no power to order the preinquest disclosure of such material … Disclosure will therefore be on a voluntary basis.

74. Paragraph 9 listed some kinds of material which require particular consideration before being disclosed, for example:

— where disclosure of documents might have a prejudicial effect on possible subsequent proceedings (criminal, civil or disciplinary);
— where the material concerns sensitive or personal information about the deceased or unsubstantiated allegations which might cause distress to the family; and *75
— personal information about third parties not material to the inquest.

74. Paragraph 11 envisaged that there would be non-disclosure of the investigating officer's report although it might be possible to disclose it in those cases which the Chief Constable considered appropriate.

C. Police Complaints Procedures

75. The police complaints procedure was governed at the relevant time by the Police (Northern Ireland) Order 1987 (the 1987 Order). This replaced the Police Complaints Board, which had been set up in 1977, by the Independent Commission for Police Complaints (the ICPC). The ICPC has been replaced from October 1, 2000 with the Police Ombudsman for Northern Ireland appointed under the Police (Northern Ireland) Act 1998 .

76. The ICPC was an independent body, consisting of a chairman, two deputy chairmen and at least four other members. Where a complaint against the police was being investigated by a police officer or where the Chief Constable or Secretary of State considered that a criminal offence might have been committed by a police officer, the case was referred to the ICPC.

77. The ICPC was required under art.9(1)(a) of the 1987 Order to supervise the investigation of any complaint alleging that the conduct of a RUC officer had resulted in death or serious injury. Its approval was required of the appointment of the police officer to conduct the investigation and it could require the investigating officer to be replaced. [13] A report by the investigating officer was submitted to the ICPC concerning supervised investigations at the same time as to the Chief Constable. Pursuant to art.9(8) of the 1987 Order , the ICPC issued a statement whether the investigation had been conducted to its satisfaction and, if not, specifying any respect in which it had not been so conducted.

78. The Chief Constable was required under art.10 of the 1987 Order to determine whether the report indicated that a criminal offence had been committed by a member of the police force. If he so decided and considered that the officer ought to be charged, he was required to send a copy of the report to the DPP. If the DPP decided not to prefer criminal charges, the Chief Constable was required to send a memorandum to the ICPC indicating whether he intended to bring disciplinary proceedings against the officer [14] save where disciplinary proceedings had been brought and the police officer had admitted the charges. [15] Where the Chief Constable considered that a criminal offence had been committed but that the offence was not such that the police

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officer should be charged or where he considered that no *76 criminal offence had been committed, he was required to send a memorandum indicating whether he intended to bring disciplinary charges and, if not, his reasons for not proposing to do so. [16]

79. If the ICPC considered that a police officer subject to investigation ought to be charged with a criminal offence, it could direct the Chief Constable to send the DPP a copy of the report on that investigation. [17] It could also recommend or direct the Chief Constable to prefer such disciplinary charges as the ICPC specified. [18]

D. The Director of Public Prosecutions

80. The Director of Public Prosecutions, appointed pursuant to the Prosecution of Offences (Northern Ireland) 1972 (the 1972 Order) is an independent officer with at least 10 years' experience of the practice of law in Northern Ireland who is appointed by the Attorney-General and who holds office until retirement, subject only to dismissal for misconduct. His duties under Art.5 of the 1972 Order are *inter alia* :

> (a) to consider, or cause to be considered, with a view to his initiating or continuing in Northern Ireland any criminal proceedings or the bringing of any appeal or other proceedings in or in connection with any criminal cause or matter in Northern Ireland, any facts or information brought to his notice, whether by the Chief Constable acting in pursuance of art.6(3) of this Order or by the Attorney-General or by any other authority or person;
> (b) to examine or cause to be examined all documents that are required under art.6 of this Order to be transmitted or furnished to him and where it appears to him to be necessary or appropriate to do so to cause any matter arising thereon to be further investigated;
> (c) where he thinks proper to initiate, undertake and carry on, on behalf of the Crown, proceedings for indictable offences and for such summary offences or classes of summary offences as he considers should be dealt with by him.

81. Article 6 of the 1972 Order requires *inter alia* Coroners and the Chief Constable of the RUC to provide information to the DPP as follows:

> (2) Where the circumstances of any death investigated or being investigated by a coroner appear to him to disclose that a criminal offence may have been committed he shall as soon as practicable furnish to the [DPP] a written report of those circumstances.
>
> (3) It shall be the duty of the Chief Constable, from time to time, to furnish to the [DPP] facts and information with respect to—
>
> (a) indictable offences [such as murder] alleged to have been committed against the law of Northern Ireland; …
>
> and at the request of the [DPP], to ascertain and furnish to the [DPP] information regarding any matter which may appear to the [DPP] to require investigation on the ground that it may involve an offence against the law of Northern Ireland or information which may appear to the [DPP] to be necessary for the discharge of his functions under this Order.

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82. According to the Government's observations submitted on June 18, *77 1998, it had been the practice of successive DPPs to refrain from giving reasons for decisions not to institute or proceed with criminal prosecutions other than in the most general terms. This practice was based upon the consideration that

(1) if reason were given in one or more cases, they would be required to be given in all. Otherwise, erroneous conclusions might be drawn in relation to those cases where reasons were refused, involving either unjust implications regarding the guilt of some individuals or suspicions of malpractice;
(2) the reason not to prosecute might often be the unavailability of a particular item of evidence essential to establish the case (for example sudden death or flight of a witness or intimidation). To indicate such a factor as the sole reason for not prosecuting might lead to assumptions of guilt in the public estimation;
(3) the publication of the reasons might cause pain or damage to persons other than the suspect (for example the assessment of the credibility or mental condition of the victim or other witnesses);
(4) in a substantial category of cases decisions not to prosecute were based on the DPP's assessment of the public interest. Where the sole reason not to prosecute was the age, mental or physical health of the suspect, publication would not be appropriate and could lead to unjust implications;
(5) there might be considerations of national security which affected the safety of individuals (for example where no prosecution could safely or fairly be brought without disclosing information which would be of assistance to terrorist organisations, would impair the effectiveness of the counter-terrorist operations of the security forces or endanger the lives of such personnel and their families or informants).

83. Decisions of the DPP not to prosecute have been subject to applications for judicial review in the High Court.

83. In *R. v DPP Ex P. C* [19] Kennedy L.J. held, concerning a decision of the DPP not to prosecute in an alleged case of buggery:

> From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:
>
> (1) because of some unlawful policy (such as the hypothetical decision in *Blackburn* not to prosecute where the value of goods stolen was below £100);
> (2) because the Director of Public Prosecutions failed to act in accordance with his own settled policy as set out in the code; or
> (3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived.

84. In the case of *R. v DPP Ex P. Timothy Jones* the Divisional Court on *78 March 22, 2000 quashed a decision not to prosecute for alleged gross negligence causing a death in dock unloading on the basis that the reasons given by the DPP—that the evidence was not sufficient to provide a realistic prospect of satisfying a jury—required further explanation.

85. *R. v DPP Ex P. Patricia Manning and Elizabeth Manning* [20] concerned the DPP's decision not to prosecute any prison officer for manslaughter in respect of the death of a prisoner, although the inquest jury had reached a verdict of unlawful death —there was evidence that prison officers had used a neck lock which was forbidden and dangerous. The DPP reviewing the case still concluded that the Crown would be unable to establish manslaughter from gross negligence. The Lord Chief Justice noted:

> Authority makes clear that a decision by the Director not to prosecute is susceptible to judicial review: see, for example, *R. v Director of Public Prosecutions Ex P. C [1995] 1 Cr. App. R. 136* . But, as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by

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> Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney-General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the CPS, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial. If, in a case such as the present, the Director's provisional decision is not to prosecute, that decision will be subject to review by Senior Treasury Counsel who will exercise an independent professional judgment. The Director and his officials (and Senior Treasury Counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will turn not on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before (in a serious case such as this) a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied.

85. As regards whether the DPP had a duty to give reasons, the Lord Chief Justice said:

> It is not contended that the Director is subject to an obligation to give ***79** reasons in every case in which he decides not to prosecute. Even in the small and very narrowly defined cases which meet Mr Blake's conditions set out above, we do not understand domestic law or the jurisprudence of the European Court of Human Rights to impose an absolute and unqualified obligation to give reasons for a decision not to prosecute. But the right to life is the most fundamental of all human rights. It is put at the forefront of the Convention. The power to derogate from it is very limited. The death of a person in the custody of the State must always arouse concern, as recognised by s.8(1)(c), (3)(b) and (6) of the Coroner's Act 1988 , and if the death resulted from violence inflicted by agents of the State that concern must be profound. The holding of an inquest in public by an independent judicial official, the coroner, in which interested parties are able to participate must in our view be regarded as a full and effective inquiry (see *McCann* ***v*** ***United*** ***Kingdom*** *[1996] 21 E.H.R.R. 97* , paras 159 to 164). Where such an inquest following a proper direction to the jury culminates in a lawful verdict of unlawful killing implicating a person who, although not named in the verdict, is clearly identified, who is living and whose whereabouts are known, the ordinary expectation would naturally be that a prosecution would follow. In the absence of compelling grounds for not giving reasons, we would expect the Director to give reasons in such a case: to meet the reasonable expectation of interested parties that either a prosecution would follow or a reasonable explanation for not prosecuting be given, to vindicate the Director's decision by showing that solid grounds exist for what might otherwise appear to be a surprising or even inexplicable decision and to meet the European Court's expectation that if a prosecution is not to follow a plausible explanation will be given. We would be very surprised if such a general practice were not welcome to Members of Parliament whose constituents have died in such circumstances. We readily accept that such reasons would have to be drawn with care and skill so as to respect third party and public interests and avoid undue prejudice to those who would have no opportunity to defend themselves. We also accept that time and skill would be needed to prepare a summary which was reasonably brief but did not distort the true basis of the decision. But the number of cases which meet Mr Blake's conditions is very small (we were told that since 1981, including deaths in police custody, there have been seven such

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> cases), and the time and expense involved could scarcely be greater than that involved in resisting an application for judicial review. In any event it would seem to be wrong in principle to require the citizen to make a complaint of unlawfulness against the Director in order to obtain a response which good administrative practice would in the ordinary course require.

85. On this basis, the court reviewed whether the reasons given by the DPP in that case were in accordance with the Code for Crown Prosecutors and capable of supporting a decision not to prosecute. It found that the decision had failed to take relevant matters into account and that this vitiated the decision not to prosecute. The decision was quashed and the DPP was required to reconsider his decision whether or not to prosecute.

86. *In the Matter of An Application by David Adams for Judicial Review* , the High Court in Northern Ireland on June 7, 2000 considered the applicant's claim that the DPP had failed to give adequate and intelligible reasons for his decision not to prosecute any police officer concerned in the arrest during which he had suffered ***80*** serious injuries and for which in civil proceedings he had obtained an award of damages against the police. It noted that there was no statutory obligation on the DPP under the 1972 Order to give reasons and considered that no duty to give reasons could be implied. The fact that the DPP in England and Wales had in a number of cases furnished detailed reasons, whether from increasing concern for transparency or in the interests of the victim's families, was a matter for his discretion. It concluded on the basis of authorities that only in exceptional cases such as the *Manning* case [21] would the DPP be required to furnish reasons to a victim for failing to prosecute and that review should be limited to where the principles identified by Kennedy L.J. [22] were infringed. Notwithstanding the findings in the civil case, they were not persuaded that the DPP had acted in such an aberrant, inexplicable or irrational manner that the case cried out for reasons to be furnished as to why he had so acted.

III. Relevant international law and practice

A. The United Nations

87. The **United** Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Force and Firearms Principles) were adopted on September 7, 1990 by the Eighth **United** Nations Congress on the Prevention of Crime and the Treatment of Offenders.

88. Paragraph 9 of the UN Force and Firearms Principles provides, *inter alia* , that the "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life".

89. Other relevant provisions read as follows:

> … law enforcement officials shall identify themselves as such and shall give a clear warning of their intent to use firearms, with sufficient time for the warnings to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident.

> … Governments and law enforcement agencies shall ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances. In cases of death and serious injury or other grave consequences, a detailed report shall be sent promptly to the competent authorities responsible for administrative review and judicial control.

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> Persons affected by the use of force and firearms or their legal *81 representatives shall have access to an independent process, including a judicial process. In the event of the death of such persons, this provision shall apply to their dependants accordingly.

90. Paragraph 9 of the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted on May 24, 1989 by the Economic and Social Council Resolution 1989/65, (UN Principles on Extra-Legal Executions) provides, *inter alia* , that:

> There shall be a thorough, prompt and impartial investigation of all suspected cases of extra legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances …

91. Paragraphs 10 to 17 of the UN Principles on Extra-Legal Executions contain a series of detailed requirements that should be observed by investigative procedures into such deaths.

91. Paragraph 10 states, *inter alia* :

> The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the inquiry … shall also have the authority to oblige officials allegedly involved in any such executions to appear and testify …

91. Paragraph 11 specifies:

> In cases in which the established investigative procedures are inadequate because of a lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognised impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided in these principles.

91. Paragraph 16 provides, *inter alia* :

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> Families of the deceased and their legal representatives shall be informed of, and have access to, any hearing as well as all information relevant to the investigation and shall be entitled to present other evidence …

91. Paragraph 17 provides, *inter alia* :

> A written report shall be made within a reasonable time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures, methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law …

92. The "Minnesota Protocol" (Model Protocol for a legal investigation of extra-legal, arbitrary and summary executions, contained in the UN Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions) provides, *inter alia* , in section B on the "Purposes of an inquiry": ***82**

> As set out in para.9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil that purpose, those conducting the inquiry shall, at a minimum, seek:
>
> (a) to identify the victim;
> (b) to recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;
> (c) to identify possible witnesses and obtain statements from them concerning the death;
> (d) to determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
> (e) to distinguish between natural death, accidental death, suicide and homicide;
> (f) to identify and apprehend the person(s) involved in the death;
> (g) to bring the suspected perpetrator(s) before a competent court established by law.

92. In section D, it is stated that "In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established …".

B. The European Committee for the Prevention of Torture

93. In the report on its visit to the **United Kingdom** and the Isle of Man from September 8 to 17, 1999, published on January 13, 2000, the European Committee for the Prevention of Torture (the CPT) reviewed the system of preferring criminal and disciplinary charges against police officers accused of ill-treating persons. It commented, *inter alia* , on the statistically few

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criminal prosecutions and disciplinary proceedings which were brought, and identified certain aspects of the procedures which cast doubt on their effectiveness:

93. The chief officers appointed officers from the same force to conduct the investigations, save in exceptional cases where they appointed an officer from another force, and the majority of investigations were unsupervised by the Police Complaints Authority.

93. It stated at para.55:

> As already indicated, the CPT itself entertains reservations about whether the PCA [the Police Complaints Authority], even equipped with the enhanced powers which have been proposed, will be capable of persuading public opinion that complaints against the police are vigorously investigated. In the view of the CPT, the creation of a fully fledged independent investigating agency would be a most welcome development. Such a body should certainly, like the PCA, have the power to direct that disciplinary proceedings be instigated against police officers. Further, in the interests of bolstering public confidence, it might also be thought appropriate that such a body be invested with the power to remit a case directly to the CPS for consideration of whether or not criminal proceedings should be brought.
>
> In any event, the CPT recommends that the role of the 'chief officer' within the existing system be reviewed. To take the example of one Metropolitan Police officer to whom certain of the chief officer's functions have been delegated (the Director of the CIB [Criminal **83* Investigations Bureau]), he is currently expected to: seek dispensations from the PCA; appoint investigating police officers and assume managerial responsibility for their work; determine whether an investigating officer's report indicates that a criminal offence may have been committed; decide whether to bring disciplinary proceedings against a police officer on the basis of an investigating officer's report, and liase with the PCA on this question; determine which disciplinary charges should be brought against an officer who is to face charges; in civil cases, negotiate settlement strategies and authorise payments into court. It is doubtful whether it is realistic to expect any single official to be able to perform all of these functions in an entirely independent and impartial way.
>
> 57. … Reference should also be made to the high degree of public interest in CPS [Crown Prosecution Service] decisions regarding the prosecution of police officers (especially in cases involving allegations of serious misconduct). Confidence about the manner in which such decisions are reached would certainly be strengthened were the CPS to be obliged to give detailed reasons in cases where it was decided that no criminal proceedings should be brought. The CPT recommends that such a requirement be introduced.

JUDGMENT

I. Alleged violations of Article 2 of the Convention

94. The applicant submitted that his son Pearse **Jordan** had been unjustifiably killed and that there had been no effective investigation into the circumstances of his death. He invoked Art.2 of the Convention which provides:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

A. The submissions made to the Court

1. The applicant

95. The applicant submitted that the death of his son was the result of the unnecessary and disproportionate use of force by an RUC officer and that his son was the victim of a shoot-to-kill policy operated by the UK Government in Northern Ireland. He referred, *inter alia* , to reports by Amnesty International and the Human Rights Watch, as well as the statements made by John Stalker, a senior policeman, who carried out an investigation into allegations of such a policy. He argued that this case could not be looked at in isolation from ***84*** the other cases in Northern Ireland involving the use of lethal force by State agents. In this context, it could be seen on analysis of the lethal force deaths between 1969 and 1994 that there was at the material time a practice whereby suspects were arbitrarily killed rather than arrested. He pointed to the common features of preplanning based on intelligence from informers, the deployment of specialist military or police units and the maximal use of force. In this case, Sergeant A had no evidence that Pearse **Jordan** was armed, and directed fire at the trunk of the body, making no attempt to wound or take evasive action in ducking behind his armoured car to protect himself. This could not be regarded as the use of minimum or proportionate force. The inadequate investigations into this and other cases were also evidence of official tolerance on the part of the State of the use of unlawful lethal force. Here, the police officer involved in the shooting was allowed to leave the scene with his weapons, a car involved in the incident had been moved from the scene and no adequate steps were taken to find independent eye witnesses, while witnesses who did come forward were subject to abuse and harassment.

96. The applicant submitted that while there were a few outstanding issues of fact, for example, whether Sergeant A issued a warning, and whether and in what manner the deceased changed direction as he ran away, these elements were relevant only to issues of individual criminal responsibility and did not prevent the Court reaching its own conclusions under Art.2 of the Convention . To the extent that the Court felt there were any issues to resolve, it should of its own motion obtain the necessary material by an investigation under Art.38(1)(a) of the Convention .

97. The applicant further submitted that there had been no effective official investigation carried out into the killing, relying on the international standards set out in the Minnesota Protocol. He argued that the RUC investigation was inadequate and flawed by its lack of independence and lack of publicity. The DPP's own role was limited by the RUC investigation and he did not make public his reasons for not prosecuting. The inquest was flawed by the delays, the limited scope of the enquiry, a lack of legal aid for relatives, a lack of access to documents and witness statements, the non-compellability of security force or police witnesses and the use of public interest immunity certificates. The Government could not rely on civil proceedings either as this depended on the initiative of the deceased's family.

2. The Government

98. While the Government did not accept the applicant's claims under Art.2 that his son was killed by any excessive or unjustified use of force, it considered that it would be wholly inappropriate for the Court to seek itself to determine the issues of fact arising on the substantive issues of Art.2. This might involve the Court seeking to resolve issues, ***85*** and perhaps examining witnesses and conducting hearings, at the same time as the High Court in Northern Ireland, with a real risk of inconsistent findings. It would also allow the applicant to forum-shop and would thus undermine the principle of exhaustion of domestic remedies. They submitted that there were in any event considerable practical difficulties for the Court to pursue an examination of the substantive aspects of Art.2 as the factual issues would be numerous and complex, involving live evidence with a substantial number of witnesses. This primary fact-finding exercise should not be performed twice, in parallel, such an undertaking wasting court time and costs and giving rise to a real risk of prejudice in having to defend two sets of proceedings simultaneously.

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99. In so far as the applicant invited the Court to find a practice of killing rather than arresting terrorist suspects, this allegation was emphatically denied. The Government submitted that such a wide-ranging allegation calling into question every anti-terrorist operation over the last 30 years went far beyond the scope of this application and referred to matters not before this Court. They denied that there had been any obstruction to the police investigation in this case, pointing out that the removal of the car from the scene was consistent with legitimate security concerns (that is the team being sent to Arizona Street where the presence of a bomb was suspected). They denied that there had been any intimidation or abuse of witnesses.

100. The Government further denied that domestic law in any way failed to comply with the requirements of this provision. They argued that the procedural aspect of Art.2 was satisfied by the combination of procedures available in Northern Ireland, namely, the police investigation, which was supervised by the ICPC and by the DPP, the inquest proceedings and civil proceedings. These secured the fundamental purpose of the procedural obligation, in that they provided for effective accountability for the use of lethal force by State agents. This did not require that a criminal prosecution be brought but that the investigation was capable of leading to a prosecution, which was the case in this application. They also pointed out that each case had to be judged on its facts since the effectiveness of any procedural ingredient may vary with the circumstances. In the present case, they submitted that the available procedures together provided the necessary effectiveness, independence and transparency by way of safeguards against abuse.

3. The Northern Ireland Human Rights Commission

101. Referring to relevant international standards concerning the right to life (for example the Inter-American Court's case law and the findings of the UN Human Rights Committee), the Commission submitted that the State had to carry out an effective official investigation when an agent of the State was involved or implicated in the use of lethal force. ***86** Internal accountability procedures had to satisfy the standards of effectiveness, independence, transparency and promptness, and facilitate punitive sanctions. It was however, in their view, not sufficient for a State to declare that while certain mechanisms were inadequate, a number of such mechanisms regarded cumulatively could provide the necessary protection. They submitted that the investigative mechanisms relied on in this case, singly or combined, failed to do so. They referred, *inter alia* , to the problematic role of the RUC in Northern Ireland, the allegedly serious deficiencies in the mechanisms of police accountability, the limited scope of and delays in inquests, and the lack of compellability of the members of the security forces who have used lethal force to appear at inquests. They drew the Court's attention to the form of enquiry carried out in Scotland under the Sheriff, a judge of criminal and civil jurisdiction, where the next-of-kin have a right to appear. They urged the Court to take the opportunity to give precise guidance as to the form which investigations into the use of lethal force by State agents should take.

B. The Court's assessment

1. General principles

102. Article 2 , which safeguards the right to life and sets out the circumstances when deprivation of life may be justified, ranks as one of the most fundamental provisions in the Convention, to which in peacetime no derogation is permitted under Art.15 . Together with Art.3 , it also enshrines one of the basic values of the democratic societies making up the Council of Europe. The circumstances in which deprivation of life may be justified must therefore be strictly construed. The object and purpose of the Convention as an instrument for the protection of individual human beings also requires that Art.2 be interpreted and applied so as to make its safeguards practical and effective. [23]

103. In the light of the importance of the protection afforded by Art.2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. [24]

104. The text of Art.2, read as a whole, demonstrates that it covers not only intentional killing but also the situations where it is permitted to ***87** "use force" which may result, as an unintended outcome, in the deprivation of life. The deliberate or intended use of lethal force is only one factor however to be taken into account in assessing its necessity. Any use of force must be no more than "absolutely necessary" for the achievement of one or more of the purposes set out in sub-paras (a) to (c). This term indicates that a stricter and more compelling test of necessity must be employed from that normally applicable

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when determining whether State action is "necessary in a democratic society" under paras 2 of Arts 8 to 11 of the Convention. Consequently, the force used must be strictly proportionate to the achievement of the permitted aims. [25]

105. The obligation to protect the right to life under Art.2 of the Convention , read in conjunction with the State's general duty under Art.1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force. [26] The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. [27]

106. For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. [28] This means not only a lack of hierarchical or institutional connection but also a practical independence. [29]

107. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances [30] and to the identification and punishment of those responsible. [31] This is not an obligation of ***88** result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. [32] Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

108. A requirement of promptness and reasonable expedition is implicit in this context. [33] It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

109. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. [34]

2. Application in the present case

(a) Concerning alleged responsibility of the State for the death of Pearse Jordan

110. It is undisputed that Pearse **Jordan** was shot and killed by a police officer while he was unarmed. This use of lethal force falls squarely within the ambit of Art.2, which requires any such action to pursue one of the purposes set out in second paragraph and to be no more than absolutely necessary for that purpose. A number of key factual issues arise in this case, in particular whether Sergeant A acted on the basis of an honest belief perceived for good reasons to be valid at the time but which turned out subsequently to be mistaken, namely, that he or any other police officer was at risk from Pearse **Jordan** in the circumstances of the case. [35] Determining this issue would involve *inter alia* an assessment of whether Sergeant A's view was blocked by any vehicle as alleged, whether Sergeant A gave a warning shout, whether Pearse **Jordan** was facing him or whether in fact his back was already turned at ***89** the moment when Sergeant A decided to open fire. The evidence of the police officers at the scene are on a number of these points in direct conflict with statements given by civilian eye witnesses. [36] Assessment of the credibility and reliability of the various witnesses would play a crucial role.

111. These are all matters which are currently pending examination in two domestic procedures—the civil proceedings brought by the applicant alleging death by wrongful act and the inquest into the death. The Court considers that in the circumstances of this case it would be inappropriate and contrary to its subsidiary role under the Convention to attempt to establish the facts

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of this case by embarking on a fact finding exercise of its own by summoning witnesses. Such an exercise would duplicate the proceedings before the civil courts which are better placed and equipped as fact finding tribunals. While the European Commission of Human Rights has previously embarked on fact finding missions in cases from Turkey where there were pending proceedings against the alleged security force perpetrators of unlawful killings, it may be noted that these proceedings were criminal and had terminated, at first instance at least, by the time the Court was examining the applications. In those cases, it was an essential part of the applicants' allegations that the defects in the investigation were such as to render those criminal proceedings ineffective. [37]

112. In the present case, the Court does not consider that there are any elements established which would deprive the civil courts of their ability to establish the facts and determine the lawfulness or otherwise of Pearse **Jordan's** death. [38]

113. Nor is the Court persuaded that it is appropriate to rely on the documentary material provided by the parties to reach any conclusions as to responsibility for the death of the applicant's son. The written accounts provided have not been tested in examination or cross-examination and would provide an incomplete and potentially misleading basis for any such attempt. The situation cannot be equated to a death in custody where the burden may be regarded as resting on the State to provide a satisfactory and plausible explanation.

114. The Court is also not prepared to conduct, on the basis largely of statistical information and selective evidence, an analysis of incidents over the past 30 years with a view to establishing whether they disclose a practice by security forces of using disproportionate force. This would go far beyond the scope of the present application.

115. Conversely, as regards the Government's argument that the avail **90* ability of civil proceedings provided the applicant with a remedy which he has yet to exhaust as regards Art.35(1) of the Convention and, therefore, that no further examination of the case is required under Art.2 , the Court recalls that the obligations of the State under Art.2 cannot be satisfied merely by awarding damages. [39] The investigations required under Arts 2 and 13 of the Convention must be able to lead to the identification and punishment of those responsible. The Court therefore examines below whether there has been compliance with this procedural aspect of Art.2 of the Convention.

(b) Concerning the procedural obligation under Art.2 of the Convention

116. Following the death of Pearse **Jordan**, an investigation was commenced by the RUC. On the basis of that investigation, there was a decision by the DPP not to prosecute any officer. An inquest was opened on January 4, 1995 and is still pending.

117. The applicant has made numerous complaints about these procedures, while the Government has contended that even if one part of the procedure failed to provide a particular safeguard, taken as a whole, the system ensured the requisite accountability of the police for any unlawful act.

(i) *The police investigation*

118. First, concerning the police investigation, the Court finds little substance in the applicant's criticisms. It appears that the investigation started immediately after the death. While the scene of the incident was not maintained intact—it appears that cars involved in the collision were moved or sent away—this has not been shown either to have obstructed the investigation or to have been unjustified in the circumstances. [40] Nor was this measure of such a nature as to undermine any possibility of reconstructing events. There were numerous eyewitnesses who were able to give their version. In so far as the applicant referred to a failure to seek out civilian witnesses, the Court does not consider it unreasonable of the police to concentrate on clearing the immediate scene of traffic and bystanders, where in a busy road there would be considerations of highway safety. It has not been shown that the RUC failed to look for or find civilian witnesses. Appeals were made to the public and it is apparent that in this case, as in others, for whatever reason, some witnesses were reluctant to come forward. Civilian witnesses have made statements and appeared at the inquest. There is no fundamental defect shown in this regard. Similarly, the **91* Court does not consider that there is sufficient evidence to establish that there was intimidation of the witnesses who did come forward.

119. The investigation included the appropriate forensic examinations. While the gun of Sergeant A was not taken immediately, it appears that it was handed in when he returned to the police station at the conclusion of the operation and that satisfactory evidence is available concerning the number of bullets discharged. If therefore there were aspects of the investigation that could have been more efficiently performed, it cannot be said that these undermined its overall effectiveness.

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120. It must be noted, however, that the investigation into the killing by a RUC police officer was headed and carried out by other RUC officers, who issued the investigation report on the file. The Government has pointed out that, as required by law, this investigation was supervised by the ICPC, an independent police monitoring authority. A member of the ICPC was present during the interviews of Sergeant A, for example. Their approval was required of the officer leading the investigation. There was nonetheless a hierarchical link between the officers in the investigation and the officers subject to investigation, all of whom were under the responsibility of the RUC Chief Constable, who plays a role in the process of instituting any disciplinary or criminal proceedings. [41] The power of the ICPC to require the RUC Chief Constable to refer the investigating report to the DPP for a decision on prosecution or to require disciplinary proceedings to be brought is not, however, a sufficient safeguard where the investigation itself has been for all practical purposes conducted by police officers connected with those under investigation. The Court notes the recommendation of the CPT that a fully independent investigating agency would help to overcome the lack of confidence in the system which exists in England and Wales and is in some respects similar. [42]

121. As regards the lack of public scrutiny of the police investigations, the Court considers that disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects to private individuals or other investigations and, therefore, cannot be regarded as an automatic requirement under Art.2 . The requisite access of the public or the victim's relatives may be provided for in other stages of the available procedures.

(ii) *The role of the DPP*

122. The Court recalls that the DPP is an independent legal officer charged with the responsibility to decide whether to bring prosecutions in respect of any possible criminal offences committed by a police officer. He is not required to give reasons for any decision not to prosecute and in this case he did not do so. No challenge by way of ***92** judicial review exists to require him to give reasons in Northern Ireland, though it may be noted that in England and Wales, where the inquest jury may still reach verdicts of unlawful death, the courts have required the DPP to reconsider a decision not to prosecute in the light of such a verdict, and will review whether those reasons are sufficient. This possibility does not exist in Northern Ireland where the inquest jury is no longer permitted to issue verdicts concerning the lawfulness or otherwise of a death.

123. The Court does not doubt the independence of the DPP. However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. Where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.

124. In this case, Pearse **Jordan** was shot and killed while unarmed. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicant was however not informed of why the shooting was regarded as not disclosing a criminal offence or as not meriting a prosecution of the officer concerned. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Art.2 , unless that information was forthcoming in some other way. This however is not the case.

(iii) *The inquest*

125. In Northern Ireland, as in England and Wales, investigations into deaths may be conducted by inquests. Inquests are public hearings conducted by coroners, who are independent judicial officers, normally sitting with a jury, to determine the facts surrounding a suspicious death. Judicial review lies from procedural decisions by coroners and in respect of any mistaken directions given to the jury. There are thus strong safeguards as to the lawfulness and propriety of the proceedings. In the case of *McCann* ***v United Kingdom*** , [43] the Court found that the inquest held into the deaths of the three IRA suspects shot by the SAS on Gibraltar satisfied the procedural obligation contained in Art.2, as it provided a detailed review of the events surrounding the killings and provided the relatives of the deceased with the opportunity to examine and cross-examine witnesses involved in the operation.

126. There are however a number of differences between the inquest as held in the *McCann* case and those in Northern Ireland. ***93**

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127. In inquests in Northern Ireland, any person suspected of causing the death may not be compelled to give evidence. [44] In practice, in inquests involving the use of lethal force by members of the security forces in Northern Ireland, the police officers or soldiers concerned do not attend. Instead, written statements or transcripts of interviews are admitted in evidence. At the inquest in this case, Sergeant A informed the Coroner that he would not appear. He has therefore not been subject to examination concerning his account of events. The records of his two interviews with investigating police officers were made available to the Coroner instead. [45] This does not enable any satisfactory assessment to be made of either his reliability or credibility on crucial factual issues. It detracts from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force and thereby to achieve one of the purposes required by Art.2 of the Convention. [46]

128. It is also alleged that the inquest in this case is restricted in the scope of its examination. According to the case law of the national courts, the procedure is a fact-finding exercise and not a method of apportioning guilt. The Coroner is required to confine his investigation to the matters directly causative of the death and not to extend his inquiry into the broader circumstances. This was the standard applicable in the *McCann* inquest also and did not prevent examination of those aspects of the planning and conduct of the operation relevant to the killings of the three IRA suspects. The Court is not persuaded therefore that the approach taken by the domestic courts necessarily contradicts the requirements of Art.2. The domestic courts accept that an essential purpose of the inquest is to allay rumours and suspicions of how a death came about. The Court agrees that a detailed investigation into policy issues or alleged conspiracies may not be justifiable or necessary. Whether an inquest fails to address necessary factual issues will depend on the particular circumstances of the case. It has not been shown in the present application that the scope of the inquest as conducted so far has prevented any particular matters relevant to the death being examined.

129. Nonetheless, unlike the *McCann* inquest, the jury's verdict in this case may only give the identity of the deceased and the date, place and cause of death. [47] In England and Wales, as in Gibraltar, the jury is able to reach a number of verdicts, including "unlawful death". As already noted, where an inquest jury gives such a verdict in England and Wales, the DPP is required to reconsider any decision not to prosecute and to give reasons which are amenable to challenge in the courts. In this case, the only relevance the inquest may have to a possible prosecution is ***94** that the Coroner may send a written report to the DPP if he considers that a criminal offence may have been committed. [48] It is not apparent however that the DPP is required to take any decision in response to this notification or to provide detailed reasons for not taking any further action. In this case it appears that the DPP did reconsider his decision not to prosecute when the Coroner referred to him information about a new eye witness who had come forward. The DPP maintained his decision however and gave no explanation of his conclusion that there remained insufficient evidence to justify a prosecution.

130. Notwithstanding the useful fact-finding function that an inquest may provide in some cases, the Court considers that in this case it could play no effective role in the identification or prosecution of any criminal offences which may have occurred and, in that respect, falls short of the requirements of Art.2 .

131. The public nature of the inquest proceedings is not in dispute. Indeed the inquest appears perhaps for that reason to have become the most popular legal forum in Northern Ireland for attempts to challenge the conduct of the police and security forces in the use of lethal force. The applicant complained however that his ability to participate in the proceedings as the next-of-kin to the deceased was significantly prejudiced as legal aid was not available in inquests and documents were not disclosed in advance of the proceedings.

132. The Court notes however that, as with the next-of-kin in the *McCann* case, the applicant has been represented by a solicitor and counsel throughout at the inquest, even though legal aid only became available for inquests in Northern Ireland from July 25, 2000. [49] He has also been granted legal aid for the judicial review applications associated with the inquest. Nevertheless, it appears that the proceedings were adjourned effectively from November 19, 1997 to November 1, 1999, a period of almost two years, while developments were awaited in a pending case which concerned the availability of legal aid for families at inquests. While it cannot therefore be said that the applicant has been prevented, by the lack of legal aid, from obtaining any necessary legal assistance at the inquest, this has contributed significantly to prolongation of the proceedings. The Court considers this further below in the context of the delay. [50]

133. As regards access to documents, until recently the applicant was not able to obtain copies of any witness statements until the witness concerned was giving evidence. This was also the position in the *McCann* case, where the Court considered that this had not substantially hampered the ability of the families' lawyers to question the witnesses. [51] However it must be noted that the inquest in that case was ***95** to some extent exceptional when compared with the proceedings in a number of cases

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in Northern Ireland. [52] The promptness and thoroughness of the inquest in the *McCann* case left the Court in no doubt that the important facts relating to the events had been examined with the active participation of the applicants' experienced legal representative. The non-access by the next-of-kin to the documents did not, in that context, contribute any significant handicap. However, since that case, the Court has laid more emphasis on the importance of involving the next of kin of a deceased in the procedure and providing them with information. [53]

134. Further, the Court notes that the practice of non-disclosure has changed in the **United Kingdom** in the light of the Stephen Lawrence Inquiry and that it is now recommended that the police disclose witness statements 28 days in advance. [54] Disclosure of the documents has now been made to the applicant in advance of the next stage of the inquest procedures. [55] This development must be regarded as a positive contribution to the openness and fairness of the inquest procedures. The Court is not prepared to reach any findings concerning the alleged incompleteness of the disclosure at this stage. There is nothing before it to suggest that materials necessary to the examination of the facts have been withheld. It may be observed however that lack of access to the witness statements was the reason for several adjournments in the inquest. [56] The previous inability of the applicant to have access to witness statements before the appearance of the witness must also be regarded as having placed him at a disadvantage in terms of preparation and ability to participate in questioning. This contrasts strikingly with the position of the RUC who had the resources to provide for legal representation and full access to relevant documents. The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. Prior to the recent development in disclosure of documents, the Court is not persuaded that the applicant's interests as next-of-kin were fairly or adequately protected in this respect.

135. Reference has also been made to the allegedly frequent use of public interest immunity certificates in inquests to prevent certain questions or disclosure of certain documents. In this case, the Secretary of State for Defence issued a certificate in or about September 1994, and the Secretary of State for Northern Ireland issued a second on January 4, ***96** 1995, to prevent disclosure of certain categories of information on the grounds of national security. As in the *McCann* case, [57] the Court finds no indication that these certificates have prevented examination of any circumstances relevant to the death of Pearse **Jordan**.

136. Finally, the Court has had regard to the delay in the proceedings. The inquest opened on January 4, 1995, more than 25 months after Pearse **Jordan's** death. The Coroner had been informed on November 29, 1993 that no prosecution would occur, but the RUC failed to pass on the case papers until almost a year later, on November 4, 1994. No explanation has been forthcoming for this delay.

136. The inquest has still not concluded at the date of this judgment, more than eight years and four months after the events in issue. There have been a series of adjournments:

— On January 16, 1995, the proceedings were adjourned on the application of the applicant to allow the DPP to reconsider the decision not to prosecute. That negative decision was communicated on February 14, 1995. However the inquest was not scheduled to resume until June 12, 1995.
— On June 2, 1995, there was a further adjournment on the application of the applicant who brought judicial review proceedings attempting *inter alia* to gain access to witness statements. The High Court rejected the application on December 11, 1995, while his applications for appeal and leave to appeal were dismissed by the Court of Appeal on June 28, 1996 and the House of Lords on March 20, 1997 respectively.
— Before the inquest was due to resume on December 1, 1997, there was another adjournment pending a case which might have affected the availability of legal aid in inquests. That decision did not issue until March 16, 1999, at which point the inquest was scheduled to resume on November 1, 1999.
— There was a fourth adjournment from October 13, 1999 as the applicant applied for the disclosure of witness statements in the light of the new policy introduced in England and Wales. [58] While partial disclosure was granted on in or about February 2, 2000, the applicant is currently pursuing a judicial review application to obtain full disclosure. The inquest has not yet resumed.

137. The Court observes that these adjournments were requested by, or consented to, by the applicant. They related principally to legal challenges to procedural aspects of the inquest which he considered essential to his ability to participate—in particular access to the documents. It may be noted that the judicial review proceedings which resulted in an adjournment from June 2, 1995 to March 20, 1997 (over one year and nine months) concerned access to witness statements ***97** which have now been disclosed voluntarily due to developments in what is perceived as desirable practice vis-à-vis a victim's relatives. Nor can

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it be regarded as unreasonable that the applicant consented to an adjournment to await a case which might have resulted in making legal aid available for his representatives. The Court notes that funding for legal representation at inquests in Northern Ireland has now become possible under an Extra-Statutory Scheme which recognises, under provisional criteria, that the family of the deceased may require legal assistance in order to participate effectively in inquest proceedings and that an effective investigation by the State into the death may be necessary in the circumstances of the case and the inquest may be the only way to conduct it. [59]

138. While it is therefore the case that the applicant has contributed significantly to the delays, this has to some extent resulted from the difficulties facing relatives in participating in inquest procedures. [60] It cannot be regarded as unreasonable that the applicant made use of the legal remedies available to him to challenge these aspects of the inquest procedure. The Court observes that the Coroner, who is responsible for the conduct of the proceedings, acceded to these adjournments. The fact that they were requested by the applicant does not dispense the authorities from ensuring compliance with the requirement for reasonable expedition. [61] If long adjournments are regarded as justified in the interests of procedural fairness to the victim's family, it calls into question whether the inquest system was at the relevant time structurally capable of providing for both speed and effective access for the deceased's family.

139. Nor has the inquest progressed with diligence in the periods outwith the adjournments. The Court refers to the delay in commencing the inquest and the delay (on two occasions of more than eight months), in scheduling the resumption of the inquest after the adjournments.

140. Having regard to these considerations, the time taken in this inquest cannot be regarded as compatible with the State's obligation under Art.2 of the Convention to ensure that investigations into suspicious deaths are carried out promptly and with reasonable expedition.

(iv) *Civil proceedings*

141. As found above, [62] civil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of ***98** any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Art.2 of the Convention.

(v) *Conclusion*

142. The Court finds that the proceedings for investigating the use of lethal force by the police officer have been shown in this case to disclose the following shortcomings:

— a lack of independence of the police officers investigating the incident from the officers implicated in the incident;
— a lack of public scrutiny, and information to the victim's family, of the reasons for the decision of the DPP not to prosecute any police officer;
— the police officer who shot Pearse **Jordan** could not be required to attend the inquest as a witness;
— the inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed;
— the absence of legal aid for the representation of the victim's family and non-disclosure of witness statements prior to their appearance at the inquest prejudiced the ability of the applicant to participate in the inquest and contributed to long adjournments in the proceedings;
— the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

143. It is not for this Court to specify in any detail which procedures the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents. While reference has been made for example to the Scottish model of enquiry conducted by a judge of criminal jurisdiction, there is no reason to assume that this may be the only method available. Nor can it be said that there should be one unified procedure providing for all requirements. If the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, as in Northern Ireland, the Court considers that the requirements of Art.2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests such as national security or the protection of material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner. In the present case, the available procedures have not struck the right balance.

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144. The Court would observe that the shortcomings in transparency and effectiveness identified above run counter to the purpose identified by the domestic courts of allaying suspicions and rumours. Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the *99 legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations, as is illustrated *inter alia* by the submissions made by the applicant concerning the alleged shoot-to-kill policy.

145. The Court finds that there has been a failure to comply with the procedural obligation imposed by Art.2 of the Convention and that there has been, in this respect, a violation of that provision.

III. Alleged violation of Art.6(1) of the Convention

146. The applicant invoked Art.6(1) which provides as relevant:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. …

147. The applicant claimed that his son was arbitrarily killed in circumstances where an arrest could have been effected by the RUC, and that Sergeant A deliberately killed him as an alternative to arresting him. He referred to concerns expressed, for example, by Amnesty International that killings by the security forces in Northern Ireland reflected a deliberate policy to eliminate individuals rather than arrest them.

148. The Government submitted that the shooting of Pearse **Jordan** could not be regarded as a summary punishment for a crime. Nor could the alleged failure to prosecute deprive the applicant of a fair hearing as this did not relate to any civil right which the applicant had.

149. The Court recalls that the lawfulness of the shooting of Pearse **Jordan** is pending consideration in the civil proceedings instituted by the applicant. In these circumstances and in the light of the scope of the present application, the Court finds no basis for reaching any findings as to the alleged improper motivation behind the incident. Any issues concerning the effectiveness of criminal investigation procedures fall to be considered under Arts 2 and 13 of the Convention.

150. There has, accordingly, been no violation of Art.6(1) of the Convention.

IV. Alleged violation of Article 14 of the Convention

151. The applicant invoked Art.14 of the Convention , which provides:

> The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

152. The applicant submitted that the circumstances of the killing of his son disclosed discrimination. He alleged that, between 1969 and March 1994, 357 people had been killed by members of the security forces, the overwhelming majority of whom

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were young men from the Catholic or *100 nationalist community. When compared with the numbers of those killed from the Protestant community and having regard to the fact that there have been relatively few prosecutions (31) and only a few convictions (four, at the date of his application), this showed that there was a discriminatory use of lethal force and a lack of legal protection *vis-à-vis* a section of the community on grounds of national origin or association with a national minority.

153. The Government replied that there was no evidence that any of the deaths which occurred in Northern Ireland were analogous or that they disclosed any difference in treatment. Bald statistics (the accuracy of which was not accepted) were not enough to establish broad allegations of discrimination against Catholics or nationalists.

154. Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group. However, even though statistically it appears that the majority of people shot by the security forces were from the Catholic or nationalist community, the Court does not consider that statistics can in themselves disclose a practice which could be classified as discriminatory within the meaning of Art.14. There is no evidence before the Court which would entitle it to conclude that any of those killings, save the four which resulted in convictions, involved the unlawful or excessive use of force by members of the security forces.

155. The Court finds that there has been no violation of Art.14 of the Convention.

V. Alleged violation of Article 13 of the Convention

156. The applicant complained that he had no effective remedy in respect of his complaints, invoking Art.13 which provides:

> Everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

157. The applicant referred to his submissions concerning the procedural aspects of Art.2 of the Convention , claiming that in addition to the payment of compensation where appropriate Art.13 required a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.

158. The Government submitted that the complaints raised under Art.13 were either premature or ill-founded. They claimed that the combination of available procedures, which included the pending civil proceedings and the inquest, provided effective remedies.

159. The Court's case law indicates that Art.13 of the Convention *101 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Art.13 is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Art.13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Art.13 must be "effective" in practice as well as in law. [63]

160. In cases of the use of lethal force or suspicious deaths, the Court has also stated that, given the fundamental importance of the right to the protection of life, Art.13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life, including effective access for the complainant to the investigation procedure. [64] In a number of cases it has found that

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there has been a violation of Art.13 where no effective criminal investigation had been carried out, noting that the requirements of Art.13 were broader than the obligation to investigate imposed by Art.2 of the Convention. [65]

161. It must be observed that these cases derived from the situation pertaining in south-east Turkey, where applicants were in a vulnerable position due to the ongoing conflict between the security forces and the PKK, and where the most accessible means of redress open to applicants was to complain to the public prosecutor, who was under a duty to investigate alleged crimes. In the Turkish system, the complainant was able to join any criminal proceedings as an intervenor and apply for damages at the conclusion of any successful prosecution. The public prosecutor's fact-finding function was often essential in that context to any attempt to take civil proceedings. In those cases, therefore, it was sufficient for the purposes of former Art.26 [66] of the Convention that an applicant complaining of unlawful killing raised the matter with the public prosecutor. There was accordingly a close procedural and practical relationship between the criminal investigation and the remedies available to the applicant in the legal system as a whole.

162. The legal system pertaining in Northern Ireland is different and any application of Art.13 to the factual circumstances of any case from that jurisdiction must take this into account. An applicant who claims the unlawful use of force by soldiers or police officers in the **United** **102* **Kingdom** must as a general rule exhaust the domestic remedies open to him or her by taking civil proceedings by which the courts will examine the facts, determine liability and if appropriate award compensation. These civil proceedings are wholly independent of any criminal investigation and their efficacy has not been shown to rely on the proper conduct of criminal investigations or prosecutions. [67]

163. In the present case, the applicant has lodged civil proceedings, which are pending. The Court has found no elements which would prevent those proceedings providing the redress identified above in respect of the alleged excessive use of force. [68]

164. As regards the applicant's complaints concerning the investigation into the death carried out by the authorities, these have been examined above under the procedural aspect of Art.2 . [69] The Court finds that no separate issue arises in the present case.

165. The Court concludes that there has been no violation of Art.13 of the Convention .

VI. Application of Article 41 of the Convention

166. Article 41 of the Convention provides:

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

A. Damage

167. The applicant submitted that he was entitled to damages in respect of the unlawful deprivation of the life of his son Pearse **Jordan**.

168. The Government disputed that any award of damages would be appropriate in the present case.

169. The Court recalls that in the case of *McCann* [70] it found a substantive breach of Art.2 of the Convention , concluding that it had not been shown that the killing of the three IRA suspects constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence. However, the Court considered it inappropriate to make any award to the applicants, as personal representatives of the deceased, in respect of pecuniary or non-pecuniary damage, “having regard to the fact that the three terrorist suspects who were killed had been intending to plant a bomb in Gibraltar”.

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170. In contrast to the *McCann* case, the Court in the present case has made no finding as to the lawfulness or proportionality of the use of **103* lethal force which killed Pearse **Jordan**, or as to the factual circumstances, including the activities of the deceased which led up to the killing, which issues are pending in the civil proceedings. Accordingly, no award of compensation falls to be made in this respect. On the other hand, the Court has found that the national authorities failed in their obligation to carry out a prompt and effective investigation into the circumstances of the death. The applicant must thereby have suffered feelings of frustration, distress and anxiety. The Court considers that the applicant sustained some non-pecuniary damage which is not sufficiently compensated by the finding of a violation of the Convention.

171. Making an assessment on an equitable basis, the Court awards the sum of £10,000.

B. Costs and expenses

172. The applicant claimed a total of £45,645.83. This included £23,500 for senior counsel (inclusive of value added tax), £13,333.33 for junior counsel and solicitors' fees of £8,812.50 (inclusive of value added tax).

173. The Government submitted that these claims were excessive, noting that the issues in this case overlapped significantly with the other cases examined at the same time and proposed that a figure of £15,000 was reasonable.

174. The Court recalls that this case has involved several rounds of written submissions and an oral hearing, and may be regarded as factually and legally complex. Nonetheless, it finds the fees claimed to be on the high side when compared with other cases from the **United Kingdom** and is not persuaded that they are reasonable as to quantum. Having regard to equitable considerations, it awards the sum of £30,000, plus any value added tax which may be payable. It has taken into account the sums received by the applicant by way of legal aid from the Council of Europe.

C. Default interest

175. According to the information available to the Court, the statutory rate of interest applicable in the **United Kingdom** at the date of adoption of the present judgment is 7.5 per cent per annum.

Order

For these reasons, THE COURT unanimously

1. *Holds* that there has been a violation of Art.2 of the Convention in respect of failings in the investigative procedures concerning the death of Pearse **Jordan**;

2. *Holds* that there has been no violation of Art.6(1) of the Convention ;

3. *Holds* that there has been no violation of Art.14 of the Convention ;

4. *Holds* that there has been no violation of Art.13 of the Convention ; **104*

5. *Holds*

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(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Art.44(2) of the Convention , the following amounts, plus any value added tax that may be chargeable;

(i) £10,000 in respect of non-pecuniary damage;
(ii) £30,000 in respect of costs and expenses;

(b) that simple interest at an annual rate of 7.5 per cent shall be payable from the expiry of the abovementioned three months until settlement;

6. *Dismisses* the remainder of the applicant's claims for just satisfaction.

Footnotes

1 See para.[13] above.
2 Royal Ulster Constabulary Headquarters Mobile Support Unit ("RUC HMSU"), the members of which were specially trained in counter terrorism.
3 See paras [73] and [74] below.
4 See, *e.g. Smith and Hogan on Criminal Law* .
5 s.7.
6 s.29.
7 s.8.
8 Art.6(2) of the Prosecution of Offences Order (Northern Ireland) 1972.
9 Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, Sch.1, para.5.
10 s.17 of the Coroners Act.
11 r.7.
12 See above.
13 Art.9(5)(b).
14 Art.10(5).
15 Art.11(1).
16 Art.11(6) and (3) .
17 Art.12(2).
18 Art.13(1) and (3).
19 *[1995] 1 Cr.App.R. 136* .
20 *[2001] Q.B. 330* .
21 para.[85] above.
22 para.[83] above.
23 See *McCann* **v** ***United Kingdom****: (1996) 21 E.H.R.R. 97* , paras [146]–[147].
24 See *Salman* **v** *Turkey: (2002) 34 E.H.R.R. 17* , para.[100], and also *Çakici* **v** *Turkey: (2001) 31 E.H.R.R. 5* , para.[85]; *App. No.20764/92, Ertak* **v** *Turkey* , para.[32] and *Timurtas* **v** *Turkey: (2001) 33 E.H.R.R. 6* , para.[82].
25 *McCann* **v** ***United Kingdom*** , cited above, paras [148]–[149].
26 See, *mutatis mutandis* , *McCann* **v** ***United Kingdom*** , cited above, para.[161], and *Kaya* **v** *Turkey: (1999) 28 E.H.R.R. 1* , para.[86].
27 See, *e.g. mutatis mutandis* , *Ilhan* **v** *Turkey: (2002) 34 E.H.R.R. 36* , para.[63].
28 See, *e.g. Güleç* **v** *Turkey: (1999) 28 E.H.R.R. 121* , paras [81]–[82]; *Ögur* **v** *Turkey: (2001) 31 E.H.R.R. 40* , paras [91]–[92].
29 See, *e.g. Ergi* **v** *Turkey: (2001) 32 E.H.R.R. 18* , paras [83]–[84], where the Public Prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the *gendarmes* implicated in the incident.
30 *e.g. Kaya* **v** *Turkey* , cited above, para.[87].
31 *Ögur* **v** *Turkey* , cited above, para.[88].

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32 See, concerning autopsies, *e.g.* *Salman v Turkey* , cited above, para.[106]; concerning witnesses, *e.g.* *Tanrikulu v Turkey: (2000) 30 E.H.R.R. 950* , para.[109]; concerning forensic evidence, *e.g.* *Gül v Turkey: (2002) 34 E.H.R.R. 28* , para.[89].
33 See *Yasa v Turkey: (1999) 28 E.H.R.R. 408* , paras [102]–[104]; *Çakici v Turkey* , cited above, paras [80], [87] and [106]; *Tanrikulu v Turkey* , cited above, para.[109] and *Kaya v Turkey* , cited above, paras [106]–[107].
34 See *Güleç v Turkey* , cited above, para.[82], where the family of the victim had no access to the investigation and court documents; *Gül v Turkey* , cited above, para.[93].
35 See *McCann v United Kingdom* , cited above, para.[200].
36 See paras [16] and [19]–[21].
37 See, *e.g.* *Salman v Turkey* , cited above, para.[107], where the police officers were acquitted of torture due to the lack of evidence resulting principally from a defective autopsy procedure; *Gül v Turkey* , cited above, para.[89], where *inter alia* the forensic investigation at the scene and autopsy procedures hampered any effective reconstruction of events.
38 See further below concerning the applicant's allegations about the defects in the police investigation, paras [118]–[121].
39 See, *e.g.* *Kaya v Turkey* , cited above, para.[105]; *Yasa v Turkey* , cited above, para.[74].
40 See paras [19]–[21] above.
41 See paras [77]–[79] above.
42 See para.[93] above.
43 Cited above, para.[162].
44 r.9(2) of the 1963 Coroners Rules, see para.[68] above.
45 See paras [19] and [20] above.
46 See also para.10 of the United Nations Principles on Extra-Legal Executions cited at para.[90] above.
47 See para.[64] above.
48 See para.[66] above.
49 See para.[67] above.
50 See paras [136]–[140].
51 Cited above, para.[62].
52 See also *McKerr v United Kingdom: (2002) 34 E.H.R.R. 20* ; *App. No.30054/96, Kelly v United Kingdom* and *App. No.37715/97 , Shanaghan v United Kingdom* .
53 See *Ögur v Turkey* , cited above, para.[92].
54 See para.[73] above.
55 See paras [50]–[54] above.
56 See further below, para.[136].
57 cited above.
58 See paras [73]–[74] above.
59 See para.[67] above.
60 See paras [132] and [134] above, concerning a lack of legal aid and the non-disclosure of witness statements.
61 See *mutatis mutandis* concerning the speed requirements under Art.6(1) of the Convention, *Scopelliti v Italy: (1994) 17 E.H.R.R. 493* , para.[25].
62 See para.[11].
63 See *Aksoy v Turkey: (1997) 23 E.H.R.R. 553* , para.[95]; *Aydin v Turkey: (1998) 25 E.H.R.R. 251* and *Kaya v Turkey* , cited above, para.[106].
64 See *Kaya v Turkey* , cited above, para.[107].
65 See also *Ergi v Turkey* , cited above, para.[123].
66 Now Art.35(1) .
67 See, *e.g.* *App. No.24520/94, Caraher v United Kingdom* , decision of inadmissibility.
68 See para.[112] above.
69 See paras [116]–[145] above.
70 Cited above, para.[219].

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*629 Dring (on behalf of the Asbestos Victims Support Groups Forum UK) v Cape Intermediate Holdings Ltd (Media Lawyers Association intervening)

Positive/Neutral Judicial Consideration

Court
Supreme Court

Judgment Date
29 July 2019

Report Citation
[2019] UKSC 38
[2020] A.C. 629

ICLR

Supreme Court

Baroness Hale of Richmond PSC , Lord Briggs , Lady Arden , Lord Kitchin , Lord Sales JJSC

2019 Feb 18, 19; July 29

Practice—Documents—Inspection and copying—Extent of court's jurisdiction under Civil Procedure Rules to permit non-party to obtain copies of documents contained in "records of the court"—Extent of court's inherent jurisdiction in respect of documents not forming part of records of the court—Principles upon which jurisdiction to be exercised— CPR r 5.4C(2)

The insurers of certain employers who had settled personal injury claims brought by employees who had been exposed to asbestos brought a claim in negligence against a company involved in the manufacture and supply of asbestos products. The company denied liability and a six-week trial took place in the High Court. After the trial had ended but before judgment had been delivered the parties settled the claim by a consent order. The applicant, who had not been a party to those proceedings, applied on behalf of a group which supported victims of asbestos-related diseases for access to all documents used or disclosed at or for the trial, including the trial bundles and trial transcripts, on the basis that they were "records of the court" within CPR r 5.4C(2) [1] . The master granted the application. The Court of Appeal allowed the company's appeal in part, holding that "records of the court" did not include trial bundles or trial transcripts but that the court had an inherent jurisdiction to permit a non-party to obtain some of the documents that a trial bundle usually contained, including witness statements and skeleton arguments. Accordingly, the court granted the applicant access to a number of documents under its inherent jurisdiction.

On appeal by the company and cross-appeal by the applicant—

Held , (1) dismissing the cross-appeal, that "records of the court" in CPR r 5.4C(2) did not refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court, but referred to those documents and records which the court itself kept for its own purposes, although it could not depend upon how much of the material lodged

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at court happened still to be there when the request was made; and that, therefore, the Court of Appeal had not erred in failing to make a wider order under rule 5.4C(2) (post, paras 21–24, 49).

(2) Dismissing the appeal, that, unless inconsistent with statute or rules of court, all courts and tribunals had an inherent jurisdiction to determine what the constitutional principle of open justice required in terms of access to documents or other information placed before the court or tribunal in question; that the default position was that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which had been placed before the court and referred to during the hearing; that, however, a non-party did not have a right to be granted access under the inherent jurisdiction but would have to explain why he sought access and how granting him access would advance the open justice principle; that the court would then have to carry out a fact-specific balancing exercise by weighing the potential value of the information sought in advancing the purpose of the open justice principle against any risk of harm which its disclosure might cause to the maintenance of an effective judicial process or to the legitimate *630 interests of others; that, therefore, the Court of Appeal had had power under the inherent jurisdiction to make a wider order than it had; and that, accordingly, those parts of the Court of Appeal's order granting the applicant access to documents would stand and the matter would be listed before the High Court to decide in accordance with the principles of open justice whether the applicant should have access to any other document placed before the judge and referred to in the course of the trial (post, paras 41–50).

R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening) [2013] QB 618 , CA approved.

Kennedy v Information Comr (Secretary of State for Justice intervening) [2015] AC 455 , SC(E) and *A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2015] AC 588* , SC(Sc) applied.

Per curiam . The bodies responsible for framing the court rules in each part of the United Kingdom are urged to give consideration to the questions of principle and practice raised in this case (post, para 51).

Decision of the Court of Appeal [2018] EWCA Civ 1795; [2019] 1 WLR 479; [2019] 1 All ER 804 affirmed on partly different grounds.

The following cases are referred to in the judgment of the court:

A v British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2014] UKSC 25; [2015] AC 588; [2014] 2 WLR 1243; [2014] 2 All ER 1037 , SC(Sc)
Barings plc v Coopers & Lybrand [2000] 1 WLR 2353; [2000] 3 All ER 910 , CA
GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening) [1999] 1 WLR 984 , CA
Home Office v Harman [1983] 1 AC 280; [1982] 2 WLR 338; [1982] 1 All ER 532 , HL(E)
Kennedy v Information Comr (Secretary of State for Justice intervening) [2014] UKSC 20; [2015] AC 455; [2014] 2 WLR 808; [2014] 2 All ER 847 , SC(E)
Law Debenture Trust Corpn (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm); 153 NLJ 1551
Practice Direction (Audio Recordings of Proceedings: Access) [2014] 1 WLR 632; [2014] 2 All ER 330, Sen Cts
R v Howell [2003] EWCA Crim 486 , CA
R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256 , DC
R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening) [2012] EWCA Civ 420; [2013] QB 618; [2012] 3 WLR 1343; [2012] 3 All ER 551 , CA
Scott v Scott [1913] AC 417 , HL(E)

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SmithKline Beecham Biologicals SA **v** *Connaught Laboratories Inc [1999] 4 All ER 498* , CA

The following additional cases were cited in argument:

Al Rawi **v** *Security Service (JUSTICE intervening) [2011] UKSC 34; [2012] 1 AC 531; [2011] 3 WLR 388; [2012] 1 All ER 1* , SC(E)
Attorney General of Nova Scotia **v** *MacIntyre [1982] 1 SCR 175*
Blue **v** *Ashley [2017] EWHC 1553 (Comm); [2017] 1 WLR 3630; [2018] 2 All ER 284*
Cadam **v** *Beaverbrook Newspapers* ***Ltd*** *[1959] 1 QB 413; [1959] 2 WLR 324; [1959] 1 All ER 453* , CA
Chan U Seek **v** *Alvis Vehicles* ***Ltd*** *(Guardian Newspapers* ***Ltd*** *intervening) [2004] EWHC 3092 (Ch); [2005] 1 WLR 2965; [2005] 3 All ER 155* ****631***
Khuja **v** *Times Newspapers* ***Ltd*** *[2017] UKSC 49; [2019] AC 161; [2017] 3 WLR 351; [2018] 1 Cr App R 1* , SC(E)
Mafart **v** *Television New Zealand [2006] NZSC 33; [2006] 3 NZLR 18*
Plant **v** *Plant [1998] 1 BCLC 38*
R (C) **v** *Secretary of State for Justice (Media Lawyers Association intervening) [2016] UKSC 2; [2016] 1 WLR 444; [2017] 1 All ER 513* , SC(E)
R (UNISON) **v** *Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2) [2017] UKSC 51; [2017] 3 WLR 409; [2017] ICR 1037; [2017] 4 All ER 903* , SC(E)
Secretary for Justice **v** *FTCW [2014] HKCA 9; [2014] 2 HKC 132*
Taylor **v** *Lawrence [2002] EWCA Civ 90; [2003] QB 528; [2002] 3 WLR 640; [2002] 2 All ER 353* , CA

APPEAL from the Court of Appeal

The insurers of certain employers who had paid out damages to employees in settlement of personal injury claims for mesothelioma caused by exposure to asbestos, brought two actions against a company, **Cape Intermediate Holdings Ltd**, the manufacturers of asbestos products, seeking a contribution towards the damages paid. The company denied liability. A six-week trial, involving a large volume of documents, took place before Picken J. After the trial had ended but before judgment had been delivered, the parties settled the claims by a consent order dated 14 March 2017.

On 6 April 2017, the applicant, Graham **Dring**, acting on behalf of the Asbestos Victims Support Groups Forum UK, applied without notice pursuant to CPR r 5.4C seeking to obtain as "records of the court" all documents used or disclosed at the trial in respect of one of the actions brought by the insurers against the company. The same day Master McCloud made an order requiring all documents and electronic bundles in the litigation to be stored and held by the court. On 5 December 2017 Master McCloud [2017] EWHC 3154 (QB) granted the applicant's application.

By an appellant's notice and with permission of Martin Spencer J granted on 5 March 2018 the company appealed. On 31 July 2018 the Court of Appeal (Sir Brian Leveson P, Hamblen and Newey LJJ) [2018] EWCA Civ 1795; [2019] 1 WLR 479 allowed the company's appeal in part, holding that "records of the court" did not extend to witness statements, expert reports, trial bundles, transcripts or written submissions but that the court had an inherent jurisdiction to allow non-parties to inspect witness statements, expert reports and documents which were read out in open court and any specific documents which were necessary for a non-party to inspect in order to comply with the principle of open justice.

Pursuant to permission granted by the Supreme Court (Baroness Hale of Richmond PSC, Lord Carnwath and Lady Arden JJSC) on 31 October 2018 the company appealed and the applicant cross-appealed. The issue on the appeal was: "What are the powers of the court pursuant to the Civil Procedure Rules or its inherent jurisdiction to permit access to documents used in litigation to which the applicant for access was not a party?"

The Media Lawyers Association was given permission to intervene on the appeal.

The facts are stated in the judgment of the court, post, paras 3–14. ****632***

Michael Fordham QC, Geraint Webb QC and *James Williams* (instructed by *Freshfields Bruckhaus Deringer llp*) for the company.

Access to documents from the court file is governed by CPR r 5.4C and is **limited** to documents held and retained as "records of the court". That denotes formal documents. The design of the rule should be adhered to. There is no "inherent jurisdiction" to disapply its restrictions and no constitutional necessity for one. The correct approach to rule 5.4C is that adopted by the Court of

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Appeal. The inherent jurisdiction could not support the orders made below. Inherent jurisdiction does not operate unless there is a gap in the Rules or there is a necessity. There is neither.

The Civil Procedure Rule Committee make the rules under a statutory obligation. Where there are rules regulating certain subject matter, that is where to look for the scope of the court's powers in that area. Any reform requires careful consideration. The rules give effect to the open justice principle. The Rule Committee has frequently reviewed the requirements of open justice and made appropriate changes to the Civil Procedure Rules . Whilst the provisions have changed over time, there has never been a general right to inspect or obtain documents in trial bundles. [Reference was made to *GIO Personal Investment Services Ltd v Liverpool and London Steamship Protection and Indemnity Association Ltd (FAI General Insurance Co Ltd intervening) [1999] 1 WLR 984* , RSC Ord 63, r 4 and to historic provisions of court rules.]

The application of the open justice principle, most commonly encountered where the hearings are in private or the reporting of what happened in open court is restricted, frequently involves the balancing of competing imperatives. Frequently the court is balancing human rights, often the right to privacy against the right to freedom of expression. The present case was in open court and is not about whether anything said in open court should be restrained from being communicated.

At the heart of the open justice principle are the dual values of a public hearing which public and press alike can attend and unrestricted communication rights so that public and press can speak freely about what they have seen and heard at the public hearing. The central rationale of the open justice principle is the scrutiny of the judicial process and public confidence which comes from such scrutiny, promoting the values of the rule of law. The open justice principle is most relevant at the time of the hearing and the emphasis in the rules giving effect to it is on contemporaneous reporting. There is an inherent jurisdiction in relation to skeleton arguments because there was a gap there; there is no such gap for witness statements or trial documents. [Reference was made to *Mafart v Television New Zealand [2006] 3 NZLR 18* .]

The open justice principle is premised on an essential interest in the determination of the court. The scrutiny arises in what the judges decide. It is in delivering judgment that the court comes to explain to the public what the key evidence and law were, and how they featured in the judicial process. The fact that some cases settle without any public hearing, or settle after a public hearing but without a judgment, is no reason to create a public register of court documents. ***633**

There is something invidious about a satellite application after a trial has taken place and proceedings have finally been disposed of, that rests upon open justice arguments by a person who had no interest in attending the trial or in inspecting the evidence-in-chief under the CPR rules, or in analysing the transcripts to see what unfolded at the trial, but simply wants to acquire documents through mandatory injunctions.

[Reference was made to *Taylor v Lawrence [2003] QB 528* , *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening) [2013] QB 618* , *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2) [2017] 3 WLR 409* and *Chan U Seek v Alvis Vehicles Ltd (Guardian Newspapers Ltd intervening) [2005] 1 WLR 2965* .]

The relevant case management powers and open justice principle responsibilities were those of the trial judge, while seized of the case, to whom requests based on the open justice principles should have been made at the time. This was a case where the judge was functus. Relevant rule-making powers are those of the Civil Procedure Rule Committee which can and should be trusted to make any appropriate amendments to the Rules following consultation.

There was no abrogation of the open justice principle in this trial nor was the principle abrogated by the applicant being unable to acquire the trial documents.

Robert Weir QC, Jonathan Butters and *Harry Sheehan* (instructed by *Leigh Day*) for the applicant.

Open justice is a common law principle which is fundamental to the rule of law and the dispensation of justice. Public scrutiny extends beyond judging the judges. Justice has to be seen to be done. It should be open to full view that the justice system provides for equality before the law. The evidence and argument at trial should be publicly known, that being something of great value in its own right. The legitimacy of the judicial process, operated by an organ of the state, depends on such transparency.

The judiciary is one of the branches of the state and the need for it to be open and accountable is as much a central feature of a democratic society as it is with the executive or the legislature. Judges are not accountable to the public through election or

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to Parliament. Transparency is the means by which the judicial system can be held to account in a democratic society. Scrutiny is only through open justice and public access to documents, whether or not they are read out in open court. Access must be provided to all documents which were referred to in court and also documents which the judge did not read but had access to.

[Reference was made to *Al Rawi* **v** *Security Service (JUSTICE intervening) [2012] 1 AC 531* , *Khuja* **v** *Times Newspapers* **Ltd** *[2019] AC 161* , *R (C)* **v** *Secretary of State for Justice (Media Lawyers Association intervening [2016] 1 WLR 444* , *Kennedy* **v** *Information Comr (Secretary of State for Justice intervening) [2015] AC 455* , *Home Office* **v** *Harman [1983] 1 AC 280* , *SmithKline Beecham Biologicals SA* **v** *Connaught Laboratories Inc [1999] 4 All ER 498* and *R (Guardian News and Media* **Ltd**) **v** *City of Westminster Magistrates' Court (Article 19 intervening) [2013] QB 618* .] ***634**

The furthering of the open justice principle so far as concerns a non-party seeking access to court documents is achieved either under the jurisdiction provided by CPR r 5.4C(2) or under the inherent jurisdiction of the court. The Civil Procedure Rules provide the necessary jurisdiction. If, however, CPR r 5.4C(2) does not cover trial documents, then access should be granted under the inherent jurisdiction.

That rule must be read purposively so as to further the open justice principle. On a plain reading the "records of the court" will include any document filed by a party with the court and still retained by the court. Thus the act of filing a document puts it on the court record. But where a filed document is no longer retained by the court, it will cease to be a record of the court.

Rule 5.4C is the principal rule by which the CPR further the open justice principle in respect of documents accessible to a non-party. Public scrutiny of a trial is not achievable unless non-parties have the right to apply to the court for copies of documents deployed at trial. *GIO Personal Investment Services* **Ltd** **v** *Liverpool and London Steamship Protection and Indemnity Association* **Ltd** *(FAI General Insurance Co* **Ltd** *intervening) [1999] 1 WLR 984* was wrongly decided, but being a decision of the Court of Appeal, that case is not binding on the Supreme Court.

The exercise of the inherent jurisdiction of the court does not contravene the CPR . There is room for the engagement of the open justice principle through the inherent jurisdiction of the court to provide copies of skeleton arguments which are generally not covered by the CPR . The Court of Appeal was wrong to limit the scope of the inherent jurisdiction. The court has an inherent power to control proceedings in order to be able to carry out its functions properly. The court has a constitutional duty to secure open justice by applying its inherent jurisdiction.

Once documents have been deployed at a trial the court has a jurisdiction to provide a non-party with access to them, whether the case subsequently settles or a judgment is given, and whether the application is made during the course of the hearing or later. The broad rationale for allowing non-party access to court documents pursuant to the open justice principle applies as much after trial as it does during the trial.

[Reference was made to *Blue* **v** *Ashley [2017] 1 WLR 3630* and *Cadam* **v** *Beaverbrook Newspapers* **Ltd** *[1959] QB 413* .]

The applicant has a legitimate interest in bringing the application as a non-party with a public interest in the subject matter of the trial. The court had jurisdiction to provide the documents sought.

Jude Bunting (instructed by *Reynolds Porter Chamberlain llp*) for the intervener.

There can be no public accountability of a justice system if there is no open justice. The public obtain information through the media. A proper democracy requires that the media be free and have access to information. The company's approach would lead to practical problems and a narrowing of open justice. The media would need to be present in court and that would not be practical due to the number of court sittings. Trial judges would be required to take editorial decisions. The media would be less able to inform ***635** the public accurately. Different approaches would arise in the different jurisdictions of the United Kingdom. The solution to these problems is the inherent jurisdiction identified in *R (Guardian News and Media* **Ltd**) **v** *City of Westminster Magistrates' Court (Article 19 intervening) [2013] QB 618* , which permits a request for access to court material to be assessed on the basis of a proportionality exercise. This approach reflects an international consensus: see *Attorney General of Nova Scotia* **v** *MacIntyre [1982] 1 SCR 175* and *Secretary for Justice* **v** *FTCW [2014] 2 HKC 132* .

Fordham QC in reply.

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There is a need to know what the inherent jurisdiction is and what is actually to be made available: practical considerations are important. Court bundles are returnable to the parties after the trial. Are parties then allowed to destroy documents or should they be retained? These are questions not dealt with by the applicant. The documents are contextualised in the judgment. Notes made by the judge in a trial are not disclosed, nor are the judge's marked up documents. They are excluded by the CPR . It is not implicit in the CPR that there is a free-standing power. The Insolvency Rules (rule 12.39) make explicit provision for access to documents; there could be such a provision in the CPR but there is not. Even if a document falls within the scope of CPR r 31.22 that does not give a right of public access. [Reference was made to *Barings plc* ***v*** *Coopers & Lybrand [2000] 1 WLR 2353* and *Plant* ***v*** *Plant [1998] 1 BCLC 38* .]

There must be a proportionality assessment. The test must be whether the ordinary observer needs the documents to understand the case. There was no such claim in the present application.

The court took time for consideration.

29 July 2019. BARONESS HALE OF RICHMOND PSC

handed down the following judgment of the court.

1. As Lord Hewart CJ famously declared, in *R* ***v*** *Sussex Justices, Ex p McCarthy [1924] 1 KB 256* , 259, "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". That was in the context of an appearance of bias, but the principle is of broader application. With only a few exceptions, our courts sit in public, not only that justice be done but that justice may be seen to be done. But whereas in the olden days civil proceedings were dominated by the spoken word—oral evidence and oral argument, followed by an oral judgment, which anyone in the court room could hear, these days civil proceedings generate a great deal of written material —statements of case, witness statements, and the documents exhibited to them, documents disclosed by each party, skeleton arguments and written submissions, leading eventually to a written judgment. It is standard practice to collect all the written material which is likely to be relevant in a hearing into a "bundle"—which may range from a single ring binder to many, many volumes of lever arch files. Increasingly, these bundles may be digitised and presented electronically, either instead of or as well as in hard copy. ***636**

2. This case is about how much of the written material placed before the court in a civil action should be accessible to people who are not parties to the proceedings and how it should be made accessible to them. It is, in short, about the extent and operation of the principle of open justice. As Toulson LJ said, in *R (Guardian News and Media* ***Ltd****)* ***v*** *City of Westminster Magistrates' Court (Article 19 intervening) [2013] QB 618* (" *Guardian News and Media* "), at para 1:

> "Open justice. The words express a principle at the heart of our system of justice and vital to the rule of law. The rule of law is a fine concept but fine words butter no parsnips. How is the rule of law itself to be policed? It is an age old question. Quis custodiet ipsos custodes—who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse."

The history of the case

3. The circumstances in which this important issue comes before the court are unusual, to say the least. **Cape Intermediate Holdings Ltd** ("**Cape**") is a company that was involved in the manufacture and supply of asbestos. In January and February 2017, it was the defendant in a six-week trial in the Queen's Bench Division before Picken J. The trial involved two sets of proceedings, known as the "PL claims" and the "CDL claim", but only the PL claims are relevant to this appeal. In essence, these were claims brought against **Cape** by insurers who had written employers' liability policies for employers. The employers had paid damages to former employees who had contracted mesothelioma in the course of their employment. The employers, through their insurers, then claimed a contribution from **Cape** on the basis that the employees had been exposed at work to asbestos

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from products manufactured by **Cape**. It was alleged that **Cape** had been negligent in the production of asbestos insulation boards; that it knew of the risks of asbestos and had failed to take steps to make those risks clear; indeed, that it obscured, understated and unfairly qualified the information that it had, thus providing false and misleading reassurance to employers and others. **Cape** denied all this and alleged that the employers were solely responsible to their employees, that it did publish relevant warnings and advice, and that any knowledge which it had of the risks should also have been known to the employers.

4. Voluminous documentation was produced for the trial. Each set of proceedings had its own hard copy "core bundle", known as Bundle C, which contained the core documents obtained on disclosure and some documents obtained from public sources. The PL core bundle amounted to over 5,000 pages in around 17 lever arch files. In addition, there was a joint Bundle D, only available on an electronic platform, which contained all the disclosed documents in each set of proceedings. If it was needed to refer to a document in Bundle D which was not in Bundle C, it could immediately be viewed on screen, and would then be included in hard copy in Bundle C. The intention was that Bundle C would contain all the documents referred to for the purpose of the trial, whether in the parties' written and oral ***637** opening and closing submissions, or in submissions or evidence during the trial.

5. After the trial had ended, but before judgment was delivered, the PL claims were settled by a consent order dated 14 March 2017 and sealed on 17 March 2017. The CDL claim was also settled a month later, before judgment.

6. The Asbestos Victims Support Groups Forum UK ("the Forum") is an unincorporated association providing help and support to people who suffer from asbestos-related diseases and their families. It is also involved in lobbying and promoting asbestos knowledge and safety. It was not a party to either set of proceedings. On 6 April 2017, after the settlement of the PL claims, it applied without notice, under the Civil Procedure Rules , CPR r 5.4C , which deals with third party access to the "records of the court", with a view to preserving and obtaining copies of all the documents used at or disclosed for the trial, including the trial bundles, as well as the trial transcripts. This was because the Forum believed that the documents would contain valuable information about such things as the knowledge of the asbestos industry of the dangers of asbestos, the research which the industry and industry-related bodies had carried out, and the influence which they had had on the Factory Inspectorate and the Health and Safety Executive in setting standards. In the Forum's view, the documents might assist both claimants and defendants and also the court in understanding the issues in asbestos-related disease claims. No particular case was identified but it was said that they would assist in current cases.

7. That same day, the master made an ex parte order designed to ensure that all the documents which were still at court stayed at court and that any which had been removed were returned to the court. She later ordered that a hard drive containing an electronic copy of Bundle D be produced and lodged at court. After a three-day hearing of the application in October, she gave judgment in December, holding that she had jurisdiction, either under CPR r 5.4C(2) or at common law, to order that a non-party be given access to all the material sought. She ordered that Mr **Dring** (now acting for and on behalf of the Forum) should be provided with the hard copy trial bundle, including the disclosure documents in Bundle C, all witness statements, expert reports, transcripts and written submissions. She did not order that Bundle D be provided but ordered that it be retained at court.

8. **Cape** appealed, inter alia, on the grounds that: (1) the master did not have jurisdiction, either under CPR r 5.4C or at common law, to make an order of such a broad scope; (2) to the extent that the court did have jurisdiction to grant access, she had applied the wrong test to the exercise of her discretion; and (3) in any event, she should have held that the Forum failed to meet the requisite test.

9. The appeal was transferred to the Court of Appeal because of the importance of the issues raised. In July 2018, that court allowed **Cape's** appeal and set aside the master's order [2019] 1 WLR 479. It held that the "records of the court" for the purpose of the discretion to allow access under CPR rule 5.4C(2) were much more **limited** than she had held. They would not normally include trial bundles, trial witness statements, trial expert ***638** reports, trial skeleton arguments or written submissions; or trial transcripts. Nevertheless, the court had an inherent jurisdiction to permit a non-party to obtain (i) witness statements of witnesses, including experts, whose statements or reports stood as evidence-in-chief at trial and which would have been available for inspection during the trial, under CPR r 32.13 ; (ii) documents in relation to which confidentiality had been lost under CPR r 31.22 and which were read out in open court, or the judge was invited to read in court or outside court, or which it was clear or stated that the judge had read; (iii) skeleton arguments or written submissions read by the court, provided that there is an effective public hearing at which these were deployed; and (iv) any specific documents which it was necessary for a non-party to inspect in order to meet the principle of open justice. But there was no inherent jurisdiction to permit non-parties to obtain trial bundles or documents referred to in skeleton arguments or written submissions, or in witness statements or experts' reports, or in open court, simply on the basis that they had been referred to in the hearing.

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10. When exercising its discretion under CPR r 5.4C(2) or the inherent jurisdiction, the court had to balance the non-party's reasons for seeking disclosure against the party's reasons for wanting to preserve confidentiality. The court would be likely to lean in favour of granting access if the principle of open justice is engaged and the applicant has a legitimate interest in inspecting the documents. If the principle of open justice is not engaged, then the court would be unlikely to grant access unless there were strong grounds for thinking it necessary in the interests of justice to do so (paras 127 and 129).

11. Accordingly, the court ordered, in summary: (i) that the court should provide the Forum with copies of all statements of case, including requests for further information and answers, apart from those listed in Appendix 1 to the order, so far as they were on the court file and for a fee, pursuant to the right of access granted by CPR r 5.4C(1) ; (ii) that **Cape** should provide the Forum with copies of the witness statements, expert reports and written submissions listed in Appendix 2 to the order; and (iii) that the application be listed before Picken J (or failing him some other High Court judge) to decide whether any other document sought by the Forum fell within (ii) or (iv) in para 9 above and if so whether **Cape** should be ordered to provide copies. Copying would be at the Forum's expense. **Cape** was permitted to retrieve from the court all the documents and bundles which were not on the court file and the hard drive containing a copy of Bundle D. In making this order, the Court of Appeal proceeded on the basis that clean copies of the documents in question were available.

12. **Cape** now appeals to this court. It argues, first, that the Court of Appeal should have **limited** itself to order (i) in para 11 above; second, that the Court of Appeal was wrong to equate the court's inherent jurisdiction to allow access to documents with the principle of open justice; the treatment of court documents is largely governed by the Civil Procedure Rules and the scope of any inherent jurisdiction is very **limited**; in so far as it goes any further than expressly permitted by the Rules, it extends only to ordering provision to a non-party of copies of (a) skeleton arguments relied on in court and (b) written submissions made by the parties in the course of a trial ***639** (as held by the Court of Appeal in *GIO Personal Investment Services **Ltd** **v** Liverpool and London Steamship Protection and Indemnity Association **Ltd** (FAI General Insurance Co **Ltd** intervening) [1999] 1 WLR 984* (" *FAI"*)); and third, that the Court of Appeal was wrong to conclude that the Forum did have a relevant legitimate interest in obtaining access to the documents; the public interest in open justice was different from the public interest in the content of the documents involved.

13. The Forum cross-appeals on the ground that the Court of Appeal was wrong to limit the scope of CPR r 5.4C in the way that it did. Any document filed at court should be treated as part of the court's records for that purpose. The default position should be to grant access to documents placed before a judge and referred to by a party at trial unless there was a good reason not to do so. It should not be **limited** by what the judge has chosen to read.

14. The Media Lawyers Association has intervened in the appeal to this court. It stresses that the way in which most members of the public are able to scrutinise court proceedings is through media reporting. The media are the eyes and ears of the public. For this, media access to court documents is essential. The need often arises after the proceedings have ended and judgment has been given because that is when it is known that scrutiny is required. The media cannot be present at every hearing. It cites, among many other apposite quotations, the famous words of Jeremy Bentham, cited by Lord Shaw of Dunfermline in the House of Lords in *Scott **v** Scott [1913] AC 417* , the leading case on open justice, at p 477: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."

The issues

15. There are three issues in this important case:

(1) What is the scope of CPR r 5.4C(2) ? Does it give the court power to order access to all documents which have been filed, lodged or held at court, as the master ruled? Or is it more **limited**, as the Court of Appeal ruled?
(2) Is access to court documents governed solely by the Civil Procedure Rules, save in exceptional circumstances, as **Cape** argues? Or does the court have an inherent power to order access outside the Rules?
(3) If there is such a power, how far does it extend and how should it be exercised?

CPR r 5.4C

16. Rule 5.4C is headed "Supply of documents to a non-party from court records". For our purposes, the following provisions are relevant:

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> "(1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of— (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it; (b) a judgment or order given or made in public (whether made at a hearing or without a hearing) … *640

> "(2) A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person."

17. By rule 2.3(1) , "statement of case":

> "(a) means a claim form, particulars of claim where these are not included in a claim form, defence, Part 20 claim, or reply to defence; and (b) includes any further information in relation to them voluntarily or by court order …"

18. There are thus certain documents to which a non-party has a right of access (subject to the various caveats set out in the rule which need not concern us) and what looks at first sight like a very broad power to allow a non-party to obtain copies of "any other document filed by a party, or communication between the court and a party or other person". Hence the Forum argues that the test is filing. CPR r 2.3 provides that "'filing', in relation to a document, means delivering it, by post or otherwise, to the court office". So, it is argued, any document which has been delivered to the court office has been filed and the court may give permission for a non-party to obtain a copy.

19. There are two problems with this argument. First, the fact that filing is to be achieved in a particular way does not mean that every document which reaches court in that same way has been filed: the famous fallacy of the undistributed middle. The second is that the copy is to be obtained "from the records of the court". The Civil Procedure Rules do not define "the records of the court". They do not even provide what the records of the court are to contain. Nor, so far as we are aware, does any other legislation.

20. The Public Records Act 1958 is not much help. It only tells us which records are public records and what is to be done with them. The person responsible for public records must make arrangements to select those which ought to be permanently preserved and for their transfer to the Public Record Office no later than 20 years after their creation (section 3). The Lord Chancellor is the person responsible for many court records, including those of the High Court and Court of Appeal (section 8). Section 10 and Schedule 1 define what is meant by a public record. Paragraph 4 of Schedule 1 includes the records of or held in the Senior Courts (i e the High Court and Court of Appeal) in the list of records of courts and tribunals which are public records. We have been shown a document prepared by Her Majesty's Courts and Tribunals Service and the Ministry of Justice, headed *Record Retention and Disposition Schedule* . This lists how long various categories of files and other records are to be kept. Queen's Bench Division files, for example, are to be destroyed after seven years. Trial bundles are to be destroyed if not collected by the parties at the end of the hearing or on a date agreed with the court. This is of no help in telling us what the court files should contain.

21. We have been shown various historical sources which indicate what the records of certain courts may from time to time have contained, but it is clear that practice has varied. Some indication of what the court *641 records may currently contain is given by CPR Practice Direction 5A , paragraph 4.2A of which lists the documents which a *party* may obtain from the records of the court unless the court orders otherwise. These include "a claim form or other statement of case together with any

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documents filed with or attached to or intended by the claimant to be served with such claim form"; "an acknowledgement of service together with any documents filed with or attached to or intended by the party acknowledging service to be served with such acknowledgement of service"; "an application notice", with two exceptions, and "any written evidence filed in relation to an application", with the same two exceptions; "a judgment or order made in public (whether made at a hearing or without a hearing)"; and "a list of documents". It does not include witness statements for trial, experts' reports for trial, transcripts of hearings, or trial bundles.

22. The essence of a record is that it is something which is kept. It is a permanent or long-term record of what has happened. The institution or person whose record it is will decide which materials need to be kept for the purposes of that institution or person. Practice may vary over time depending on the needs of the institution. What the court system may have found it necessary or desirable to keep in the olden days may be different from what it now finds it necessary or desirable to keep. Thus one would expect that the court record of any civil case would include, at the very least, the claim form and the judgments or orders which resulted from that claim. One would not expect that it would contain all the evidence which had been put before the court. The court itself would have no need for that, although the parties might. Such expectations are confirmed by the list in Practice Direction 5A .

23. The "records of the court" must therefore refer to those documents and records which the court itself keeps for its own purposes. It cannot refer to every single document generated in connection with a case and filed, lodged or kept for the time being at court. It cannot depend upon how much of the material lodged at court happens still to be there when the request is made.

24. However, current practice in relation to what is kept in the records of the court cannot determine the scope of the court's power to order access to case materials in particular cases. The purposes for which court records are kept are completely different from the purposes for which non-parties may properly be given access to court documents. The principle of open justice is completely distinct from the practical requirements of running a justice system. What is required for each may change over time, but the reasons why records are kept and the reasons why access may be granted are completely different from one another.

Other court rules

25. There are other court rules which are relevant to the access to documents which may be granted to non-parties. CPR r 39.2 lays down the general rule that court hearings are to be in public. Rule 39.9 provides that in any hearing the proceedings will be recorded. Any party or other person may require a transcript (for which there will be a fee). If the hearing was in ***642** private, a non-party can get a transcript but only if the court so orders. *Practice Direction (Audio Recordings of Proceedings: Access) [2014] 1 WLR 632* states that there is generally no right for either a party or a non-party to listen to the recording. If they have obtained a copy of the transcript, they can apply for permission to listen, but this will only be granted in exceptional circumstances, save to official law reporters. Nevertheless, the effect of rule 39.9 (which is wider than its predecessor) is that a non-party can (at a fee) obtain a transcript of everything that was said in court.

26. Rule 39.5 requires the claimant to file a trial bundle and Practice Direction 32 , paragraph 27.5, deals in detail with how these are to be prepared. Nothing is said about non-parties being granted access to them.

27. CPR Pt 32 deals with evidence. If a witness who has made a witness statement is called to give evidence, the witness statement shall stand as his evidence-in-chief (rule 32.5(2)). A "witness statement which stands as evidence-in-chief is open to inspection during the course of the trial unless the court otherwise directs" (rule 32.13(1)). The considerations which might lead the court otherwise to direct are listed as the interests of justice, the public interest, the nature of expert medical evidence, the nature of confidential information, and the need to protect a child or protected person (rule 32.13(3)). Rule 32.13 recognises that the modern practice of treating a witness statement as evidence-in-chief (which dates back to the *Report of the Review Body on Civil Justice* (1988) (Cm 394)) means that those observing the proceedings in court will not know the content of that evidence unless they can inspect the statement. The rule puts them back into the position they would have been in before that practice was adopted.

28. In *FAI [1999] 1 WLR 984>* , FAI applied to inspect and obtain: copies of documents referred to in witness statements which they had obtained under the predecessor to rule 32.13 (RSC Ord 38, r 2A); any written opening, skeleton argument or submissions, to which reference was made by the judge, together with any documents referred to in them; and any document which the judge was specifically requested to read, which was included in any reading list, or which was read or referred to during trial. The Court of Appeal held that RSC Ord 38, r 2A, the predecessor to CPR r 5.4C(2) , did not cover documents referred to in witness statements. The purpose of using witness statements was to encourage a "cards on the table" approach,

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to accelerate the disclosure of the parties' evidence as between themselves; it was not to enable non-parties to obtain access to documentation which would otherwise have been unavailable to them whether or not they had attended court. As to the inherent jurisdiction of the court, based on the principle of open justice, the same reasoning applied to documents referred to in court or read by the judge, unless they had been read out in court and thus entered the public domain.

29. Written submissions or skeleton arguments were a different matter. The confidence of the public in the integrity of the judicial process must depend upon having an opportunity to understand the issues. Until recently this had been done in an opening speech, but if the public were deprived of that opportunity by a written opening or submissions which were not read out, it was within the inherent jurisdiction of the court to require that a copy be made available. Nevertheless, the court did observe (at p 997), having ***643*** referred to Lord Woolf's report, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (July 1996) that "It is of great importance that the beneficial saving in time and money which it is hoped to bring about by such new procedures should not erode the principle of open justice".

30. Indeed, Lord Woolf MR himself took the same view. In *Barings plc v Coopers & Lybrand [2000] 1 WLR 2353* , para 43, he said:

> "As a matter of basic principle the starting point should be that practices adopted by the courts and parties to ensure the efficient resolution of litigation should not be allowed to adversely affect the ability of the public to know what is happening in the course of the proceedings."

31. In this case the Court of Appeal [2019] 1 WLR 479 largely adopted the approach in *FAI* , while recognising that in certain respects the law had been developed. First, it was now apparent that the court had inherent jurisdiction to allow access to all parties' skeleton arguments, not just the opening submissions, provided there was an effective public hearing at which they were deployed (see *Law Debenture Trust Corpn (Channel Islands) Ltd v Lexington Insurance Co [2003] EWHC 2297 (Comm); 153 NLJ 1551*), and the same would apply to other advocates' documents provided to the court to assist its understanding of the case, such as chronologies, dramatis personae, reading lists and written closing submissions (para 92). Second, although CPR r 32.13 is **limited** to access during the trial, there was no reason why access to witness statements taken as evidence-in-chief should not be allowed under the inherent jurisdiction after the trial (para 95). Third, what applies to witness statements should also apply to experts' reports which are treated as their evidence-in-chief (para 96). This did not extend to documents exhibited to witness statements or experts' reports unless it was not possible to understand the statement or report without sight of a particular document (para 100).

32. Finally, developments since *FAI* also meant that it was within the inherent jurisdiction to allow access to "documents read or treated as read in open court" (para 107). This should be **limited** to documents which are read out in open court; documents which the judge is invited to read in open court; documents which the judge is specifically invited to read outside court; and documents which it is clear or stated that the judge has read (para 108). These were all documents which were likely to have been read out in open court had the trial been conducted orally. Furthermore, the rule that parties may only use documents obtained on disclosure for the purpose of the proceedings in which they are disclosed does not apply to documents which have been "read to or by the court, or referred to, at a hearing which has been held in public" unless the court prohibits or limits their use (CPR r 31.22). However, the mere fact that a document had been referred to in court did not mean that it would have been read out had the trial been conducted wholly orally or that sight of it is necessary in order to understand or scrutinise the proceedings (para 109). So, as in *FAI* , the court did not consider that the inherent jurisdiction extended to granting ***644*** access "simply on the basis that it has been referred to in open court" (para 109).

33. The decisions of the Court of Appeal in *FAI* and in this case are not the only cases in which the courts have accepted that they have an inherent jurisdiction to allow access to materials used in the course of court proceedings and that the rationale for doing so is the constitutional principle of open justice. That this is so is made even plainer by some recent cases of high authority.

The principle of open justice

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34. The Court of Appeal had the unenviable task of trying to reconcile the very different approaches taken by that court in *FAI* and *Guardian News and Media* . This court has the great advantage of being able to consider the issues from the vantage point of principle rather than the detailed decisions which have been reached by the courts below. There can be no doubt at all that the court rules are not exhaustive of the circumstances in which non-parties may be given access to court documents. They are a minimum and of course it is for a person seeking to persuade the court to allow access outside the rules to show a good case for doing so. However, case after case has recognised that the guiding principle is the need for justice to be done in the open and that courts at all levels have an inherent jurisdiction to allow access in accordance with that principle. Furthermore, the open justice principle is applicable throughout the United Kingdom, even though the court rules may be different.

35. This was plainly recognised in *Guardian News and Media [2013] QB 618* . A district judge had ordered two British citizens to be extradited to the USA. The Guardian newspaper applied to the district judge to inspect and take copies of affidavits, witness statements, written arguments and correspondence, supplied to the judge for the purpose of the extradition hearings, referred to during the course of the hearings but not read out in open court. The judge held that she had no power to allow this and the Divisional Court agreed. In a comprehensive judgment, Toulson LJ, with whom both Hooper LJ and Lord Neuberger of Abbotsbury MR agreed, held that she did.

36. The requirements of open justice applied to all tribunals exercising the judicial power of the state. The fact that magistrates' courts were created by statute was neither here nor there (para 70). The decisions of the House of Lords in *Scott* ***v*** *Scott [1913] AC 417* , and of the Court of Appeal in *FAI [1999] 1 WLR 984* , and *R* ***v*** *Howell [2003] EWCA Crim 486* —respectively a family, civil and criminal case—were illustrations of the jurisdiction of the court to decide what open justice required (para 71). Hence the principles established in *Guardian News and Media* cannot be confined to criminal cases. They were clearly meant to apply across the board. Nor has anyone suggested why the jurisdiction in criminal cases should be wider than that in civil. More to the point, they have since been approved by this court.

37. So what were those principles? The purpose of open justice "is not simply to deter impropriety or sloppiness by the judge hearing the case. It is wider. It is to enable the public to understand and scrutinise the justice ****645*** system of which the courts are the administrators" (para 79). The practice of the courts was not frozen (para 80). In *FAI* , for example, issues of informing the public about matters of general public interest did not arise (para 81). In earlier cases, it had been recognised, principally by Lord Scarman and Lord Simon of Glaisdale (dissenting) in *Home Office* ***v*** *Harman [1983] 1 AC 280* , 316, and by Lord Bingham of Cornhill CJ in *SmithKline Beecham Biologicals SA* ***v*** *Connaught Laboratories Inc [1999] 4 All ER 498* , 512, that the practice of receiving evidence without its being read in open court "has the side effect of making the proceedings less intelligible to the press and the public". Lord Bingham had contemplated that public access to documents referred to in open court might be necessary "to avoid too wide a gap between what has in theory, and what has in practice, passed into the public domain". The time had come to acknowledge that public access to documents referred to in open court was necessary (para 83). Requiring them to be read out would be to defeat the purpose of making hearings more efficient. Stating that they should be treated as if read out was merely a formal device for allowing access. It was unnecessary. Toulson LJ was unimpressed by the suggestion that there would be practical problems, given that the Criminal Procedure Rules 2011 , in rule 5.8 , provided, not only that there was certain (**limited**) information about a criminal case which the court officer was bound to supply, but also that, if the court so directs, the officer could supply "other information" about the case orally and allow the applicant to inspect or copy a document containing information about the case (para 84). But it was the common law, not the rule, which created the court's power; the rule simply provided a practical procedure for implementing it.

38. Hence "In a case where documents have been placed before a judge and referred to in the course of proceedings … the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong". In evaluating the grounds for opposing access, the court would have to carry out a fact-specific proportionality exercise. "Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others" (para 85).

39. The principles laid down in *Guardian News and Media* were clearly endorsed by the majority of the Supreme Court in *Kennedy* ***v*** *Information Comr (Secretary of State for Justice intervening) [2015] AC 455* : see Lord Mance JSC, at para 47, Lord Toulson JSC, with whom Lord Neuberger of Abbotsbury PSC and Lord Clarke of Stone-cum-Ebony JSC agreed, at paras 110–118, Lord Sumption JSC, who agreed with both Lord Mance and Lord Toulson JJSC, at para 152. Nor did the minority cast doubt upon the decision: see Lord Wilson JSC, at para 192; Lord Carnwath JSC, at para 236. The principles were also endorsed by a unanimous Supreme Court in *A* ***v*** *British Broadcasting Corpn (Secretary of State for the Home Department intervening) [2015] AC 588* , a case emanating from Scotland: see Lord Reed JSC, with whom Baroness Hale of Richmond DPSC, Lord

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Wilson, Lord Hughes and Lord Hodge JJSC agreed, at paras 23–27. That case was concerned with the exceptions to the open *646 justice principle, in particular to the naming of a party to the proceedings, and at para 41 Lord Reed JSC expressly adopted the test laid down in *Kennedy* , which was a direct citation from *Guardian News and Media* , at para 85:

> "Whether a departure from the principle of open justice was justified in any particular case would depend on the facts of that case. As Lord Toulson JSC observed in *Kennedy v Information Comr (Secretary of State for Justice intervening) [2015] AC 455* , 525, para 113, the court has to carry out a balancing exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the information in question in advancing that purpose and, conversely, any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others."

40. It follows that there should be no doubt about the principles. The question in any particular case should be about how they are to be applied.

Discussion

41. The constitutional principle of open justice applies to all courts and tribunals exercising the judicial power of the state. It follows that, unless inconsistent with statute or the rules of court, all courts and tribunals have an inherent jurisdiction to determine what that principle requires in terms of access to documents or other information placed before the court or tribunal in question. The extent of any access permitted by the court's rules is not determinative (save to the extent that they may contain a valid prohibition). It is not correct to talk in terms of limits to the court's jurisdiction when what is in fact in question is how that jurisdiction should be exercised in the particular case.

42. The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly. In *A v British Broadcasting Corpn [2015] AC 588* , Lord Reed JSC reminded us of the comment of Lord Shaw of Dunfermline, in *Scott v Scott [1913] AC 417* , 475, that the two Acts of the Scottish Parliament passed in 1693 requiring that both civil and criminal cases be heard "with open doors", "bore testimony to a determination to secure civil liberties against the judges as well as against the Crown" (para 24).

43. But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases. In the olden days, as has often been said, the general practice was that all the argument and the evidence was placed before the court orally. Documents would be read out. The modern practice is quite different. Much more of the argument and evidence is reduced into writing before the hearing takes place. Often, documents are not read out. It is difficult, if not *647 impossible, in many cases, especially complicated civil cases, to know what is going on unless you have access to the written material.

44. It was held in *Guardian News and Media [2013] QB 618* that the default position is that the public should be allowed access, not only to the parties' written submissions and arguments, but also to the documents which have been placed before the court and referred to during the hearing. It follows that it should not be **limited** to those which the judge has been asked to read or has said that he has read. One object of the exercise is to enable the observer to relate what the judge has done or decided to the material which was before him. It is not impossible, though it must be rare, that the judge has forgotten or ignored some important piece of information which was before him. If access is **limited** to what the judge has actually read, then the less conscientious the judge, the less transparent is his or her decision.

45. However, although the court has the power to allow access, the applicant has no right to be granted it (save to the extent that the rules grant such a right). It is for the person seeking access to explain why he seeks it and how granting him access will advance the open justice principle. In this respect it may well be that the media are better placed than others to demonstrate a good reason for seeking access. But there are others who may be able to show a legitimate interest in doing so. As was said

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in both *Kennedy [2015] AC 455* , at para 113, and *A v British Broadcasting Corpn [2015] AC 588* , at para 41, the court has to carry out a fact-specific balancing exercise. On the one hand will be "the purpose of the open justice principle" and "the potential value of the information in question in advancing that purpose".

46. On the other hand will be "any risk of harm which its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others". There may be very good reasons for denying access. The most obvious ones are national security, the protection of the interests of children or mentally disabled adults, the protection of privacy interests more generally, and the protection of trade secrets and commercial confidentiality. In civil cases, a party may be compelled to disclose documents to the other side which remain confidential unless and until they are deployed for the purpose of the proceedings. But even then there may be good reasons for preserving their confidentiality, for example, in a patent case.

47. Also relevant must be the practicalities and the proportionality of granting the request. It is highly desirable that the application is made during the trial when the material is still readily available, the parties are before the court and the trial judge is in day-to-day control of the court process. The non-party who seeks access will be expected to pay the reasonable costs of granting that access. People who seek access after the proceedings are over may find that it is not practicable to provide the material because the court will probably not have retained it and the parties may not have done so. Even if they have, the burdens placed on the parties in identifying and retrieving the material may be out of all proportion to benefits to the open justice principle, and the burden placed upon the trial judge in deciding what disclosure should be made may have become much harder, or more time-consuming, to discharge. On the other hand, ***648*** increasing digitisation of court materials may eventually make this easier. In short, non-parties should not seek access unless they can show a good reason why this will advance the open justice principle, that there are no countervailing principles of the sort outlined earlier, which may be stronger after the proceedings have come to an end, and that granting the request will not be impracticable or disproportionate.

48. It is, however, appropriate to add a comment about trial bundles. Trial bundles are now generally required. They are compilations of copies of what are likely to be the relevant materials—the pleadings, the parties' submissions, the witness statements and exhibits, and some of the documents disclosed. They are provided for the convenience of the parties and the court. To that end, the court, the advocates and others involved in the case may flag, mark or annotate their copies of the bundle as an aide memoire. But the bundle is not the evidence or the documents in the case. There can be no question of ordering disclosure of a marked up bundle without the consent of the person holding it. A clean copy of the bundle, if still available, may in fact be the most practicable way of affording a non-party access to the material in question, but that is for the court hearing the application to decide.

Application to this case

49. **Cape** argues that the Court of Appeal did not have jurisdiction to make the order that it did, not that if it did have jurisdiction the order was wrong in principle. The Forum argues that the court should have made a wider order under CPR r 5.4C(2) . Both are, in our view, incorrect. The Court of Appeal not only had jurisdiction to make the order that it did, but also had jurisdiction to make a wider order if it were right so to do. On the other hand, the basis of making any wider order is the inherent jurisdiction in support of the open justice principle, not the Civil Procedure Rules, CPR r 5.4C(2) . The principles governing the exercise of that jurisdiction are those laid down in *Guardian News and Media [2013] QB 618* , as explained by this court in *Kennedy [2015] AC 455* , *A v British Broadcasting Corpn [2015] AC 588* and this case.

50. In those circumstances, as the Court of Appeal took a narrower view, both of the jurisdiction and the applicable principles, it would be tempting to send the whole matter back to a High Court judge, preferably Picken J, so that he can decide it on the basis of the principles enunciated by this court. However, **Cape** has chosen to attack the order made by the Court of Appeal, not on its merits, but on a narrow view of the court's jurisdiction. Nor has it set up any countervailing rights of its own. In those circumstances, there seems no realistic possibility of the judge making a more **limited** order than did the Court of Appeal. We therefore order that paragraphs 4 and 7 of the Court of Appeal order (corresponding to points (i) and (ii) in para 11 above) stand. But we would replace paragraph 8 (corresponding with point (iii)) with an order that the application be listed before Picken J (or, if that is not possible, another High Court judge) to determine whether the court should require **Cape** to provide a copy of any other document placed before the judge and referred to in the course of the ***649*** trial to the Forum (at the Forum's expense) in accordance with the principles laid down by this court.

Postscript

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51. We would urge the bodies responsible for framing the court rules in each part of the United Kingdom to give consideration to the questions of principle and practice raised by this case. About the importance and universality of the principles of open justice there can be no argument. But we are conscious that these issues were raised in unusual circumstances, after the end of the trial, but where clean copies of the documents were still available. We have heard no argument on the extent of any continuing obligation of the parties to co-operate with the court in furthering the open justice principle once the proceedings are over. This and the other practical questions touched on above are more suitable for resolution through a consultative process in which all interests are represented than through the prism of an individual case.

Shiranikha Herbert, Barrister ***650**

Appeal and cross-appeal dismissed.

Case remitted to High Court for further consideration.

Footnotes

1 CPR r 5.4C : see post, para 16.

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Howell and others v Lees-Millais and others [2007] EWCA Civ 720

COURT OF APPEAL (CIVIL DIVISION)

SIR ANTHONY CLARKE MR, SIR IGOR JUDGE P, BUXTON LJ

4 JULY 2007

4 JULY 2007

Natural justice — Judge — Bias — Apparent bias — Judge having been engaged in discussions with solicitors' firm about possibility of joining firm — Email correspondence — Firm terminating negotiations on financial grounds — Firm being instructed in application before judge — Partner in firm being one of claimant trustees in application — Trustees asking judge to recuse himself on basis of tone of email correspondence after firm terminating negotiations — Judge refusing application for recusal — Whether judge in error

C Flint QC and T Weisselberg for the Appellant

N Le Poidevin for the First Defendant

A Steinfeld QC and J Stephens for the Second Defendant

Addleshaw Goddard; Taylor Wessing; DLA Piper UK LLP

SIR ANTHONY CLARKE MR:

INTRODUCTION

[1] On the afternoon of Monday 2 July we heard an appeal from a decision of Peter Smith J made on Friday 29 June refusing to recuse himself from hearing what I understand is known as a Beddoe application in which trustees seek directions from the court with regard to the operation of a trust ("the application"). We gave permission to appeal and allowed the appeal and said that we would give our reasons today, Wednesday, 4 July.

[2] This is a most unusual case. The three Claimants in the application are trustees of two settlements. The First Claimant is a Mr Paul Howell, who is a partner in the solicitors firm of Addleshaw Goddard ("AG"). They are a large and well-known firm with some 178 partners and 400 fee earners. The recusal application that led to this appeal arises out of exchanges between some members of AG and Peter Smith J in his personal capacity in the recent past. They culminated in two emails which he sent to Simon Twigden of AG on 26 and 31 May, which was of course not much more than a month ago. The Beddoe application was assigned to Smith J ("the judge") some time last week. AG learned on Wednesday that he was to hear the application which was due to begin on Friday 29 June. On Thursday 28 June leading counsel for the Claimants, Mr Peter Crampin QC, wrote to the judge asking him to recuse himself. The judge refused by letter dated the same day. He said in the letter that if Mr Crampin wanted to renew the application he should make it on Friday supported by evidence.

[3] The application was heard on Friday and the judge refused to recuse himself. He handed down a judgment containing reasons for his decision on Monday. We heard submissions in support of the Claimants' appeal from that decision on Monday afternoon. Mr Le Poidevin and Mr Steinfeld QC indicated, on behalf of the First and Second Defendants, respectively, that their clients were neutral. I will consider the questions raised by the appeal under these heads: the principles, communications between the judge and AG, the application, the recusal hearing and the judgment.

THE PRINCIPLES

[4] The Claimants' submission is that this is a case of apparent bias. The relevant test is now well established. In *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465, especially per Lord Hope at paras 102 to 103, the House of Lords endorsed the approach set out by Lord Phillips MR giving the judgment of this court in *Re Medicaments and Related Class of Goods (No 2)* [2001] 1 WLR 700, [2001] ICR 564 at 85as follows:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

[5] In *Lawal v Northern Spirit* [2003] UKHL 35, [2004] 1 All ER 187, [2003] ICR 856, Lord Steyn, giving the opinion of the appellate committee, said this:

> "The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in *Porter* has at its core the need for the confidence which must be inspired by the courts in a democratic society . . . public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* [2000] 201 CLR 488, 509, para 53, by Kirby J when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious'."

[6] This court, comprising Mummery, Latham and Carnwath LJJ recently summarised the principles in *AWG Group v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163, as follows:

> "i) A judge is automatically disqualified from hearing a case on the ground of apparent bias if, on an assessment of all the relevant circumstances, the conclusion was that the principle of judicial impartiality would be breached [AWG at 6].
>
> i) This disqualification is not a discretionary case management decision reached by weighing various relevant factors (such as inconvenience, costs and delay) since there was either a real possibility of bias or there was not [AWG at 6].
>
> ii) The test is, having ascertained all the circumstances bearing on the suggestion that the Judge was (or could be) biased, the court must itself decide 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased' [AWG at 7].
>
> iv) An appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias [AWG at 20].
>
> v) An example of a real danger of bias is where there was . . . animosity between the Judge and any member of the public involved in the case *Locabail UK Ltd v Bayfield Properties Ltd* [2000] QB 451(CA) at 25; the categories of such danger are not closed, 'if for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections' then recusal would be necessary.
>
> vi) In most cases, the answer, one way or the other will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal (*Locabail* at 25).
>
> vii) Where the hearing has not yet begun, there is scope for the sensible application of the precautionary principle. Prudence normally leans on the side of being safe rather than sorry [AWG at 9]."

[7] The material circumstances to be considered by the fair-minded and informed observer will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where such an explanation is proffered, the reviewing court does not have to rule whether or not the explanation should be accepted or rejected; rather, it has to rule whether or not the observer would consider that there was a real danger of bias notwithstanding the explanation advanced (see in *Re Medicaments* at 86, 92 and 93. I would add that as in that case the reviewing court here is this court. The correct approach to the views of the judge can be seen from this passage in *Locabail* at 19:

> "While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibly of doubt and the likelihood of public scepticism. All will turn on the facts of a particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."

[8] The Guide to Judicial Conduct issued by the Judge's Council, First Supplement, June 2006, indicates at para 7.2.3 that;

> "A current or recent business association with a party will usually mean that a judge should not sit on a case."

[9] The passage of time between the events said to give rise to the apparent bias and the hearing or trial is a relevant factor. This is apparent both from para 7.2.3 and 25 of *Locabail* where the court comprising Lord Bingham CJ, Lord Woolf MR, and Sir Richard Scott Vice Chancellor said that:

> "The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

[10] The mere fact that a judge has decided a case adversely to a party or criticised the conduct of a party or his lawyers will rarely if ever be a ground for recusal. However, a real danger of bias might be thought to arise if there were personal friendship or animosity between the judge and a member of the public (see eg *Locabail* at 25. The same would, I think, be true if there were personal animosity against a firm of solicitors or his partners.

COMMUNICATIONS BETWEEN THE JUDGE AND AG

[11] Between November 2006 and May 2007 there were quite lengthy discussions between AG and the judge about the possibility of the judge joining AG. It is not, I think, necessary in order to determine this appeal to set out the nature of those discussions in any detail. It is sufficient to refer to exchanges between Mr Simon Twigden, who is a partner and head of the contentious group at AG, and the judge which show how their discussions came to an end and which demonstrate the judge's reaction to their termination by AG.

[12] On 21 May 2007 the judge emailed Mr Twigden as follows:

> "I thought I might have heard further from you as you said. I am a little concerned over the time frame. There are some decisions that I have to make by the end of June which will be affected by our discussions so I do need to progress the matter as soon as possible so I can see where we are going."

[13] Mr Twigden replied on 25 May saying that for financial reasons AG could not take the matter any further. He set out some of the financial detail, to which it is not necessary to refer, and concluded:

> "Regrettably, although there was agreement that this was an innovative and good idea, we concluded that the level of investment required cannot be supported in the context of the overall priorities for our business. Our Banking and Corporate practices are our immediate priorities as we seek to build the firm to deliver on our strategy.
>
> I am sorry that it has taken longer than we originally anticipated to revert to you but a combination of year end, my absence from the office, and very careful consideration of this at the highest levels in our firm, have all contributed to that.
>
> I wish you all the best for the future."

[14] The judge replied on the next day 26 May. His reply shows considerable disappointment. He said that he did not think that the senior management of AG had given "a fair appraisal to my proposal". He complained that AG had treated his proposal as one of partnership, whereas it was not. He then stressed the considerable advantages of being associated with him as a judge who had recently given judgment in "a landmark decision on corruption" which "also has an impact on Banking and Corporate". He thus stressed the value of the contribution he could make to the firm but concluded by saying that, if it was too late, please would Mr Twigden let him know and he would go elsewhere. On 31 May Mr Twigden replied setting out the financial position as AG saw it and concluded:

> "As we discussed at our last meeting, we have tested this with our key litigation partners and, of course, Mark is fully aware of this from a management perspective. We have concluded after very careful deliberation and with regret that, at this time in the firm's development and mindful of its current investment priorities, we cannot support this innovative prospect.
>
> 'Kind regards.'"

Some four hours later the judge replied:

> "I found your first email insulting and your second one condescending. I do not think the response should have been from you by such emails. You really should have had the courtesy to speak to me."

He then again reverted to the financial position and said of the figures which had been referred to in AG's earlier email:

> "They are just artificial figures. It is galling that these are used to knock down a proposal that emanated from you, which was never discussed with me and I would never have agreed it with you if presented in this way. We all agreed it there ought to be substantial benefits if properly sold but at this stage they would be difficult to assess."

[15] He then made some further observations on the figures and concluded:

> "I feel you have wasted my time for several months. I am extremely disappointed because contrary to your fine words you have allowed the bean counters to prevail. I am not very impressed with you or your firm at the moment and I do not think the tone of your emails enhances the position."

[16] Mr Flint submits that these exchanges show that the judge was plainly upset with AG, to put it no higher. I agree. To my mind they show disappointment and some animosity towards Mr Twigden and AG. I can understand the real concern subsequently demonstrated by AG when they learned that the judge was to hear the Beddoe application. I will return to this in a moment after considering so far as necessary the role of AG and their partners in the application.

THE APPLICATION

[17] In the ordinary Beddoe application the trustees will not be ordered to pay the costs personally even if the application fail. The costs will be directed to come out of the fund. However, in this case the Defendants to the application, who I think included former trustees and a beneficiary of the trusts, have made it clear through their solicitors that they will be seeking an order that the trustees personally pay both their own costs and the costs of the other parties to the application and indeed the costs of proposed substantive litigation. The correspondence shows that this will be a hard-fought application and that efforts will be made to impose costs liabilities on the trustees personally. As I have already indicated, one of those trustees is Mr Howell, who is a partner of AG. Although I should make it clear, as is accepted by Mr Flint, that this is not a case in which the honesty of Mr Howell is impugned it is a case in which his conduct is impugned. It is not just a run of the mill case in which the trustees can necessarily look to the trust for the payment of costs.

THE RECUSAL HEARING

[18] As I said earlier, on 28 June Mr Crampin QC wrote to the judge to ask him to recuse himself. He referred to the fact that the application was hotly contested and to the discussions between the judge and AG, including the contents of the emails referred to above. He said that he had advised his clients that, in view of the short time since the discussions ended on 31 May and the tone of the judge's comments in the emails, the judge was under a duty to recuse himself. He referred to paras 5, 6 and 20 in *AWG* and quoted this passage from a recent decision of this court in *Drury v the BBC* [2007] All ER (D) 205, 14 May 2007:

> "The mere fact that the judge had made a finding against a party on a previous occasion even if he had been critical to that did not found a later objection to the judge sitting in another matter. It was however also plain that where there was any room for doubt as to which course to adopt that doubt should be resolved in favour of recusal."

Mr Crampin concluded his letter as follows:

> "For the avoidance of doubt, it is not being suggested that you should never again hear a case in which Addleshaw Goddard are the solicitors on the record. However, it is my advice in this case that in view of the shortness of time since the discussions ended, the tone of the comments you made in your email 31 May and the fact that a partner in Addleshaw Goddard is himself a party, you have no alternative but to recuse yourself.
>
> I have written to my opponents to inform them that I have invited you to recuse yourself for reasons which I am not at liberty to disclose to them."

[19] Mr Crampin wrote to counsel for the other parties saying that he had written to the judge asking him to recuse himself for reasons which he was not at liberty to impart.

[20] The judge replied as follows on the same day:

> "Thank you for your letter of 28 June 2007.
>
> I have considered the contents of the letter most carefully and I do not accept that there is any reasonable perception of judicial impartiality in this case. I do not know Mr Howell and although the litigation as you say is hotly contested he is a party in a professional position and there is no issue which might affect his credibility so far as I am aware.
>
> Your letter rightly observes that it would be impossible to suggest that I would have to recuse myself whenever Addleshaw Goddard is on the record. I do not see how the shortness of time (or for that matter the passage of time) makes any difference to this decision.
>
> If you wish to renew your application then you must make it tomorrow supported with evidence.
>
> I am sure you will appreciate that the discussions you refer to in your letter were confidential. I would hope that you would also keep the contents of those confidential for reasons which should appear to you to be self-evident.
>
> I have copied this letter to your opponents."

[21] I would accept Mr Flint's submission that the penultimate paragraph of that letter was a clear indication that the discussions including the emails were confidential and that they should not be shown to the other parties, at any rate without the consent of the judge. It was for that reason that Mr Twigden prepared a short witness statement in which he said that the relevant matters were contained in "a schedule of confidential facts". That seems to me to have been an entirely sensible approach. The schedule contains ten paragraphs in which Mr Twigden describes meetings and discussions with the judge and exhibits the emails. The matter then came on for hearing before the judge.

[22] We have a transcript of the hearing, which does not make entirely happy reading. The judge began by saying that the hearing was confidential. Mr Twigden gave evidence. In examination-in-chief he confirmed the truth of his statement and of the confidential schedule. Counsel for the Defendants did not ask him any questions. He was then asked a number of questions by the judge, which read very much like a cross-examination. Mr Twigden agreed that disclosure of information would be a contempt of court. He accepted that his schedule was not a full record of everything which took place. He was asked a number of questions about the discussions. They included the judge asking him about the figures which had been discussed by way of remuneration. It is again not necessary for me to refer to the figures in this judgment.

[23] The judge then put to Mr Twigden two previous occasions in which he, the judge, had made strong criticisms of AG; one when he was a QC and one when he was a judge. Mr Twigden agreed that the judge had asked whether those criticisms would have any adverse impact on his joining the firm and said that they would not. The judge put to Mr Twigden that his criticisms of AG on those two previous occasions were much more serious than those contained in the emails. Mr Twigden said that the emails were sent only a month ago. The judge then turned

to a different topic, namely Mr Twigden's familiarity with the details of the Beddoe application. He said that he had scant knowledge of the case.

[24] I am bound to say that to my mind it was not appropriate for the judge to cross-examine Mr Twigden rather as if he, the judge, was fighting his own case. The authorities to which I have referred lead to the conclusion that at most a judge should make a short statement of the position on the record. It was in my judgment wholly inappropriate for the judge to cross-examine Mr Twigden.

[25] There followed submissions by Mr Crampin. He put the application thus:

> "Your Lordship having heard the evidence, I renew my application to you to recuse yourself on the basis that there is a real risk or possibility that your Lordship will not be able to bring to bear, on the determination of the matters in dispute in this case, an open mind and objectivity which is required in the discharge of high judicial office. The reasons that I make that submission to your Lordship are apparent from the terms of the emails which were exchanged between you and Mr Twigden and which indicated, or would indicate, to a fair-minded person reading those emails, that your Lordship, having made an unsuccessful job application."

The judge interrupted. He said "I made no job application. They invited me. That's your first point failing. There is plainly a big difference, Mr Crampin."

[26] There then followed these exchanges:

> "MR CRAMPIN: Having had an unsuccessful discussion or negotiation with Addleshaws, your lordship expressed yourself in strong – intemperate, almost – anguish.
>
> PETER SMITH J: Nonsense. I don't know what part of the country you come from, Mr Crampin, but it's about time you grew up. If you think that's intemperate, then you are on another planet from me. If you thought it was intemperate, then you should have seen the correspondence which didn't trouble Mr Twigden.
>
> MR CRAMPIN: I'm endeavouring to make a submission, not to engage with your Lordship in badinage of that kind. The question that a fair-minded person –
>
> PETER SMITH J: I'm challenging you, Mr Crampin, on your analysis, when you suggest that my correspondence was intemperate. I don't accept that.
>
> MR CRAMPIN: Well, it's a submission, my Lord –
>
> PETER SMITH J: Well, I have rejected it. I've just told you.
>
> MR CRAMPIN: Your Lordship will no doubt make it part of your judgment in due course. It's a submission I'm making to your Lordship that a fair-minded, reasonable onlooker, reading that correspondence, would come to the view that your Lordship bore a degree of animosity and hostility, even, towards Addleshaws as a result of the way that you thought you had been treated by them. That is what the emails disclose.
>
> PETER SMITH J: I don't agree the emails disclose that at all. The emails simply disclose that, and Mr Twigden has confirmed it today, that the reasons they gave were not the same reasons when they introduced me, and that I was therefore unimpressed by their change of attitude, which bore no relation to our discussions. But I'm sorry, Mr Crampin, life goes on, I'm afraid. I accept that. I am somewhat surprised that your solicitors are unable to accept that, despite the fact that they were willing to take me into the firm, despite the fact that I had accused a partner on the management firm of negligence, in correspondence which went far beyond that. It was a point which was so trivial, in Mr Twigden's mind, not only did he forget it when he prepared his confidential statement, but he also forgot that he said he would ensure that he would put no objection if that person objected.
>
> MR CRAMPIN: Well, this is one of the more unusual exchanges that I've taken place –
>
> PETER SMITH J: This whole procedure is unusual, but we can't avoid that, because effectively I am being asked to recuse myself, and I'm the person who can deal with it.

MR CRAMPIN: Your Lordship is in the process of, while listening to my submissions, giving evidence.

PETER SMITH J: I'm not giving evidence; I'm reminding you of what Mr Twigden said. I'm not going to decide this case on anything other than the answers Mr Twigden gave, and Mr Twigden confirmed that I did indeed raise those matters, and that they were not sufficient to lead him to believe I couldn't join the firm and that, if anybody objected, he would ensure they would be overruled. That is what his evidence was.

Now given that, and given the seriousness of those matters, it is extraordinary to believe, is it not, that Addleshaws are actually fearful on the basis of these emails?

MR CRAMPIN: I do not think the test is what Addleshaws think –

PETER SMITH J: Of course it is.

MR CRAMPIN: – it is what a fair-minded person can think."

[27] Pausing there, I am bound to say that those exchanges seem to me to be somewhat extraordinary. In my judgment, Mr Crampin was entirely justified in saying that the judge was in the process of giving evidence. The judge's approach was quite wrong. It is one thing to test counsel's submissions as a judge. It is quite another for a judge to give evidence of fact.

[28] There then followed another exchange which in my judgment demonstrated an animosity toward AG. Immediately after the last exchange, the transcript continues:

"PETER SMITH J: A fair-minded person would think that Addleshaws could not possibly be concerned about those emails when they were so unconcerned about somebody who made allegations of negligence against them, and somebody who criticised them in the way in which they conducted the case, didn't stop them contemplating him even becoming a partner in the firm. That shows there's no genuine belief.

MR CRAMPIN: In my respectful submission, there's all the difference in the world between discussions that were taking place between you and Addleshaws at the time that your future employment was under consideration, and the position you're in now, meaning that your Lordship has adjudicated on the matter . . . .

PETER SMITH J: So it's all right to have, as a partner, somebody who does this, but it's not alright for that person to be a judge? That's just unreal, Mr Crampin. It just shows the lack of genuineness in this evidence."

[29] Pausing there, in that passage the judge was saying that the evidence of Mr Twigden was not genuine or, put another way, not true. No such allegations had been put to Mr Twigden and I see no warrant for them at all. This again seems to me to be evidence of that animosity towards Mr Twigden and AG.

[30] Finally, I should I think refer to this part of the transcript, if only in fairness to Mr Crampin. Immediately after the last extract the transcript continues:

"MR CRAMPIN: I don't think your Lordship is actually going to pay attention to anything further I say on this subject. Your conduct of the matter in the court today is remarkable. My submission to your Lordship . . . .

PETER SMITH J: I'm not going to comment on that, Mr Crampin. It does not dignify a comment.

MR CRAMPIN: I'm making the submission that I am.

PETER SMITH J: If you're going to say that, you'd better say it with specificity, or you'd better withdraw it, or there might be professional consequences.

MR CRAMPIN: Your Lordship can take whatever course you'd like to take.

PETER SMITH J: No, if are going to say my conduct in court is quite remarkable, you have to say why. In which way do you think my conduct has been remarkable?

MR CRAMPIN: It is a remarkable proposition that a judge should cross-examine a witness in the basis of what is in the judge's head, which no-one else has seen.

PETER SMITH J: Forgive me, Mr Crampin, that's because of the nature of the application because it appertains to particular facts. I have already said to you that I will decide this issue not on things that were in my head, but solely on the evidence that Mr Twigden has given, and he accepted all of my points. So it's his evidence which decides it, and nothing else. Do you have any other, better criticisms of my conduct?

MR CRAMPIN: My Lord, I have made the submissions I wish to make.

PETER SMITH J: I'm sorry, Mr Crampin, I'm not going to allow you to pass over a gratuitous comment saying my conduct is remarkable, any more than anybody else would, without requiring you to be specific.

MR CRAMPIN: Well, I've indicated why your comment is –

PETER SMITH J: Well, that's the one, is it?

MR CRAMPIN: Hmm?

PETER SMITH J: That's the one thing? Because that would have made the application inevitable, because it would mean that the Defendants, who have no knowledge of this, can't say anything, and I can't say anything, and therefore you ensure an absolute certainty to your application.

MR CRAMPIN: No, my lord. The question is, viewing those emails, whether, as I say, a fair-minded observer would conclude that –

PETER SMITH J: You've already said that.

MR CRAMPIN: Yes, I have.

PETER SMITH J: Well, you don't get better by repeating your submissions. I have that, and I'm aware of the authorities. Do you have anything more to say?

MR CRAMPIN: No, my Lord.

PETER SMITH J: Thank you."

[31] The judge's contribution to these exchanges seems to me to be intemperate. In short, the cross-examination of Mr Twigden and the approach adopted by the judge in the course of Mr Crampin's submissions provides strong support for Mr Flint's submissions that the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the judge was biased against AG and its partners, one of whom is the First Claimant in the application. When this evidence is put together with the content and tone of the emails sent by the judge that I quoted earlier, I am quite satisfied that this is a case in which the judge should have recused himself. This is not to my mind a case which is close to the borderline but a case in which there is no doubt that the test laid down in the authorities is satisfied. I should add by way of postscript that to my mind Mr Crampin behaved entirely appropriately throughout.

THE JUDGMENT

[32] Mr Flint relies upon a number of elements in the judge's judgment. First, he submits that the judge erred in para 9 in saying that the shortness of time since the email exchanges is irrelevant. He notes Mr Crampin's acceptance that he was not saying that the judge should never hear an AG case, and the judge said this in para 9:

> "Nevertheless I do not see how once he [ie Mr Crampin] makes that concession he can support any claim that I should recuse myself. Equally the suggestion that shortness of time is a relevant factor is in my view nonsensical. Either there is a perception that a fair-minded and informed observer with the knowledge of all the relevant circumstances would believe that there would be apparent bias or not I do not see how the passage of time has any impact whatsoever on that perception."

[33] I would accept Mr Flint's submission that that conclusion was wrong in principle as the authorities to which I referred earlier demonstrate. The exchange of emails was only just over a month ago and the reaction of the judge in argument was only last Friday.

[34] Secondly, Mr Flint submits that the judge was wrong to reject, as he did in para 24, the concern that Mr Howell's conduct was being impugned. Again I would accept that submission. As I indicated earlier, while it is true that Mr Howell's honesty was not being impugned, his conduct was, and the judge was wrong to hold that the potential costs order was, as he put it, nothing more than a costs order that might be made against any party to litigation if an application is unsuccessful. The usual order in an application of this kind is not that trustees pay the costs personally, yet that is the order sought here.

[35] Thirdly, I would accept Mr Flint's submissions that in the judgment the judge again impugned the good faith of Mr Twigden. He said at para 25:

> "I do not believe that given the matters which were omitted Mr Twigden could have seriously believed that I might not be able to deal with the issues fairly objectively. At the end of the day in any event Mr Howell is a professional trustee one of three and I do not see how anyone looking at it objectively could possibly think given the concession that there can be no objection to me hearing cases where Addleshaw Goddard are involved that there are any genuine grounds for the present application."

He added at para 28:

> "As set out above Mr Twigden's evidence was seriously deficient. When the totality of his evidence is evaluated there is no room for doubt. There cannot on his evidence be any possible belief that it shows there is any reasonable objective perception of possible bias and Addleshaw Goddard could not have believed that given the extra material which Mr Twigden acknowledged in response to my questions."

[36] That is an echo of the point made by the judge in the course of Mr Crampin's submissions, to which I have already referred and held to be unsatisfactory.

[37] Finally, and less importantly, the judge said that he would recuse himself if the Defendants raised any objection. It is difficult to see how that approach can be justified given the nature of the test.

CONCLUSION

[38] It may well be that the judge became somewhat carried away in the heat of the argument. But for the reasons I have given, I would hold that his attitude throughout, from the emails at the end of May, during the hearing on Friday and in his judgment show that the test for apparent bias is satisfied. As the reviewing court, this court is in a position to form its own view. I have concluded that in all the circumstances, a fair-minded and informed observer would conclude that the judge was biased against AG and its partners, including Mr Howell. It was for that reason that I concluded on Monday that the appeal should be allowed.

SIR IGOR JUDGE (P):

[39] The Master of the Rolls has summarised the essential facts and the relevant principles. Without repeating them, I shall add a short judgment of my own simply to add emphasis to my entire agreement with his judgment.

[40] There is no disguising the regrettable features of this case. The application to Peter Smith J to recuse himself was entirely justified and, notwithstanding the inevitable delicacy of the position in which he found himself, leading counsel responsibly handled the case throughout in accordance with his professional obligations both to his client and to the court. The exchange of still very recent emails demonstrates that the judge was extremely displeased that the negotiations about his possible future with the firm of solicitors Addleshaw Goddard had broken down. His irritation is obvious. It did not arise from previous professional encounters with the solicitors or their conduct of

earlier or indeed the current litigation when different considerations would apply. It arose exclusively and directly from the judge's personal affairs and his private but recently unsuccessful dealings with Addleshaw Goddard. The solicitors were not simply solicitors on the record. Mr Howell, a partner in the firm of Addleshaw Goddard, was a party to what I may loosely describe trustee proceedings, and this contentious litigation carried with it at least the potential for serious adverse personal consequences for him.

[41] It is the conduct of the hearing which underlines that the judge had become too personally involved in the decision he was being asked to make to guarantee the necessary judicial objectivity which would be required in the trustee proceedings. I identify three particular features. First, the witness who supported the application was in effect cross-examined by the judge in something of the style of an advocate instructed to oppose the application. Second, the submission by counsel for the Applicant that the judge had given evidence was in the circumstances unsurprising, and the concerns he expressed on this topic were validly made. Finally, the judge impugned the good faith of the application, a conclusion repeated in the strongest terms of his judgment when there is no shred of evidence to suggest some ulterior or improper motive behind the application.

[42] In these circumstances it is unfortunate to have to record that, in my judgment, the conduct of the hearing itself demonstrated not only that the application to the judge to recuse himself was rightly made, but that it should have been granted.

BUXTON LJ:

[43] I agree with both judgments and there is nothing I need to add.

Appeal allowed.

End of Document

Court of Appeal

*In re Medicaments and Related Classes of Goods (No 2)

2000 Nov 21; Dec 21

Lord Phillips of Worth Matravers MR, Brooke and Robert Walker LJJ

Natural justice — Bias — Apparent bias — Judge applying for job at consultancy providing expert evidence in case in which judge sitting — Judge withdrawing application — Whether appearance of bias — Appropriate test

During the hearing by the Restrictive Practices Court of an application by the Director General of Fair Trading under the Resale Prices Act 1976 which was contested by two trade associations, R, a lay member of the court, applied for a job with an economic consultancy firm. A few days later, on the advice of the presiding judge, she sent a personal statement to the parties informing them that she had made the application not recalling at the time that one of the principal expert witnesses for the Director General in the case was a director of the firm and that she had told them that, in view of her involvement in the case and that of the expert witness, her application could not be pursued until after the conclusion of the trial. R declined an invitation by the trade associations to recuse herself, issuing a further statement to the parties in which she explained, inter alia, that as soon as she had appreciated the firm's involvement in the case she realised that it would be inappropriate for her to join them, that it was now clear that they had no interest in her joining them and that she would undertake not to join them for two years or more after the final order in the proceedings. Attached to her statement was a letter from a director of the firm stating that they did not have any vacancies for a person of her experience and were unlikely to have any for the foreseeable future. The trade associations thereupon applied to the court for orders requiring R to recuse herself on the ground of her apparent bias and for the other members of the court to withdraw from the case on the ground that they were infected thereby. The court held that the essential issue was whether R's actions in relation to her job application gave rise to a real danger of bias or reasonable apprehension of bias, the test being whether the associations had legitimate grounds for fearing a lack of impartiality, however slight the justification. Contrary to the submissions made on behalf of the trade associations, the court found that R had not been aware of the potential conflict of interest at the time she made her job application and that any occasion for bias had been removed once it became clear that R no longer had any chance of obtaining a job with the firm. The court accordingly held that there was no objective justification for fears of lack of impartiality on R's part and dismissed the application.

On appeal by the associations—

Held, allowing the appeal, that, giving effect to article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and taking into account the approach of the European Court of Human Rights in accordance with the Human Rights Act 1998, the court had first to ascertain all the circumstances which had a bearing on the suggestion that the judge was biased and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the judge was biased; that the material circumstances included any explanation given by the impugned judge as to his knowledge or appreciation of those circumstances and where any such explanation was disputed the reviewing court did not have to rule whether the explanation should be accepted or rejected but rather had to decide whether the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced; that instead of determining whether R's statement was truthful the court should have considered what impression her conduct, including her explanation for it, would have had on a fair-minded observer; that such

A an observer would not have been convinced that all prospects of R working for the firm at some time in the future had been destroyed or that she might not still hope to work for them in due course; that, in those circumstances, the fair-minded observer would apprehend that there was a real danger that R would be unable to make an objective and impartial appraisal of the expert evidence placed before the court by the firm; and that, accordingly, R ought to have recused herself and the other members of the court should stand down (post, pp 726H–727B, 728C–E, H, 729A–B, C–E).

B *R v Gough* [1993] AC 646, HL(E) considered.

Decision of the Restrictive Practices Court reversed.

The following cases are referred to in the judgment of the court:

Borgers v Belgium (1991) 15 EHRR 92
De Cubber v Belgium (1984) 7 EHRR 236
Delcourt v Belgium (1970) 1 EHRR 355
C *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759, HL(E)
Gregory v United Kingdom (1997) 25 EHRR 577
Hauschildt v Denmark (1989) 12 EHRR 266
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA
Medicaments Reference, In re (No 2) [1970] 1 WLR 1339; [1971] 1 All ER 12, RPCt
Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 577; [1968] 3 WLR
D 694; [1968] 3 All ER 304, CA
Piersack v Belgium (1982) 5 EHRR 169
R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association [1960] 2 QB 167; [1960] 3 WLR 305; [1960] 2 All ER 703, CA
R v Bow Street Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E)
R v Camborne Justices, Ex p Pearce [1955] 1 QB 41; [1954] 3 WLR 415; [1954] 2 All
E ER 850, DC
R v Gough [1993] AC 646; [1993] 2 WLR 883; [1992] 4 All ER 481, CA; [1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724, HL(E)
R v Inner West London Coroner, Ex p Dallaglio [1994] 4 All ER 139, CA
R v Rand (1866) LR 1 QB 230
R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256, DC
Roylance v General Medical Council (No 2) [2000] 1 AC 311; [1999] 3 WLR 541, PC
F *Webb v The Queen* (1994) 181 CLR 41

The following additional cases were cited in argument:

McGonnell v United Kingdom (2000) 30 EHRR 289
R v Cheltenham Comrs (1841) 1 QB 467
R v Hendon Rural District Council, Ex p Chorley [1933] 2 KB 696, DC
R v Hertfordshire Justices (1845) 6 QB 753
G *R v London County Council, Ex p Akkersdyk* [1892] 1 QB 190, DC
R v Meyer (1875) 1 QBD 173, DC
Sander v United Kingdom The Times, 12 May 2000

The following cases, although not cited, were referred to in the skeleton arguments:

Arab Monetary Fund v Hashim (1993) 6 Admin LR 348, CA
Auckland Casino Ltd v Casino Control Authority [1995] 1 NZLR 142
H *Gautrin v France* (1998) 28 EHRR 196
Porter v Magill [2000] 2 WLR 1420, CA

INTERLOCUTORY APPEAL from the Restrictive Practices Court

On 2 October 2000 the Restrictive Practices Court (Lightman J, Mr James Scott and Dr Penelope Rowlatt) commenced the hearing of an

application by the Director General of Fair Trading under the Resale Prices Act 1976 to discharge an order of the court exempting branded medicaments and certain related goods from the statutory ban on resale price maintenance. The Proprietary Association of Great Britain and the Proprietary Articles Trade Association ("the associations") were respondents to the application. By oral applications made to the Restrictive Practices Court on 15 and 16 November 2000 the associations applied for orders (i) that Dr Rowlatt withdraw from further hearing the case on the ground of her apparent bias in applying for a job with Frontier Economics ("Frontier"), a director of whom was appearing as an expert witness for the Director General in the trial, and (ii) that all three members of the court recuse themselves from sitting as members of the Restrictive Practices Court in the trial of the action on the ground that they were infected by Dr Rowlatt's apparent bias. On 17 November 2000 the court (Lightman J, Mr James Scott and Dr Penelope Rowlatt) dismissed the applications and refused permission to appeal.

By an undated notice of application the associations applied to the Court of Appeal for permission to appeal on the grounds, inter alia, that: (1) the Restrictive Practices Court failed to apply, alternatively misapplied, the test whether the associations had legitimate grounds for fearing a lack of impartiality in Dr Rowlatt; (2) the court ought to have considered whether a reasonable man, informed of the relevant matters, would have had legitimate doubts that Dr Rowlatt would try the case impartially, or whether he would reasonably have had a suspicion that she was or might be biased; alternatively, whether there was a real danger that she might be biased; (3) the court ought to have concluded that a reasonable man informed of the circumstances would have had legitimate doubts that Dr Rowlatt would try the case impartially, or would have had a reasonable suspicion that she was, or might be, biased; alternatively, that there was a real danger that she might be biased; (4) the court erred in law and misapplied the correct test (i) in considering whether there was any reality or substance in the suggestion that Dr Rowlatt would be influenced in her conduct as a judge by considerations of resentment against the associations for preventing her obtaining the job and in finding that there could be no reality or substance in the suggestion, (ii) in inferring that she would not have applied for the job if she had known that Frontier were instructed as experts in the case, (iii) in considering whether there was any reality or substance in the suggestion that Dr Rowlatt would be influenced by considerations of gratitude in favour of Frontier for writing the letter rejecting her job application to them and in finding that there could be no reality or substance in that suggestion, (iv) in inferring that it was "plain, irrespective of that letter, that so far as she was concerned the job application was dead", (v) in giving weight to Dr Rowlatt's statement and inferring from it that she would not have applied for the job had she known that Frontier were instructed as experts in the case, (vi) in finding that Dr Rowlatt's application to Frontier did not show a partiality that could not be removed or undone and (vii) in inferring that Dr Rowlatt had no prospect of employment by Frontier in the future.

On 21 November 2000, the Court of Appeal granted permission to appeal, heard the appeal and at the conclusion of the hearing announced that the appeal would be allowed for reasons to be given later.

The facts are stated in the judgment of the court.

Jonathan Sumption QC, *Catharine Otton-Goulder QC* and *Margaret Gray* for the associations.

Trevor Philipson QC, *James Eadie*, *Jon Turner* and *Kassie Smith* for the Director General of Fair Trading.

Cur adv vult

21 December. **LORD PHILLIPS OF WORTH MATRAVERS MR** handed down the following judgment of the court.

1 On 2 October 2000 the Restrictive Practices Court began the trial of a contested application by the Director General of Fair Trading under the Resale Prices Act 1976. The purpose of the application is to discharge an order made by the court in 1970, by which it exempted branded medicaments and certain related goods from the general statutory ban on resale price maintenance ("RPM"): see *In re Medicaments Reference (No 2)* [1970] 1 WLR 1339. The Director General contends that this industry-wide restrictive practice in the over-the-counter medicaments industry can no longer be justified, and that it now operates seriously to the injury of the general public for so long as it persists.

2 The case is contested by two trade associations, the appellants to this appeal, who represent a large number of the manufacturers and retailers of branded over-the-counter medicaments.

3 On 15 and 16 November 2000 the appellants moved the court on two applications with the purpose of vacating the trial: (a) that one of the members of the court, Dr Penelope Rowlatt, recuse herself on the ground of apparent bias; and (b) that the whole court should recuse themselves on the ground that they are infected by the apparent bias of Dr Rowlatt.

4 The court handed down a reasoned judgment on Friday, 17 November 2000 dismissing the applications.

5 On Tuesday, 21 November 2000 we gave the appellants leave to appeal, heard the appeal and allowed it in relation to both applications. We now give our reasons for that decision.

Procedure

6 The Restrictive Practices Court is a superior court of record and, in consequence, its decisions are not subject to judicial review by the High Court. Section 10 of the 1976 Act provides that an appeal lies from any decision or order of the court, in the case of proceedings in England and Wales, to the Court of Appeal. The section goes on to provide that the appeal lies on a question of law only and the court's decision on a question of fact is final and that the appeal is by way of case stated.

7 We are satisfied that the question of whether or not members of the Restrictive Practices Court are disqualified from continuing to hear the Director General's application is a question of law. That question falls to be determined on the basis of the facts stated in the case. Rule 62(1) of the Restrictive Practices Court Rules 1976 (SI 1976/1897) provides that the judgment of the court, in so far as facts are stated in it, is deemed to be a case stated for the purpose of any appeal on a question of law to which those facts give rise. The parties have agreed, however, that in addition to the facts set out in the judgment below we should have regard to the facts placed before the court in support of the applications in an affidavit sworn by Christine

Bendall, the solicitor with the conduct of the case on behalf of the appellants. The statement of facts which follows is based on these agreed sources.

The facts

8 The appellants are the Proprietary Association of Great Britain ("PAGB") and the Proprietary Articles Trade Association ("PATA"). PAGB is an association of manufacturers, importers and suppliers of branded "pharmacy only" and "general sales list" medicines, vitamins and mineral supplements sold over the counter (without the need for a prescription) in the United Kingdom. The majority of PAGB members have established and maintain a system of resale price maintenance in relation to the sale of such branded goods in the United Kingdom. In this judgment we shall refer to those products as "OTCs" and the manufacturers, importers and suppliers as the "suppliers". PATA is an association whose members include, as well as 23 members of PAGB, three trade associations whose members comprise 98% of all registered retail pharmacies trading in the United Kingdom, with the significant exception of Boots The Chemist which itself accounts for 25% of sales in the OTC market. PATA's function is to monitor the compliance by retailers with RPM and to report any instance of non-compliance so that the supplier can take action to enforce compliance.

9 RPM is enforced by the insertion into contracts of supply between suppliers and their customers of a term requiring the wholesaler to sell to the retailer, or the retailer to sell to the public, either at prices not less than those stipulated by the supplier or, less often, at the precise prices stipulated by the supplier. Such a term as a matter of contract is enforceable as between the parties to the contract of supply. But the Resale Prices Act 1976, as did its predecessor the Resale Prices Act 1964, makes it unlawful in general for suppliers to provide for minimum or fixed prices to be charged on the resale of goods in the United Kingdom. The 1976 Act however makes provision, as did the 1964 Act, for suppliers to apply to the court for an order exempting goods of any specified category from the general prohibition provided that the conditions laid down in section 14 of the 1976 Act are satisfied.

10 In 1970 on application by PAGB and PATA the court granted an exemption in respect of OTCs. On 8 January 1998 the Director General gave notice that he intended to seek the leave of the court to apply for the discharge of the 1970 order and accordingly the removal of the exemption. On 11 March 1999 leave was granted and the Director General thereupon proceeded with the application. The form of the proceedings is the same as if the 1970 order had not been obtained, and PAGB and PATA must again establish their entitlement to exemption under section 14 of the 1976 Act.

11 The court was established by the Restrictive Trade Practices Act 1956 and its existence was continued by section 1(1) of the Restrictive Practices Court Act 1976 ("the 1976 Court Act"). The 1976 Act and the 1976 Court Act were both repealed and the court was abolished by section 1(a) and (b) of the Competition Act 1998 as from 1 March 2000. But section 74 of that Act, and the transitional provisions in Schedule 13, provided that the abolition did not affect an application to the court, such as the present, made under the 1976 Act which had not been determined by 1 March 2000. Section 7(1) of the 1976 Court Act requires that any hearing shall be conducted by a court comprising a presiding judge and at least two other members. Lightman J was the presiding judge and, since the

A application raised issues of accountancy and economics, Mr James Scott (an accountant) and Dr Rowlatt (an economist) were appointed as the two other members. Section 7(2) of the 1976 Court Act provides that, on the hearing of proceedings before the court, the opinion of the judge upon any question of law shall prevail, but subject to this the decision of the court shall be taken by all the members sitting or, in the event of a difference of opinion, by the votes of the majority of the members.

B

12 The interlocutory stages in the proceedings culminated in the trial being fixed to commence on 2 October 2000. The documentation put before the court in this case is quite enormous. A special courtroom had to be adapted for the hearing within the Principal Registry of the Family Division building in High Holborn. The first two and a half weeks of the trial were set aside for pre-reading. This proved a most onerous task. The closely packed

C bundles of documents number some 170. The appellants alone had put in lengthy witness statements, often more than one, of some 39 witnesses of fact and even lengthier witness statements, again more than one, of some 19 experts. To add to the task the appellants contended that a number of the 39 witnesses of fact were also, to some extent, expert witnesses. The Director General submitted statements by six witnesses of fact and five expert witnesses. The size of the task before the court was reflected in the fact

D that the appellants appear by five counsel and the Director General by four.

13 Practically all the witnesses of fact required to attend for cross-examination had attended and the court was proceeding with hearing the expert witnesses. The programme agreed before the applications changed events was that the expert evidence and outstanding factual evidence would be completed within two weeks. Leaving out of account a Ms Kelly, who

E might be regarded at least in part as a witness of fact, the first and perhaps the most important expert witness to be called on behalf of the appellants was Professor Lord Peston, the distinguished economist, who attended on Wednesday, 8 November and Thursday, 9 November. Shortly before that took place there occurred the events which led to the applications, which had the effect of bringing the proceedings to a halt on Friday, 10 November 2000.

F

14 The world of economic consultancies is a small one. According to the appellants there are only about half a dozen consultancies in the field (currently three well known firms, NERA, Frontier Economics and Lexecon, and three niche practices, Europe Economics, LECG and Charles River Associates), and two firms of accountants who take this area seriously (PwC and Arthur Andersen). Frontier Economics was launched with some

G publicity in 1999 by a number of economists who left another firm, London Economics. It retains a high profile in the profession.

15 Dr Rowlatt had been employed for some years by NERA before moving to Europe Economics. She is the treasurer and a member of the executive committee of the Royal Economic Society, responsible since 1975 for the formulation and execution of the society's policy; a former senior

H adviser in the Department of Energy; a member of the Retail Prices Advisory Committee until 1995; and was a member of the Royal Commission on Environmental Pollution and was a director of NERA from 1988 to 1998. One of Dr Rowlatt's specialisms is in financial regulation and she is a member of the "Guardian" newspaper panel of "wise women" economists who have commented, for example, for that newspaper on the 1999 Budget.

16 Mr Zoltan Biro, who is a co-founder and director of Frontier Economics, is a principal expert witness in these proceedings for the Director General. Professor David Newbery is the other principal expert witness for the Director General, whose report forms a central part of the Director General's case before the court. His report draws heavily on Mr Biro's own expert report.

17 His report, which represents the work of a number of individuals from Frontier Economics, is concerned with what is probably the most central issue in this case, the impact on small independent community pharmacies if RPM is abolished. It being common ground that some closures would be likely to result, the real issues are the likely number and pattern of closures, and the impact of those closures on the customers who will be affected. The Director General's principal evidence on these two issues, indeed almost the entirety of such evidence, is contained in the work of Mr Biro and Frontier Economics. They have constructed an economic model of the profitability of community pharmacies; and, building on that, have predicted the likely number and pattern of closures if community pharmacies lose OTC business to certain putative levels. They have then carried out a cost-benefit analysis comparing the detriments of predicted pharmacy closures to customers affected with the benefits nationally resulting from (assumed) lower prices and margins on OTC medicaments.

18 Mr Biro's conclusions can be summarised as follows: (1) that, using his model of community pharmacy profitability, a relatively small number of community pharmacies would be expected to close, or become "newly at risk" of closure, if RPM on OTC medicaments were to be abolished; and (2) that, employing his cost-benefit analysis, any local detrimental effects of such closures would be outweighed by the benefit to consumers nationally of lower prices.

19 Mr Rowe, Mr Tym and Lord Peston, the economists instructed by the appellants, all contend that the cost-benefit analysis carried out by Mr Biro/Frontier Economics is methodologically unsound, employs inappropriate techniques and reasoning and draws erroneous conclusions.

20 Professor Newbery's main report was an important item in the reading list for the reading in period of over two weeks. That report referred frequently to Mr Biro and to Frontier Economics.

21 On Tuesday, 7 November 2000 the following document was faxed by the court to the parties:

> "The court has directed that the following personal statement by Dr Penelope Rowlatt be sent to both parties: 'I have worked for some two and a half years for Europe Economics, an economics consultancy. Many months ago I gave consideration to moving to another consultancy because I was unhappy where I was. On Friday, 3 November 2000 I decided to ring Frontier Economics to ask that firm if they would consider me for a part-time post. Although I had known earlier that Mr Zoltan Biro of that firm was an expert witness [on behalf of the Director General] in the Medicaments case, I did not recall this fact at the time: if I had, I would not have telephoned. I spoke to the personal assistant to the managing director to ask if I could be considered, and she said that she would telephone back. I asked her who were the directors of that company—she mentioned the name of Mr Zoltan Biro. After I had

A rung off, I realised that this might be of some significance and I decided to inform Lightman J at the first opportunity. The first opportunity was this morning and he advised me to send this statement to counsel for both sides. I have as yet received no reply from Frontier Economics. Lightman J also advised me to send (and I have sent) a fax to Frontier Economics in the following terms: "In view of the involvement of myself as part of the court and Mr Biro as an expert witness in the Medicaments B case, the application which I made to the personal assistant to the managing director cannot be pursued until after the conclusion of the trial." ' "

22 The appellants and their counsel gave careful consideration to this document and on 10 November they sent to the court a fax, signed by Mr Mark Cran QC, their leading counsel, which invited Dr Rowlatt to C recuse herself from sitting further in the case. The letter set out at length the considerations which were said to justify this request.

23 On Monday, 13 November the court sent to the parties a further fax, which read:

"The court has directed that a further personal statement by Dr Penelope Rowlatt be sent to both parties: 'For the sake of completeness D I wish to record two further contacts between Frontier Economics and myself. Soon after the clerk to Lightman J sent the fax to Frontier Economics in the terms set out in my previous statement, I received a telephone call from the personal assistant to the managing director of Frontier Economics. As soon as she told me who she was, I said that I could not speak to her. She replied that Frontier Economics had come to E the same conclusion and the telephone conversation ended at that point. On Thursday evening I received a telephone call from a person saying that he was calling on behalf of Mr Zoltan Biro asking for my address. I gave him my address but I told him to tell Mr Biro that I might feel obliged to disclose any communication to the parties. The following day I received a letter, a copy of which is attached to this statement. With respect to the letter addressed to the court by Mr Cran requesting that I should recuse F myself, I should like to say the following: (1) in the current proceedings my mind has been focused on the substance of the statements of the expert witnesses and not on the names of the firms for which they worked. Although the connection of Frontier Economics with the case slipped my mind when I made the original telephone call, the mention of the name of Mr Zoltan Biro by the personal assistant to the managing G director in the course of our telephone conversation did strike a bell; (2) as soon as I appreciated that Frontier Economics was instructed by the [appellants] in this case, I realised that it would be inappropriate for me to join that firm, and it is now clear that Frontier Economics has no interest in my joining them. To confirm my position, I would be happy to give an undertaking not to join that firm for two years after the final order in these proceedings or indeed for any lengthier period which either party H may request. I have no regret in withdrawing the application. If I had had in mind the involvement of Frontier Economics in the case, I would never have made the application in the first place; (3) I am confident that I retain (as I have retained throughout this whole case) the essential independence of mind required of a member of the court and (unless persuaded to the

contrary by the submissions made by the [appellants] on their application to the court) I do not consider that I ought to recuse myself.' "

24 The attached letter dated 10 November 2000 ("the Frontier letter") reads as follows:

"Dear Penelope,

"Following your call to my PA, Victoria Card, we have considered your request to meet to discuss possible working requirements. Unfortunately, we do not have any vacancies for a person of your experience and are unlikely to do so for the foreseeable future. I must, therefore, decline your request to meet. I wish you well in the future.

"Yours sincerely,

[signed] Simon Gaysford Director."

The issue before the court below

25 In the judgment of the court Lightman J described the issue as follows:

"There is no suggestion in this case of actual bias on the part of Dr Rowlatt. The essential issue underlying the applications is whether the actions of Dr Rowlatt in relation to her application for a job at Frontier Economics gives rise to a real danger of bias or reasonable apprehension of bias. It is common ground that: (1) the relevant circumstances by reference to which the issue is to be determined are the circumstances as they exist today when the applications are being determined; (2) as is now quite clear, Dr Rowlatt today has no prospect of any employment by Frontier, whatever prospect she may have entertained before or after the 7 November fax; and (3) Mr Biro's evidence is central to the Director General's case. As we understand the concerns expressed by Mr Cran on behalf of the [appellants], they are threefold: (1) that Dr Rowlatt by making the application to Frontier in the course of the proceedings showed a partiality which cannot be removed or undone; (2) that Dr Rowlatt will feel a sense of resentment against the [appellants] for preventing her from obtaining a job with Frontier; (3) that Dr Rowlatt will feel a sense of gratitude to Frontier for writing the Frontier letter which 'got her off the hook' by publicly bringing to an end any prospect of employment and thereby improving the prospects that the applications would fail. Dr Rowlatt gave her provisional view in the fax dated 13 November 2000 that she ought not to recuse herself. She reconsidered her position after full argument had been addressed to the court and that remains her final view. In the circumstances the court must itself decide, in effect if not in form, whether she is wrong, for the court must independently decide the question whether she should recuse herself as the preliminary to deciding whether the court should accede to the application that the court should recuse itself."

The decision of the court

26 The court considered the law relating to bias and formulated the applicable test, at paragraph 28, as being whether the appellants had "legitimate grounds for fearing a lack of impartiality, however slight the justification".

A 27 The court then went on to make findings in respect of a number of factual issues. For present purposes it is only necessary to record the following, at paragraph 29:

> "The [appellants] strenuously challenge the credibility of the statement by Dr Rowlatt that, at the time she made the telephone call, she did not have in mind that Mr Biro worked for Frontier and that Mr Biro and
B Frontier were providing expert evidence in the case for the Director General. Certainly the papers in the case made this plain to anyone reading them. Dr Rowlatt must have seen this fact when she read the papers. But that does not make it incredible that she did not have it in mind when making the approach to Frontier. Indeed what is surely more incredible is that Dr Rowlatt should have had this in mind at the time of
C the telephone call, and yet at the first opportunity after the call should have felt impelled to bring this matter to the attention of the judge and, through the judge, of the parties and thereby bring upon herself the applications. Dr Rowlatt says that she did not have in mind the fact of Frontier's engagement in the proceedings when she made the call and we think that this is more credible than that she did have it in mind at the time. We should add that we are far from satisfied that it would make
D any significant difference if she had known at the time and, being subsequently troubled by this knowledge, took the action which she did to bring her actions to the notice of the court and the parties. It might raise questions as to her judgment, but would not significantly affect the case made on apparent bias."

E 28 The court went on to hold that there was no objective justification for fears of lack of impartiality on the part of Dr Rowlatt. This conclusion was essentially based upon the proposition that, as soon as it became plain that Dr Rowlatt no longer had any chance of obtaining a job with Frontier, the occasion for bias in respect of the job application was removed. The judgment concluded that the appellants had sought to bolster their case by putting together a multitude of complaints and causes for concern which
F were fanciful and insubstantial and that the applications were likewise fanciful and insubstantial. The applications were accordingly dismissed.

The grounds of appeal

29 On 17 November, the day of the judgment of the court below, an outline argument for the appeal, 39 pages in length, and setting out grounds
G of appeal, was served. It included the averment that, despite their letter, Frontier had not necessarily closed the door to taking Dr Rowlatt into their employment and that the reasonable onlooker would conclude that Dr Rowlatt might well retain aspirations to work for Frontier in the fullness of time. This contention contrasted with this submission made by Mr Cran to the court in argument on the second day of the hearing:

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> "We say also that a reasonable onlooker would be concerned firstly that Dr Rowlatt might have some resentment that her hopes had been frustrated. The reasonable onlooker would doubt the truth of what Frontier Economics has to say in its letter, but would know, nevertheless, that Dr Rowlatt could not, after all that has happened, expect ever to go

there. She must know that too and that would be a source of lasting resentment." A

30 On the hearing before us Mr Jonathan Sumption appeared as the appellants' leading counsel. In a concise skeleton argument, Mr Sumption put at the forefront of his case the following submissions:

"The essential problem in this case is that Dr Rowlatt would like to be employed by Frontier Economics. She says that she has for some time been unhappy in her current employment. Frontier are probably the most prominent and successful firm in the relatively small world of economic consultancy in which she operates. There is no reason to suppose that the events of the last few days have diminished Dr Rowlatt's desire to join Frontier if she properly can. She initially did no more than suspend her application until after the conclusion of the trial. She gave more extensive undertakings only later and in response to the threat of this application. Although the probability must be that the present dispute has deferred any prospect of her being employed by Frontier for some time, this is wholly conjectural and the future course of her relations with Frontier is frankly impossible to predict, by her or anyone else." B C

31 Before us Mr Sumption contended that the test in law was whether the facts of the case were such as to raise a reasonable apprehension in the mind of the objective onlooker that Dr Rowlatt might be affected by bias, whether conscious or unconscious, when performing her judicial duties. He submitted that the court below, which included Dr Rowlatt, had erred in seeking itself to evaluate the likelihood that she would be actually biased. Instead the court should have considered whether the factual situation was one which gave rise to a reasonable apprehension of the possibility of bias. D E

32 When it was put to Mr Sumption that it had been conceded before the court below that Dr Rowlatt could plainly have no further hope of being employed by Frontier, Mr Sumption submitted that this was not his case, and that in a matter as important as this it would be quite wrong for this court to approach the facts fettered by any concession made in argument below as to their implication. F

33 We agree with Mr Sumption that, in a case such as this, it is for the court to consider the facts and to decide for itself whether having regard to those facts the tribunal or any member of it is disqualified from continuing to sit. The substantive decision to be made in this case is one in which the public interest is paramount. It would be quite wrong to treat the issue of bias as if it was simply a point of contention in litigation between two parties. G

The law in relation to bias

34 Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) provides:

"*Right to a fair trial* H

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A Since 2 October 2000 English courts have been obliged under the Human Rights Act 1998 to give effect to the right to a fair trial as embodied in article 6.

35 The requirement that the tribunal should be independent and impartial is one that has long been recognised by English common law. An appellate or reviewing court will set aside a decision affected by bias. The
B precise test to be applied when determining whether a decision should be set aside on account of bias has, however, given rise to difficulty, reflected in judicial formulations that have appeared in conflict. The House of Lords in *R v Gough* [1993] AC 646 attempted to resolve that conflict. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 476 this court observed that the test in *R v Gough* had not commanded universal approval outside this jurisdiction and that Scotland and some Commonwealth countries
C preferred an alternative test which might be "more closely in harmony with the jurisprudence of the European Court of Human Rights". Since 2 October the English courts have been required to take that jurisprudence into account. This then is an occasion to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence.

36 Judicial tribunals come in many forms. We shall refer to "the judge"
D to embrace all forms of judicial tribunal, including juror, lay magistrate and judge of a superior court. For convenience we shall refer to the judge as "he" rather than "he or she".

37 Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve. A judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than
E another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him.

F 38 The decided cases draw a distinction between "actual bias" and "apparent bias". The phrase "actual bias" has not been used with great precision and has been applied to the situation (1) where a judge has been influenced by partiality or prejudice in reaching his decision and (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. "Apparent bias" describes the situation where circumstances exist which give rise to a reasonable apprehension that the
G judge may have been, or may be, biased.

39 Findings of actual bias on the part of a judge are rare. The more usual issue is whether, having regard to all the material circumstances, a case of apparent bias is made out. We do not propose to refer to more than a few of the many cases that were reviewed in *R v Gough* and the *Locabail* case. We believe that two critical and interrelated questions are raised by the
H authorities, and we propose to focus on the cases which exemplify those questions. The questions are: (1) must the reasonable apprehension of bias be that of the reviewing court itself, or that which the reviewing court would attribute to an informed onlooker? (2) What are the circumstances that fall to be taken into account when applying the test of bias and how are those circumstances to be determined?

40 It has long been held that, where a judge has a pecuniary interest in the outcome of a case, he is automatically disqualified, whether or not that interest gives rise to a reasonable apprehension of bias: see *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759. That principle and its extension in *R v Bow Street Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119 have been subjected to a powerful critical analysis by Professor Olowofoyeku in "The Nemo Judex Rule: The Case Against Automatic Disqualification" [2000] PL 456. We are not concerned with this category of case and do not propose to pick up the gauntlet thrown down in that article.

41 We start our analysis of the authorities with the decision of the Divisional Court in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256. That decision concerned a prosecution before the lay justices for dangerous driving. Unknown to the defendant and his solicitors, the clerk to the justices was a member of the firm of solicitors acting in a civil claim against the defendant arising out of the accident that had given rise to the prosecution. The clerk retired with the justices, who returned to convict the defendant. On learning of the clerk's provenance, the defendant applied to have the conviction quashed. The justices swore affidavits stating that they had reached their decision to convict the defendant without consulting their clerk. In giving the leading judgment Lord Hewart CJ said, at pp 258–259:

> "It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction. In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed."

A 42 Had Lord Hewart CJ asked the question "Was there any likelihood that the clerk's connection with the case influenced the verdict?" he would have answered in the negative on the basis that he accepted the evidence that the clerk had not intervened in the justices' discussion. Had he asked the question "Would a reasonable onlooker aware of all the material facts, including the fact that the clerk did not speak to the justices after retiring, B have concluded that the clerk's connection with the case might have influenced the verdict?" he would equally have answered in the negative. His decision was reached on the premise that what actually transpired between the clerk and the justices behind closed doors was not relevant. The fact that the clerk had retired with the justices gave an appearance of the possibility of injustice, and that was enough to lead to the quashing of the verdict.

C 43 Lord Hewart CJ's decision apparently led to a number of cases in which verdicts were quashed on the ground that the circumstances gave rise to a suspicion of bias, even where the suspicion was fanciful. In *R v Camborne Justices, Ex p Pearce* [1955] 1 QB 41 the cases were reviewed in a reserved judgment of the Divisional Court, presided over by Lord Goddard CJ. That case also involved an allegation of bias on the part of a justices' D clerk. The applicant had been convicted by the justices on charges of offences under the Food and Drugs Act 1938 which had been brought under the authority of the health committee of the Cornwall County Council. The clerk to the justices was a councillor member of the council, but he did not serve on the health committee. The court found on the evidence before it that the clerk was summoned by the justices to advise on a point of law, that he did not discuss the facts of the case with them at all during the short time E that he was with them and that the justices returned and gave their decision some appreciable time after the clerk had returned to court.

44 The court had the assistance of the Solicitor General, Sir Reginald Manningham-Buller QC, as amicus. He submitted, at pp 46–47, that the correct test was whether or not there was a "real likelihood" of bias, that is "something to which a person in possession of such facts as are readily F available to him would take exception to". This submission was reflected in the judgment of the court, which reviewed the authorities, and concluded, at p 51:

> "In the judgment of this court the right test is that prescribed by Blackburn J [in *R v Rand* (1866) LR 1 QB 230], namely, that to disqualify a person from acting in a judicial or quasi-judicial capacity upon the G ground of interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown. This court is further of opinion that a real likelihood of bias must be made to appear not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries."

H 45 The court held that on the full facts of the case, most of which would have been available to the applicant, there was no real likelihood of bias. It added this observation, at pp 51–52:

> "The frequency with which allegations of bias have come before the courts in recent times seems to indicate that Lord Hewart's reminder in

the *Sussex Justices* case [1924] 1 KB 256, 259 that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' is being urged as a warrant for quashing convictions or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."

It is noteworthy that leading counsel for the applicant did not contend that the clerk had improperly influenced the bench, but relied upon the contention that the circumstances gave rise to a reasonable apprehension of bias.

46 Over the next four decades it was possible to identify two alternative tests applied by the courts, usually in criminal proceedings, when considering whether a decision was vitiated on account of bias. (1) Did it appear to the court that there was a real danger that the judge had been biased? (2) Would an objective onlooker with knowledge of the material facts have a reasonable suspicion that the judge might have been biased?

47 It seems to us that the two tests should produce the same result *unless*, when applying the first test, the court has regard to matters which do not form part of the "material facts" that fall to be taken into account when applying the second test. This was precisely the position in *R v Gough* [1993] AC 646, at least on the approach of the Court of Appeal.

48 In *R v Gough* the issue was whether a guilty verdict was unsafe by reason of apparent bias on the part of a juror. The juror had, for two years, lived next door to the brother of the defendant. This was of particular significance as the defendant was charged with conspiracy with that brother to commit burglaries. After the guilty verdict had been entered, the brother started shouting in court. The juror then informed the judge of the fact that she lived next door to the brother. A photograph of the brother had been placed before the jury in the course of the trial, and his address had been read out. The juror, however, subsequently stated on affidavit that she had only become aware that her next door neighbour was the defendant's brother after the verdict had been delivered.

49 On appeal counsel for the appellant accepted that the juror was telling the truth when she stated that she only became aware after the verdict that she lived next door to the brother. At the same time, however, he submitted that this claim of ignorance would not be acceptable to a fair-minded observer. While accepting that there was no actual danger that the verdict had been affected by bias, counsel submitted that the verdict could not stand because an objective observer would have a reasonable suspicion that a fair trial was not possible.

50 The Court of Appeal accepted, at p 652, that, if the correct test was the impression that would be made on a fair-minded observer, it would not be right to include in the material facts known to the observer the fact that the juror was unaware that she lived next to the defendant's brother:

"Mr Hytner submits, applying that test, that the fair-minded observer would suspect in the present case that a fair trial was not possible. In this

A case Mrs Smith in her affidavit evidence has stated that she was unaware of the relevant facts connecting her to the appellant until after the jury had delivered its verdict. This evidence was unchallenged. Accordingly this can be distinguished from the various authorities which have been cited to us in that in these latter cases the relevant 'connecting' facts giving rise to the alleged bias have already been known to the particular member of the tribunal, against whom bias has been raised, throughout the trial in B question. This did not apply in the present case. If the fact that Mrs Smith was not aware of the relevant facts connecting her to the appellant had been known to the fair-minded observer, then surely the observer would, in those circumstances, have regarded the trial as having been a fair one. Should we impute knowledge of Mrs Smith's particular state of mind to the fair-minded observer? Mr Hytner submits that such an observer C would be bound to conclude that Mrs Smith must have realised who the case concerned when she heard the address referred to in the statement and also when she saw David Gough's photograph. Her claim of ignorance would be unacceptable to a fair-minded observer. We think there is force in this contention. Accordingly we do not seek to distinguish the instant case by imputing to the fair-minded observer *actual* knowledge of Mrs Smith's unawareness of the relevant facts until D after the verdict had been delivered."

51 The court held, however, that the authorities showed that, at least in the case of jury trials, the "real danger" of bias rather than the "reasonable suspicion" of bias was the correct test. On that basis it was common ground that the appeal could not succeed.

E 52 In the House of Lords the appeal proceeded on the basis that there was no likelihood, or even possibility, that the verdict had in fact been affected by bias. The issue was whether the Court of Appeal had been correct to apply the test of "real danger" rather than the test of whether the objective onlooker would have a reasonable apprehension or suspicion of bias.

F 53 Lord Goff of Chieveley gave the leading speech. At the outset he explained, at pp 659–660, the difficulty confronting the court when bias was alleged:

"A layman might well wonder why the function of a court in cases such as these should not simply be to conduct an inquiry into the question whether the tribunal was in fact biased. After all it is alleged that, for example, a justice or a juryman was biased, i e that he was motivated by a G desire unfairly to favour one side or to disfavour the other. Why does the court not simply decide whether that was in fact the case? The answer, as always, is that it is more complicated than that. First of all, there are difficulties about exploring the actual state of mind of a justice or juryman. In the case of both, such an inquiry has been thought to be undesirable; and in the case of the juryman in particular, there has long been an inhibition against, so to speak, entering the jury room and finding H out what any particular juryman actually thought at the time of decision. But there is also the simple fact that bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias—a point stressed by Devlin LJ in *R v Barnsley Licensing Justices, Ex p Barnsley*

and District Licensed Victuallers' Association [1960] 2 QB 167, 187. In any event, there is an overriding public interest that there should be confidence in the integrity of the administration of justice, which is always associated with the statement of Lord Hewart CJ in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259, that it is 'of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. I shall return to that case in a moment, for one of my tasks is to place the actual decision in that case in its proper context. At all events, the approach of the law has been (save on the very rare occasion where actual bias is proved) to look at the relevant circumstances and to consider whether there is such a degree of possibility of bias that the decision in question should not be allowed to stand."

54 Later in his speech Lord Goff considered the decisions both in the *Sussex Justices* case [1924] 1 KB 256 and the *Camborne Justices* case [1955] 1 QB 41, concluding that the test in the latter was to be preferred. He went on, in the course of reviewing the authorities, to quote with approval the approach commended by Devlin LJ in *R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association* [1960] 2 QB 167, 187:

"We have not to inquire what impression might be left on the minds of the present applicants or on the minds of the public generally. We have to satisfy ourselves that there was a real likelihood of bias—not merely satisfy ourselves that that was the sort of impression that might reasonably get abroad. The term 'real likelihood of bias' is not used, in my opinion, to import the principle in *R v Sussex Justices* to which Salmon J referred. It is used to show that it is not necessary that actual bias should be proved. It is unnecessary, and, indeed, might be most undesirable, to investigate the state of mind of each individual justice. 'Real likelihood' depends on the impression which the court gets from the circumstances in which the justices were sitting. Do they give rise to a real likelihood that the justices might be biased? The court might come to the conclusion that there was such a likelihood, without impugning the affidavit of a justice that he was not in fact biased. Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit."

55 Lord Goff went on in *R v Gough* [1993] AC 646, 666 to observe the apparent dissent of Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577, 599, from Devlin LJ's approach:

"in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. 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

A would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit . . . There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might B think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased.' "

56 Lord Goff concluded, at pp 667–668, that the difference between the two approaches was more apparent than real:

"both considered that it was not necessary that actual bias should be C proved, the court having therefore to proceed upon an impression derived from the circumstances; and that the question is whether such an impression reveals a real likelihood of bias. The only difference between them seems to have been that, whereas Devlin LJ spoke of the impression which the court gets from the circumstances, Lord Denning MR looked at the circumstances from the point of view of a reasonable man, stating that D there must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, was biased. Since however the court investigates the actual circumstances, knowledge of such circumstances as are found by the court must be imputed to the reasonable man; and in the result it is difficult to see what difference there is between the impression derived by a reasonable man to whom such knowledge has been imputed, and the impression derived by the E court, here personifying the reasonable man. It is true that Lord Denning MR expressed the test as being whether a reasonable man would think it 'likely or probable' that the justice or chairman was biased. If it is a correct reading of his judgment (and it is by no means clear on the point) that it is necessary to establish bias on a balance of probabilities, I for my part would regard him as having laid down too rigorous a test. In my F opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the G principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose. Finally there is, so far as I can see, no practical distinction between the test as I have stated it, and a test which requires a real danger of bias, as stated in *R v Spencer* [1987] AC 128. In this way, therefore, it may be possible to achieve a H reconciliation between the test to be applied in cases concerned with justices and other members of inferior tribunals, and cases concerned with jurors."

57 At the end of his speech Lord Goff summarised his understanding of the law, at p 670:

"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him; though, in a case concerned with bias on the part of a justices' clerk, the court should go on to consider whether the clerk has been invited to give the justices advice and, if so, whether it should infer that there was a real danger of the clerk's bias having infected the views of the justices adversely to the applicant."

58 In a concurring speech, Lord Woolf summarised his view of the law in the following passage, at pp 672–673:

"It must be remembered that except in the rare case where actual bias is alleged, the court is not concerned to investigate whether or not bias has been established. Whether it is a judge, a member of the jury, justices or their clerk, who is alleged to be biased, the courts do not regard it as being desirable or useful to inquire into the individual's state of mind. It is not desirable because of the confidential nature of the judicial decision making process. It is not useful because the courts have long recognised that bias operates in such an insidious manner that the person alleged to be biased may be quite unconscious of its effect. It is because the court in the majority of cases does not inquire whether actual bias exists that the maxim that justice must not only be done but seen to be done applies. When considering whether there is a real danger of injustice, the court gives effect to the maxim, but does so by examining all the material available and giving its conclusion on that material. If the court having done so is satisfied there is no danger of the alleged bias having created injustice, then the application to quash the decision should be dismissed. This, therefore, should have been the result in the *Sussex Justices* case if Lord Hewart CJ's remarks are to be taken at face value and are to be treated as a finding, and not merely an assumption, that there was no danger of the justices' decision being contaminated by the possible bias of the clerk."

59 It appears to us that the House of Lords in *R v Gough* laid down the following approach to be adopted by a court reviewing whether a decision of an inferior tribunal should be set aside on the ground of bias: (1) the reviewing court should first identify all the circumstances that are relevant to the issue of bias; (2) the reviewing court should not then consider the effect that those circumstances would have upon a reasonable observer; rather (3) the reviewing court should itself decide whether, in the light of the relevant circumstances, there was a real danger that the inferior tribunal was biased.

60 The House of Lords indicated that, had this approach been adopted in the *Sussex Justices* case [1924] 1 KB 256, the decision of the justices should have been upheld. The Divisional Court should have found as a fact that the clerk had not intervened in the discussion of the justices and, in the light of that finding, should have ruled that there was no danger that the justices' decision had been affected by bias. In *R v Gough* [1993] AC 646 itself, it was common ground that the juror was telling the truth when she said that she had not been aware, until after the verdict, that her next door neighbour was the brother of the defendant. Hence, applying the "real danger" test, the validity of the verdict was not in doubt. The House of Lords did not have to consider the question of how the reviewing court should approach evidence given by the inferior tribunal where that evidence was challenged by the application for review.

61 In *R v Inner West London Coroner, Ex p Dallaglio* [1994] 4 All ER 139, 162 this court applied the test in *R v Gough*, when holding that injudicious remarks made by a coroner gave rise to a real possibility that the coroner had unconsciously allowed his decision to be influenced by a feeling of hostility towards the applicant and other members of an action group, with the result that his decision to refuse to continue an inquest should be quashed. In the leading judgment Simon Brown LJ set out, at pp 151–152, the following propositions which he derived from *R v Gough*:

> "From *R v Gough* I derive the following propositions: (1) Any court seised of a challenge on the ground of apparent bias must ascertain the relevant circumstances and consider all the evidence for itself so as to reach its own conclusion on the facts. (2) It necessarily follows that the factual position may appear quite differently as between the time when the challenge is launched and the time when it comes to be decided by the court. What may appear at the leave stage to be a strong case of 'justice [not] manifestly and undoubtedly be[ing] seen to be done', may, following the court's investigation, nevertheless fail. Or, of course, although perhaps less probably, the case may have become stronger. (3) In reaching its conclusion the court 'personifies the reasonable man'. (4) The question upon which the court must reach its own factual conclusion is this: is there a real danger of injustice having occurred as a result of bias? By 'real' is meant not without substance. A real danger clearly involves more than a minimal risk, less than a probability. One could, I think, as well speak of a real risk or a real possibility. (5) Injustice will have occurred as a result of bias if 'the decision-maker unfairly regarded with disfavour the case of a party to the issue under consideration by him'. I take 'unfairly regarded with disfavour' to mean 'was predisposed or prejudiced against one party's case for reasons

unconnected with the merits of the issue'. (6) A decision-maker may have unfairly regarded with disfavour one party's case either consciously or unconsciously. Where, as here, the applicants expressly disavow any suggestion of actual bias, it seems to me that the court must necessarily be asking itself whether there is a real danger that the decision-maker was unconsciously biased. (7) It will be seen, therefore, that by the time the legal challenge comes to be resolved, the court is no longer concerned strictly with the appearance of bias but rather with establishing the possibility that there was actual although unconscious bias."

62 Sir Thomas Bingham MR, remarked, at p 162, that the effect of the decision in *R v Gough* was that:

"The famous aphorism of Lord Hewart CJ in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, 259 that 'justice . . . should manifestly and undoubtedly be seen to be done' is no longer, it seems, good law, save of course in the case where the appearance of bias is such as to show a real danger of bias."

63 The decision in *R v Gough* received critical analysis by the High Court of Australia in *Webb v The Queen* (1994) 181 CLR 41. In the leading judgment, Mason CJ and McHugh J commented, at pp 50–52:

"In considering the merits of the test to be applied in a case where a juror is alleged to be biased, it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. The test of 'reasonable likelihood' or 'real danger' of bias tends to emphasise the court's view of the facts. In that context, the trial judge's acceptance of explanations becomes of primary importance. Those two tests tend to place inadequate emphasis on the public perception of the irregular incident. We do not think that it is possible to reconcile the decision in *Gough* with the decisions of this court. In *Gough*, the House of Lords specifically rejected the reasonable suspicion test and the cases and judgments which had applied it in favour of a modified version of the reasonable likelihood test. In *R v Watson, Ex p Armstrong* (1976) 136 CLR 248 faced with the same conflict in the cases between the two tests, this court preferred the reasonable suspicion or apprehension test. That test has been applied in this court on no less than eight subsequent occasions. In the light of the decisions of this court which hold that the reasonable apprehension or suspicion test is the correct test for determining a case of alleged bias against a judge, it is not possible to use the 'real danger' test as the general test for bias without rejecting the authority of those decisions. Moreover, nothing in the two speeches in the House of Lords in *Gough* contains any new insight that makes us think that we should re-examine a principle and a line of cases to which this court has consistently adhered for the last 18 years. On the contrary, there is a strong reason why we should continue to prefer the reasoning in our own cases to that of the House of Lords. In *Gough*, the House of

A Lords rejected the need to take account of the public perception of an incident which raises an issue of bias except in the case of a pecuniary interest. Behind this reasoning is the assumption that public confidence in the administration of justice will be maintained because the public will accept the conclusions of the judge. But the premise on which the decisions in this court are based is that public confidence in the B administration of justice is more likely to be maintained if the court adopts a test that reflects the reaction of the ordinary reasonable member of the public to the irregularity in question. References to the reasonable apprehension of the 'lay observer', the 'fair-minded observer', the 'fair-minded, informed lay observer', 'fair-minded people', the 'reasonable or fair-minded observer', the 'parties or the public', and the 'reasonable C person' abound in the decisions of this court and other courts in this country. They indicate that it is the court's view of the public's view, not the court's own view, which is determinative. If public confidence in the administration of justice is to be maintained, the approach that is taken by fair-minded and informed members of the public cannot be ignored. Indeed, as Toohey J pointed out in *Vakauta v Kelly* (1989) 167 CLR 568, 585 in considering whether an allegation of bias on the part of a judge has D been made out, the public perception of the judiciary is not advanced by attributing to a fair-minded member of the public a knowledge of the law and the judicial process which ordinary experience suggests is not the case. That does not mean that the trial judge's opinions and findings are irrelevant. The fair-minded and informed observer would place great weight on the judge's view of the facts. Indeed, in many cases the fair-E minded observer would be bound to evaluate the incident in terms of the judge's findings."

64 These comments presuppose that the "real danger" test may lead the court to reach a conclusion as to the likelihood of bias which does not reflect the view that the informed observer would form on the same facts—and this because the viewpoint of the judge may not be the same as that of members F of the public. This objection was addressed by this court in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477:

> "In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special G knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done."

65 We do not find it easy to reconcile this passage with an approach that requires the court to decide whether there was in fact a real danger that a H particular judge was biased. Once the reviewing court excludes from consideration matters known to it which would be outside the ken of ordinary, reasonably well informed members of the public, it seems to us that a hypothetical rather than an actual test of the likelihood of bias is being applied.

66 A similar conclusion flows from a subsequent passage in the judgment in the *Locabail* case, at pp 477–478:

> "While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."

67 What is the court to do where, although inclined to accept a statement about what the judge under review knew at any material time, it recognises the possibility of doubt and the likelihood of public scepticism? It is invidious for the reviewing court to question the word of the judge in such circumstances, but less so to say that the objective onlooker might have difficulty in accepting it.

68 Such a situation highlights a wider consideration. Jurors are warned by the judge to put all extraneous considerations and prejudices from their minds and to try the case on the evidence, and are normally expected to achieve this. A professional judge is adept, by training and experience, at reaching decisions by objective appraisal of the facts. A finding that in a particular case there is a real danger that a particular judge was biased inevitably carries with it a slur on the judge in question, albeit that the reviewing court may take pains to emphasise that the bias may have been unconscious. As Deane J put it in *Webb v The Queen* 181 CLR 41, 71–72:

> "One advantage of the test of reasonable apprehension on the part of a fair-minded and informed observer is that it makes plain that an appellate court is not making an adverse finding on the question whether it is possible or likely that the particular judge or juror was in fact affected by disqualifying bias. In contrast, the real danger test is focused upon that very question. Regardless of an appellate court's care to make plain that its finding is only one of possibility of danger, such a finding is likely to be unfairly damaging to the reputation of the person concerned who will commonly not have been a party to the proceedings before the appellate court and whose subjective thought processes will not have been investigated in the appellate court."

69 The problem with the "real danger" test is particularly acute where a judge is invited to recuse himself. In such a situation it is invidious to expect a judge to rule on the danger that he may actually be influenced by

A partiality. The test of whether the objective onlooker might have a reasonable apprehension of bias is manifestly more satisfactory in such circumstances.

70 Mr Sumption submitted that the test in *R v Gough* [1993] AC 646 was no different in reality from the "reasonable apprehension of bias" test favoured in Scotland and most other common law jurisdictions. He added that, if it was different, it had to be discarded in favour of the reasonable B apprehension test in the light of the Human Rights Act 1998 as this was unequivocally the test applied by the Strasbourg court. This submission received support from Mr Philipson for the Director General. We turn to consider the Strasbourg jurisprudence.

71 We start, 30 years ago, with *Delcourt v Belgium* (1970) 1 EHRR 355. The applicant had failed in appeals against conviction and sentence for C offences of fraud and forgery before the Belgian Cour de Cassation. He complained that he had not enjoyed the right to a fair trial recognised by article 6(1) of the Convention because a member of the Procureur Général's department, which was attached to the Cour de Cassation, had retired with the court to consider the result of the appeal.

72 Under the European system of criminal justice the Procureur Général's department plays an active role in prosecuting criminal offences. D This was true of the lower courts in Belgium. The Strasbourg court held that this might also appear to be the case to litigants in the Cour de Cassation. It commented, at p 369, para 30:

> "And one may imagine that such litigants can have a feeling of inequality if, after hearing a member of the Procureur Général's department at the Court of Cassation make, in open court, final E submissions unfavourable to their pleas, they see him withdraw with the judges to attend the deliberations held in the privacy of chambers."

73 The Strasbourg court held, at p 368, para 29, however, that it had to "make a careful examination of the real position and functions of the Procureur Général's department attached to the Court of Cassation". This disclosed that, unusually, the Procureur Général's department did not adopt F an adversarial role at that court, but performed a neutral advisory function which might lead it to intervene in favour of an appellant as readily as against him. The Strasbourg court noted that the applicant's concerns were understandable, but commented, at p 369, para 31:

> "The preceding considerations are of a certain importance which must not be underestimated. If one refers to the dictum 'justice must not only G be done; it must also be seen to be done', these considerations may allow doubts to arise about the satisfactory nature of the system in dispute. They do not, however, amount to proof of a violation of the right to a fair hearing. Looking behind appearances, the court does not find the realities of the situation to be in any way in conflict with this right."

H 74 This decision shows the Strasbourg court is concerned to look at the reality behind a situation that might give to the litigant an appearance of injustice and supports the approach of the English court in reviewing the risk of bias having regard to material circumstances that may not be apparent to those observing the trial. It does not go so far, however, as to formulate a test of real danger that the tribunal under review was actually biased.

75 In 1982 Belgium again provided the Strasbourg court with the occasion to consider the law of bias. In *Piersack v Belgium* (1982) 5 EHRR 169 an applicant convicted of murder complained that his right to a fair trial under article 6(1) had been denied because the trial court had been presided over by a judge who, when senior deputy procureur, had been in charge of the department which decided to prosecute the applicant. The approach of the Strasbourg court appears from the following passage of the judgment, at pp 179–180, para 30:

"Whilst impartiality normally denotes absence of prejudice or bias, its existence or otherwise can, notably under article 6(1) of the Convention, be tested in various ways. A distinction can be drawn in this context between a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect. (a) As regards the first approach, the court notes that the applicant is pleased to pay tribute to Mr Van de Walle's personal impartiality; it does not itself have any cause for doubt on this score and indeed personal impartiality is to be presumed until there is proof to the contrary: see *Le Compte, Van Leuven and De Meyere v Belgium* (1981) 4 EHRR 1, 21, para 58. However, it is not possible to confine oneself to a purely subjective test. In this area, even appearances may be of a certain importance: see *Delcourt v Belgium* 1 EHRR 355, 369, para 31. As the Belgian Court of Cassation observed in its judgment of 21 February 1979, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts must inspire in the public in a democratic society. (b) It would be going too far to the opposite extreme to maintain that former judicial officers in the public prosecutor's department were unable to sit on the bench in every case that had been examined initially by that department, even though they had never had to deal with the case themselves. So radical a solution, based on an inflexible and formalistic conception of the unity and indivisibility of the public prosecutor's department, would erect a virtually impenetrable barrier between that department and the bench. It would lead to an upheaval in the judicial system of several contracting states where transfers from one of those offices to the other are a frequent occurrence. Above all, the mere fact that a judge was once a member of the public prosecutor's department is not a reason for fearing that he lacks impartiality; the court concurs with the government on this point. (c) The Belgian Court of Cassation, which took article 6(1) into consideration of its own motion, adopted in this case a criterion based on the functions exercised, namely whether the judge had previously intervened 'in the case in or on the occasion of the exercise of . . . functions as a judicial officer in the public prosecutor's department'. It dismissed Mr Piersack's appeal on points of law because the documents before it did not, in its view, show that there had been any such intervention on the part of Mr Van de Walle in the capacity of senior deputy to the Brussels Procureur du Roi, even in some form other than the adoption of a personal standpoint or the taking of a specific step in the process of prosecution or investigation. (d) Even when clarified in the manner just

A mentioned, a criterion of this kind does not fully meet the requirements of article 6(1). In order that the courts may inspire in the public the confidence which is indispensable, account must also be taken of questions of internal organisation. If an individual, after holding in the public prosecutor's department an office whose nature is such that he may have to deal with a given matter in the course of his duties, subsequently B sits in the same case as a judge, the public are entitled to fear that he does not offer sufficient guarantees of impartiality."

76 On examination of the facts the court found that the procureur in question had presided over the section of the public prosecutor's department responsible for the prosecution of the applicant and had personally played some part in the prosecution process. In these circumstances the court held C that it was not necessary to gauge the precise extent of the role played by the procureur. It was sufficient to find that the impartiality of the tribunal was capable of appearing open to doubt. Article 6(1) had been violated.

77 The following features of this decision are significant. (1) The court was at pains to emphasise that its decision did not throw doubt on the procureur's personal impartiality. (2) The court carried out a detailed examination of the general circumstances of the procureur's involvement D with the prosecution, but drew the line at an investigation of the precise extent of his involvement. (3) The court held that article 6(1) was violated because the material circumstances identified by it gave rise to the appearance that the tribunal might have been biased.

78 The Strasbourg court followed a similar approach in *De Cubber v Belgium* (1984) 7 EHRR 236. There the applicant complained that one of E the judges of the court which had convicted him of forgery had previously acted as the investigating judge in his case. In that case allegations had been made that the judge in question was actually biased against the applicant. The court held, at pp 243–244:

"25 . . . the personal impartiality of a judge is to be presumed until there is proof to the contrary, and in the present case no such proof is to be F found in the evidence adduced before the court. In particular, there is nothing to indicate that in previous cases Mr Pilate had displayed any hostility or ill-will towards Mr De Cubber or that he had 'finally arranged', for reasons extraneous to the normal rules governing the allocation of cases, to have assigned to him each of the three preliminary investigations opened in respect of the applicant in 1977.

G "26. However, it is not possible for the court to confine itself to a purely subjective test; account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, *Delcourt v Belgium* 1 EHRR 355, 369, para 31, 'justice must not only be done: it must also be seen to be done'. As the Belgian Court of Cassation has H observed (21 February 1979, *Pasicrisie* 1979, I, p 750), any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused."

79 The court repeated this test in *Hauschildt v Denmark* (1989) 12 EHRR 266, adding this comment at p 279, para 48: A

> "in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive: see *Piersack v Belgium* 5 EHRR 169, 180, para 31. What is decisive is whether this fear can be held objectively justified." B

80 In *Borgers v Belgium* (1991) 15 EHRR 92 the court reconsidered the nature of the involvement of the Procureur Général's department in decisions taken by the Belgian Cour de Cassation. The court sitting in plenary session reached, by a majority, a decision which effectively reversed *Delcourt v Belgium* 1 EHRR 355. In doing so the majority observed that the rights of the defence and the principle of equality of arms had "undergone a C considerable evolution the court's case law, notably in respect of the importance attached to appearances and to the increased sensitivity of the public to the fair administration of justice": see 15 EHRR 92, 108, para 24.

81 The court did not, however, refine the principles set out in *Delcourt v Belgium*. Rather it reanalysed the facts and concluded that the prosecution was unfair in circumstances where the advocate general intervened at the D hearing in a manner adverse to an appellant. This was because an appellant had no right of reply and might reasonably think, when the advocate general retired with the court, that he would further urge that the appeal should be dismissed.

82 In *Gregory v United Kingdom* (1997) 25 EHRR 577 the court recognised that it was possible for risk of prejudice on the part of a jury to be effectively neutralised by an appropriate direction from the judge. The court E commented, at p 595, para 48, that the legal principles applied in England corresponded closely to its own case law on the objective requirements of impartiality.

83 We would summarise the principles to be derived from this line of cases as follows. (1) If a judge is shown to have been influenced by actual bias, his decision must be set aside. (2) Where actual bias has not been F established the personal impartiality of the judge is to be presumed. (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside. (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court. (5) An important consideration in making an objective appraisal of the facts is the G desirability that the public should remain confident in the administration of justice

84 This approach comes close to that in *R v Gough* [1993] AC 646. The difference is that, when the Strasbourg court considers whether the material circumstances give rise to a reasonable apprehension of bias, it makes it plain that it is applying an objective test to the circumstances, not passing H judgment on the likelihood that the particular tribunal under review was in fact biased.

85 When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the

A Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

86 The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those B circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias C notwithstanding the explanation advanced. Thus in *R v Gough*, had the truth of the juror's explanation not been accepted by the defendant, the Court of Appeal would correctly have approached the question of bias on the premise that the fair-minded onlooker would not necessarily find the juror's explanation credible.

The material circumstances in the present case

D

87 We have set out the material circumstances in the first 24 paragraphs of this judgment. In her affidavit sworn on behalf of the appellants Christine Bendall suggested that not all the statements that formed part of those circumstances could be taken at their face value.

88 Ms Bendall stated that her clients did not accept that the Frontier letter of 10 November 2000 was truthful when it stated that Frontier were E unlikely to have any vacancies for a person of Dr Rowlatt's experience in the foreseeable future. They believed that this letter was a contrivance devised by Frontier "designed to bolster the proposition that Dr Rowlatt had no reason to resent the [appellants] for having frustrated her desired employment with Frontier".

89 In her affidavit Ms Bendall suggested that there were a number of F matters which indicated that the Frontier letter could not be taken at its face value. These included: why was the letter written at all when (i) Dr Rowlatt's first personal statement indicated only that she had made an inquiry of a personal assistant, and had made no mention of a request for a meeting, and (ii) Dr Rowlatt had sent a fax saying that her application was suspended? Why was the letter addressed "Dear Penelope" when, on the facts disclosed by the two personal statements, Dr Rowlatt and Mr Gaysford had never G met, nor did they speak on the telephone? On what basis did Mr Gaysford say that Frontier were unlikely to have vacancies for a person of Dr Rowlatt's experience when (i) Dr Rowlatt's first statement did not suggest that information about her professional experience was communicated to Frontier in any detail, (ii) her experience is none the less extensive and (iii) Frontier are a rapidly expanding consultancy that according to their website have vacancies at most levels of seniority and are recruiting for H people with qualifications such as those of Dr Rowlatt?

90 We do not believe that the matters referred to by Ms Bendall would lead the fair-minded observer to ascribe to Frontier the convoluted motive for writing their letter that she suggests. We do consider, however, that the observer might well conclude that the letter was a reaction to

embarrassment felt by Frontier at Dr Rowlatt's application rather than a reflection of the fact that her qualifications were not ones for which Frontier were likely to have a need in the foreseeable future.

91 Ms Bendall also stated that her clients had difficulty in accepting Dr Rowlatt's statement that, when she applied for a position with Frontier, she did not recall that Mr Zoltan Biro of that firm was an expert witness in the case. She pointed out that Professor Newbery's main report for the Director General, which was prominent in both parties' reading lists for the reading-in period before the hearing began, contained abundant reference to Frontier, sometimes in conjunction with Mr Biro's name. The report drew extensively on Frontier's work and, so Ms Bendall contended, Dr Rowlatt, as the economist member of the court, might have been expected to have given particular attention to it. Frontier has a high profile and Ms Bendall commented that it was not understood how a professional economist sitting in the court could have failed to recall the name of this one of the two firms in her own field (out of a possible field of only about eight) engaged by the parties to the litigation.

92 The court below, of which Dr Rowlatt was a member, found itself in the unenviable position of having to address this challenge to Dr Rowlatt's credibility. It did so on an objective basis, concluding that it was more credible that she did not have Frontier's position in mind when she applied for a post with them, rather than that she had it in mind and, having made her application to them, then felt impelled to bring the matter to the attention of the judge.

93 We do not think that it was appropriate that the court below should have set out to answer the question of whether or not Dr Rowlatt's statement was truthful. The court should have considered what impression her conduct, including her explanation for it, would have had on a fair-minded observer.

94 We do not consider that the reasoning of the court would have left the fair-minded observer confident that Dr Rowlatt had forgotten Frontier's role as experts in the case when she applied for a post with them. It is, indeed, hard to credit that, had she had this fact in mind, she would have made the application, only to appreciate no sooner had she done so that it was inappropriate. But it is equally hard to credit, for the reasons given by Ms Bendall, that Dr Rowlatt could have lost sight of the fact that Frontier were providing critical expert evidence in the case. Thus any concerns that Dr Rowlatt's initial application would have raised in the mind of the observer would have been augmented rather than allayed by the fact that she proffered an explanation which it was not easy to accept.

95 What concerns would the remarkable facts that we have set out above raise in the mind of a fair-minded observer? The Restrictive Practices Court is, in this case, going to have to resolve a fundamental conflict of economic analysis between rival economic consultants. Ms Bendall stated that her clients considered that Dr Rowlatt had, by making her application for employment to one of these consultants, indicated a partiality to them which could not be undone. We consider that the fair-minded observer would be concerned that, if Dr Rowlatt esteemed Frontier sufficiently to wish to be employed by them, she might consciously or unconsciously be inclined to consider them a more reliable source of expert opinion than their rivals.

A 96 Mr Sumption advanced a more basic contention: that an objective bystander would conclude that Dr Rowlatt might still harbour hopes that, sooner or later, she might find employment with Frontier and that this might induce in her, whether consciously or unconsciously, a reluctance to reject as unsound evidence advanced by Frontier's experts.

97 We agree with Mr Sumption that the fair-minded observer would not be convinced that all prospects of Dr Rowlatt working for Frontier at B some time in the future had been destroyed, nor that she might not still hope, in due course, to work for Frontier. He would not be reassured by the fact that initially, albeit on the advice of the judge, she wrote to Frontier asking that her application should not be pursued until "after the conclusion of the trial" and that she later offered an undertaking not to join Frontier "for two years after the final order in these proceedings or indeed for any lengthier C period which either party may request". The observer's concern at the possibility that Dr Rowlatt's wish to work for Frontier demonstrated partiality would be augmented by a concern that she might still have hopes of doing so.

98 It is for these reasons that we concluded that a fair-minded observer would apprehend that there was a real danger that Dr Rowlatt would be unable to make an objective and impartial appraisal of the expert evidence D placed before the court by Frontier and that, on objection being taken, she should have recused herself.

99 Having reached this decision, we then had to consider the position of the other two members of the court. The trial had reached an advanced stage by the time that it was interrupted by the appellants' application. Dr Rowlatt must have discussed the economic issues with the other members E of the court. We concluded that it was inevitable that the decision that Dr Rowlatt should be disqualified carried with it the consequence that the other two members of the court should stand down.

100 We reached our decision with great regret. Its consequence is that an immense amount of industry will have gone for nothing, and very substantial costs will be thrown away. But Mr Philipson for the Director General made it plain that he did not advance the argument that these F considerations ought to influence our decision.

Postscript

101 While we were preparing this judgment it came to the attention of Lord Phillips of Worth Matravers MR that Dr Rowlatt was known to him, although only by sight, because she is a near neighbour. While that is not a G fact which could cast doubt on the objectivity with which we have addressed the issues in this case, it is right that it should be recorded.

Appeal allowed.
Permission to appeal refused.

Solicitors: CMS Cameron McKenna; Treasury Solicitor.

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I C

Overview | [2000] QB 451, | [2000] 1 All ER 65, | [2000] 2 WLR 870, | [2000] 3 LRC 482, | [2000] IRLR 96, | (1999) Times, 19 November, | [1999] Lexis Citation 3395, | 7 BHRC 583, | [1999] All ER (D) 1279

LOCABAIL (U.K.) LTD. v. BAYFIELD PROPERTIES LTD.AND ANOTHERLOCABAIL (U.K.) LTD. AND ANOTHER v. WALDORF INVESTMENT CORPORATION AND OTHERSTIMMINS v. GORMLEYWILLIAMS v. H.M. INSPECTOR OF TAXES AND OTHERSREGINA v. BRISTOL BETTING AND GAMING LICENSING COMMITTEE,Ex parte O'CALLAGHAN [2000] Q.B. 451

[COURT OF APPEAL]

Lord Bingham of Cornhill C.J., Lord Woolf M.R. and Sir Richard Scott V.-C.

1999 Oct. 18,19,20;

Natural Justice — Bias — Judge in own cause — Duty and extent of inquiry required of judge — Whether direct interest in outcome of proceedings — Whether automatic disqualification — Whether real danger of bias — Waiver of objection

In the first two cases the plaintiffs sought to enforce charges securing the repayment of advances made, inter alia, to the former husband of one of the defendants, E., in respect of two properties over which she asserted equitable interests. Both actions were heard by a solicitor, the senior partner in a large firm of solicitors, sitting as a deputy judge of the High Court. During the hearing E. produced material relating to her matrimonial proceedings which included a press cutting from which the judge learnt that his firm was acting for clients in litigation for the enforcement of financial claims and of bankruptcy against E.'s former husband. The judge immediately disclosed that connection, stating that he knew no more of that litigation than had appeared from the cutting. Neither party sought an adjournment, no objection was raised and the hearing continued. The judge gave judgment for the plaintiffs and thereafter E. applied to the judge to disqualify himself from further involvement in the cases and to set aside his judgment on the ground of bias. The judge concluded that his firm's engagement to clients involved in litigation against E.'s former husband had not created a conflict of interest such as to disqualify him from dealing with the cases and he accordingly refused her application.

In the third case the defendant admitted liability for personal injuries sustained by the claimant but disputed the quantum of damage. Trial of that issue was heard by a member of the Bar, sitting as a recorder, who was a specialist practitioner in personal injury cases and had, by regular contributions to specialist literature, shown consistent support for claimants in obtaining damages from defendants and their insurers. At the outset of the proceedings the recorder disclosed his membership of an association which ordinarily represented claimants rather than defendants. No objection was taken by either party, although the defendant was unaware of the recorder's written work, and the hearing continued. Following judgment in the claimant's favour the defendant learnt of an article written by the recorder and published shortly after trial in which he had expressed views in trenchant terms in favour of claimants and critical of defendants

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and their insurers. The defendant considered that the terms of the article disclosed a real danger that the recorder had been biased against him and that in consequence the judgment should be set aside.

In the fourth case the applicant complained to an industrial tribunal of racial discrimination by her former employers. The tribunal's chairman disclosed during the hearing that he had many years previously been employed for a short period by the same employers. The applicant did not specify any objection, the hearing continued and her complaint was dismissed. Her appeal on the ground of bias was dismissed by the Employment Appeal Tribunal.

In the fifth case the applicant obtained leave to apply for judicial review of a local licensing authority's decisions to renew bookmakers' licences, dismissing his applications by way of objection and making a costs order in a fixed sum against him. Following his failing to enter and serve the proceedings within the prescribed period he applied for an extension of time. The judge concluded that, since the licences had been renewed, the only surviving issue in the proceedings related to the costs order and that, given the applicant's considerable delay, the application should be refused. After his decision the judge learnt from a newspaper article that the bookmakers were tenants of premises let to them by a property investment company owned by the judge's family in which he held shares and a non-executive directorship. The applicant also learnt of the connection and sought to appeal against the judge's decision on the grounds that his interest automatically disqualified him from dealing with the application and in any event gave rise to a real danger of bias. The judge, in a statement sent to the court confirming the contents of the article, indicated that he was not involved in the management of the company, that until reading the article he had been unaware that the bookmakers were its tenants and that the rent payable for the single shop let to them represented approximately four per cent. of the company's total receivable rent.

On applications for permission to appeal:-

Held, (1) that where a judge had a direct personal interest, which was other than de minimis, in the outcome of proceedings bias was presumed to exist and he was automatically disqualified from hearing or continuing to hear the case and any judgment he had given would be set aside; that such disqualification arose irrespective of the judge's state of knowledge as to his interest; but that a party with an irresistible right to object to his hearing or continuing to hear the case might waive that right so long as he did so in clear and unequivocal terms and with full knowledge of the relevant facts (post, pp. **472G-474A**, **475C**).

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.) and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119, H.L.(E.) applied.

(2) That where apparent bias was asserted it was for the reviewing court, personifying the reasonable man with knowledge of the relevant circumstances and adopting a broad approach, to assess whether there was a real danger of bias; that in making that assessment the court might properly inquire whether the judge knew of the matter relied on as undermining his impartiality, since ignorance would preclude its having influenced his mind and dispel any such danger; that, although the judge could not be cross-examined or required to give disclosure, the reviewing court might properly receive, but would not necessarily accept, a

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statement from him as to his state of knowledge, but not as to its effect on him since that issue was for the court, not the judge, to assess (post, pp. **475D-E**, **476H-477C**).

Reg. v. Gough [1993] A.C. 646, H.L.(E.) applied.

(3) That in any case of personal embarrassment, or of automatic disqualification where the judge had knowledge of his interest, he should recuse himself before objection was raised and at the earliest possible stage; that in any other case where he was or became aware of a matter which could arguably give rise to a real danger of bias he should make disclosure to the parties in advance of any hearing so that where objection was taken he might consider and adjudicate on it; that where, following appropriate disclosure, no objection was taken to his hearing or continuing to hear a case no subsequent complaint of bias could be made in respect of the matter so disclosed; that what constituted appropriate disclosure would largely depend on the stage reached in the

proceedings so that where, in advance of the hearing, the judge became aware of a matter which might affect his fitness to sit he should inquire fully into it and make full disclosure but where such a matter emerged during the hearing the judge, while being required to disclose what he then knew, was not obliged to conduct any fuller inquiry (post, pp. **478F-479A**, **480A-C**, **481A-D**).

(4) That, while members of the Bar would not ordinarily have any knowledge of or responsibility for the affairs of other members of chambers, since a solicitor who was a partner in a firm bore responsibility for his partners and owed a duty to their clients of whose affairs he might personally be ignorant, he should, prior to sitting in any assigned civil case, conduct a careful conflict search within the firm; that where any association was discovered during the hearing it should be disclosed to the parties and addressed on the particular facts by reference to the test whether a real danger of bias arose; but that where a conflict of interest, such as would prohibit the solicitor from acting for one of the parties under the solicitors' professional rules, emerged before or during the hearing he was not necessarily barred from hearing or continuing to hear the case nor was any judgment he had given necessarily to be set aside (post, pp. **478A-F**, **488F-489B**).

(5) Refusing permission to appeal in the first two cases, that, while it could be inferred that the judge had conducted a conflict search within his firm before the hearing, such a search had been confined to the parties themselves; that partnership in a firm acting for clients whose success in litigation against E.'s former husband might attract profit and goodwill did not give him a sufficient interest in the outcome of the proceedings before him either to attract the principle of automatic disqualification or to give rise to a real danger of bias; that although he might not have acted as a solicitor for E. under his professional rules he was not necessarily debarred from continuing with the hearing; that any conflict of interest between the firm's clients and E., whereby the former might recover more substantially against her former husband if her claim failed, would not have occurred to a reader of the press cutting and did not occur to the judge, any party or their representatives at the time despite their knowledge of the facts on which the alleged conflict depended; that, given the large number of partners and size of the judge's firm, his statement as to his state of knowledge was cogent and convincing; that it was unchallenged by any party when it was made and there was nothing to cast doubt on its credibility; and that, accordingly, there was no real danger of bias; further that since no objection was taken when he disclosed the connection E., having been put to her election at that

time, could not subsequently complain after the dismissal of her claims (post, pp. **486B-E**, **487C**, **489E-F**, **490D-G**, **491D-E**).

(6) Granting permission to appeal in the third case and allowing the appeal, that, although extra-curricular comment in textbooks and articles was not incompatible with the discharge of judicial functions and would not ordinarily of itself give rise to a real danger of bias, the intemperate terms in which the recorder had expressed views critical of defendants and their insurers could have given rise to the possibility that in resolving the case he had favoured the claimant against the defendant; and that, accordingly, there was a real danger of bias which required the court to set aside his judgment and to order a retrial (post, pp. **480B-C**, **496B-E**, **496D-497A**).

(7) Refusing permission to appeal in the fourth case, that in the circumstances the former employment of the chairman of the industrial tribunal with the employers against whom the applicant's complaint was made would not suggest any danger of bias; and that, accordingly, the appeal tribunal had correctly dismissed her appeal (post, p. **498A-C**).

(8) Refusing permission to appeal in the fifth case, that, since at the time of the application before the judge the only remaining issue in the judicial review proceedings related to the costs order made against the applicant, and since such a sum could not affect the bookmakers' ability to meet their obligations to the judge's family company, the judge had only a nominal and indirect interest arising from his directorship and shares in that company; and that, accordingly, the principle of automatic disqualification did not apply; that his role in the family company was non-executive, there was no reason why he should know of the tenancy and no reason to doubt his statement; and that, accordingly, there was no real danger of bias; further that, in any event, given the applicant's gross delay and the limited scope of the issue before him the judge's order, which was well within his discretion, was

correctly made (post, p. **500B-G**).

Per curiam. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided (post,p. **480A-B**).

The following cases are referred to in the judgment of the court:

Auckland Casino Ltd. v. Casino Control Authority [1995] 1 N.Z.L.R. 142

B.T.R. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union, 1992 (3) S.A. 673

Bradford v. McLeod, 1986 S.L.T. 244

Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd. [1999] V.S.C.A. 35

De Cubber v. Belgium (1984) 7 E.H.R.R. 236

Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759, H.L.(E.)

Doherty v. McGlennan, 1997 S.L.T. 444

Ebner, In re (1999) 161 A.L.R. 557

Hauschildt v. Denmark (1989) 12 E.H.R.R. 266

J.R.L., In re; Ex parte C.J.L. (1986) 161 C.L.R. 342

K.F.T.C.I.C. v. Icori Estero S.p.A., 28 June 1991, vol. 6, 8/91, International Arbitration Report, C.A. Paris

Laker Airways Inc. v. F.L.S. Aerospace Ltd. [1999] 2 Lloyd's Rep. 45

Langborger v. Sweden (1989) 12 E.H.R.R. 416

Law v. Chartered Institute of Patent Agents [1919] 2 Ch. 276

---------- ***[2000] Q.B. 451 at 455***

McKenzie v. McKenzie [1971] P. 33; [1970] 3 W.L.R. 472; [1970] 3 All E.R. 1034, C.A.

Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon [1968] 1 W.L.R. 815; [1968] 1 All E.R. 354, D.C. [1969] 1 Q.B. 577; [1968] 3 W.L.R. 694; [1968] 3 All E.R. 304, C.A.

Moch v. Nedtravel (Pty.) Ltd. 1996 (3) S.A. 1

Piersack v. Belgium (1982) 5 E.H.R.R. 169

President of the Republic of South Africa v. South African Rugby Football Union, 1999 (4) S.A. 147

Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association [1960] 2 Q.B. 167; [1960] 3 W.L.R. 305; [1960] 2 All E.R. 703, C.A.

Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2) [2000] 1 A.C. 119; [1999] 2 W.L.R. 272; [1999] 1 All E.R. 577, H.L.(E.)

Reg. v. Camborne Justices, Ex parte Pearce [1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850, D.C.

Reg. v. Gough [1993] A.C. 646; [1993] 2 W.L.R. 883; [1992] 4 All E.R. 481, C.A.; [1993] A.C. 646; [1993] 2 W.L.R. 883; [1993] 2 All E.R. 724, H.L.(E.)

Reg. v. Inner West London Coroner, Ex parte Dallaglio [1994] 4 All E.R. 139, C.A.

Reg. v. Liverpool City Justices, Ex parte Topping [1983] 1 W.L.R. 119; [1983] 1 All E.R. 490, D.C.

Reg. v. Mulvihill [1990] 1 W.L.R. 438; [1990] 1 All E.R. 436, C.A.

Reg. v. Rand (1866) L.R. **1** Q.B. 230

Reg. v. Spencer [1987] A.C. 128; [1986] 3 W.L.R. 348; [1986] 2 All E.R. 928, H.L.(E.)

Reg. v. Watson, Ex parte Armstrong (1976) 136 C.L.R. 248

Rex v. Essex Justices, Ex parte Perkins [1927] 2 K.B. 475, D.C.

Rex v. Sunderland Justices [1901] 2 K.B. 357, C.A.

Rex v. Sussex Justices, Ex parte McCarthy [1924] 1 K.B. 256, D.C.

Shrager v. Basil Dighton Ltd. [1924] 1 K.B. 274, C.A.

Vakauta v. Kelly (1989) 167 C.L.R. 568

Webb v. The Queen (1994) 181 C.L.R. 41

Wells v. Wells [1999] 1 A.C. 345; [1998] 3 W.L.R. 329; [1998] 3 All E.R. 481, H.L.(E.)

The following additional cases were cited in argument:

A. T. & T. Corporation v. Saudi Cable Co. [2000] 1 Lloyd's Rep. 22

Alfred McAlpine Construction Ltd. v. Panatown Ltd. (unreported), 25 July 1996; Court of Appeal (Civil Division) Transcript No. 937 of 1996, C.A.

Arab Monetary Fund v. Hashim (1993) 6 Admin.L.R. 348, C.A.

Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd. (1996) 135 A.L.R. 753

B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd. [1997] N.Z.A.R. 49

Bolkiah (Prince Jefri) v. KPMG [1999] 2 A.C. 222; [1999] 2 W.L.R. 215; [1999] 1 All E.R. 517, H.L.(E.)

Borgers v. Belgium (1991) 15 E.H.R.R. 92

Bryan v. United Kingdom (1995) 21 E.H.R.R. 342

Bulut v. Austria (1996) 24 E.H.R.R. 84

Campbell and Fell v. United Kingdom (1984) 7 E.H.R.R. 165

Committee for Justice and Liberty v. National Energy Board (1976) 68 D.L.R. (3d) 716

Cormac Moore's Application, In re (unreported), 21 January 1994, C.A.(N.I.)

---------- ***[2000] Q.B. 451 at 456***

D. v. Ireland (1986) 51 D. & R. 117

Dallas' Application, In re [1996] N.I. 276

De Haan v. Netherlands (1997) 26 E.H.R.R. 417

Delcourt v. Belgium (1970) 1 E.H.R.R. 355

Demicoli v. Malta (1991) 14 E.H.R.R. 47

Fey v. Austria (1993) 16 E.H.R.R. 387

Findlay v. United Kingdom (1997) 24 E.H.R.R. 221

Gregory v. United Kingdom (1997) 25 E.H.R.R. 577

Hannam v. Bradford Corporation [1970] 1 W.L.R. 937; [1970] 2 All E.R. 690, C.A.

Howard Holdings Inc., In re [1998] B.C.C. 549

Incal v. Turkey (unreported), 9 June 1998, E.C.H.R.

Kristinsson v. Iceland (1990) 13 E.H.R.R. 238

Leckie (Judge), In re; Ex parte Felman (1977) 52 A.L.J.R. 155

Liljeberg v. Health Services Acquisition Corporation (1988) 486 U.S. 847

Liteky v. United States (1994) 510 U.S. 540

Najjar v. Haines (1991) 25 N.S.W.L.R. 224

Peyman v. Lanjani [1985] Ch. 457; [1985] 2 W.L.R. 154; [1984] 3 All E.R. 703, C.A.

Pfeifer and Plankl v. Austria (1992) 14 E.H.R.R. 692

Procola v. Luxembourg (1995) 22 E.H.R.R. 193

Pullar v. United Kingdom (1996) 22 E.H.R.R. 391

Reg. v. Altrincham Justices, Ex parte N. Pennington [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78, D.C.

Reg. v. Box [1964] 1 Q.B. 430; [1963] 3 W.L.R. 696; [1963] 3 All E.R. 240, C.C.A.

Reg. v. Chesterfield Borough Council, Ex parte Darker Enterprises Ltd. (unreported), 18 May 1992, Brooke J.

Reg. v. Commonwealth Conciliation and Arbitration Commission, Ex parte Angliss Group (1969) 122 C.L.R. 546

Reg. v. Gregory (unreported), 19 January 1993, C.A.

Reg. v. Panel on Takeovers and Mergers, Ex parte Cheng Kai-man (unreported), 30 October 1995, P.C.

Reg. v. S. (R. D.) (1997) 151 D.L.R. (4th) 193

Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd. [1996] 3 All E.R. 304

Reg. v. South Worcestershire Justices, Ex parte Lilley [1995] 1 W.L.R. 1595; [1995] 4 All E.R. 186, D.C.

Reg. v. Uxbridge Justices, Ex parte Burbridge, The Times, 20 June 1972, D.C.

Roylance v. General Medical Council (No. 2) [2000] 1 A.C. 311; [1999] 3 W.L.R. 541, P.C.

Rustal Trading Ltd. v. Gill & Duffus S.A. [2000] 1 Lloyd's Rep. 14

Serjeant v. Dale (1877) 2 Q.B.D. 558

The following additional cases, although not cited, were referred to in the skeleton arguments:

Ardahalian v. Unifert International S.A. [1984] 2 Lloyd's Rep. 84, C.A.

Banque Financière de la Cité v. Parc (Battersea) Ltd. [1999] 1 A.C. 221; [1998] 2 W.L.R. 475; [1998] 1 All E.R. 737, H.L.(E.)

Barnard v. Wieland (1882) 30 W.R. 947

Benthem v. The Netherlands (1985) 8 E.H.R.R. 1

Berry v. Director of Public Prosecutions (No. 2), The Times, 28 October 1996, P.C.

Biesheuvel v. Birrell [1999] P.I.Q.R. Q40

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Borelli v. Commission of the European Communities (Case C-97/91) [1992] E.C.R. I-6313, E.C.J.

Bremer Handelsgesellschaft m.b.H. v. Ets. Soules et Cie. [1985] 1 Lloyd's Rep. 160; [1985] 2 Lloyd's Rep. 199, C.A.

Bristol and West Building Society v. Mothew [1998] Ch. 1; [1997] 2 W.L.R. 436; [1996] 4 All E.R. 698, C.A.

Castle Phillips Finance Co. Ltd. v. Piddington (1994) 70 P. & C.R. 592, C.A.

Cleather v. Twisden (1884) 28 Ch.D. 340, C.A.

Cochrane (E. H.) Ltd. v. Ministry of Transport [1987] 1 N.Z.L.R. 146

Council of Review, South African Defence Force v. Monnig, 1992 (3) S.A. 482

Crociani v. Italy (1980) 22 D.R. 147

Derby's (Earl of) Case (1614) 12 Co.Rep. 114

Eckersley v. Mersey Docks and Harbour Board [1894] 2 Q.B. 667, C.A.

Elliniki Radiophonia Tiléorassi A.E. v. Pliroforissis (Case C-260/89) [1991] E.C.R. I-2925, E.C.J.

Ellis v. Allen [1914] 1 Ch. 904

Equity & Law Home Loans Ltd. v. Prestidge [1992] 1 W.L.R. 137; [1992] 1 All E.R. 909, C.A.

Frome United Breweries Co. Ltd. v. Bath Justices [1926] A.C. 586, H.L.(E.)

Gardiner Fire Ltd. v. Jones, The Times, 22 October 1998; Court of Appeal (Civil Division) Transcript No. 1638 of 1998, C.A.

Hickman v. Berens [1895] 2 Ch. 638, C.A.

Johnston v. Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] Q.B. 129; [1986] 3 W.L.R. 1038; [1986] 3 All E.R. 135; [1986] E.C.R. 1651, E.C.J.

Kik v. Council of the European Union (Case T-107/94) [1995] E.C.R. II-1717, C.F.I.

Ladd v. Marshall [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745, C.A.

Laws v. Australian Broadcasting Tribunal (1990) 170 C.L.R. 70

Le Compte, Van Leuven & De Meyere v. Belgium (1981) 4 E.H.R.R. 1

Lenz v. Commission of the European Communities (Case T-47/92) [1992] E.C.R. II-2523, C.F.I.

Livesey v. New South Wales Bar Association (1983) 151 C.L.R. 288

London and North Western Railway Co. v. Lindsay (1858) 3 Macq. 99, H.L.(Sc.)

Lusink, In re; Ex parte Shaw (1980) 55 A.L.J.R. 12

Matthews v. United Kingdom (unreported), 18 February 1999, E.C.H.R.

Matua Finance Ltd. v. Equiticorp Industries Group Ltd. [1993] 3 N.Z.L.R. 650

Metropolitan Properties Co. Ltd. v. Cordery (1979) 251 E.G. 567, C.A.

Nye Saunders & Partners v. Alan E. Bristow (1987) 37 B.L.R. 92, C.A.

Oberschlick v. Austria (1991) 19 E.H.R.R. 389

Porter v. Magill [2000] 2 W.L.R. 1420, C.A.

Practice Direction (Court of Appeal (Civil Division)) [1999] 1 W.L.R. 1027; [1999] 2 All E.R. 490, C.A.

Rees v. Crane [1994] 2 A.C. 173; [1994] 2 W.L.R. 476; [1994] 1 All E.R. 833, P.C.

Reg. v. Bassetlaw District Council, Ex parte Oxby, The Times, 18 December 1997; Court of Appeal (Civil Division) Transcript No. 2283 of 1997, C.A.

Reg. v. Batth, The Times, 11 April 1990, C.A.

Reg. v. Cameron (1991) 64 C.C.C. (3d) 96

Reg. v. Cheltenham Commissioners (1841) 1 Q.B. 467

Reg. v. Gaming Board for Great Britain, Ex parte Kingsley (unreported), 4 July 1996; Court of Appeal (Civil Division) Transcript No. 851 of 1996, C.A.

Reg. v. Hammond (1863) 9 L.T. 423

Reg. v. Handsley (1881) 8 Q.B.D. 383, D.C.

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Reg. v. Horne (1987) 35 C.C.C. (3d) 427

Reg. v. Lessard (1992) 74 C.C.C. (3d) 552

Reg. v. McLean, Ex parte Aikens (1974) 139 J.P. 227, D.C.

Reg. v. Marylebone Magistrates' Court, Ex parte Joseph, The Times, 7 May 1993, D.C.

Reg. v. Mayor and Justices of Deal, Ex parte Curling (1881) 45 L.T. 439

Reg. v. Morris (orse. Williams) (1990) 93 Cr.App.R. 102, C.A.

Reg. v. North and East Devon Health Authority, Ex parte Coughlan [2000] 2 W.L.R. 622, C.A.

Reg. v. Panel on Take-overs and Mergers, Ex parte Guinness Plc. [1990] 1 Q.B. 146; [1989] 2 W.L.R. 863; [1989] 1 All E.R. 509, C.A.

Reg. v. Pennington (1985) 81 Cr.App.R. 217, C.A.

Reg. v. Putnam (1991) 93 Cr.App.R. 281, C.A.

Reg. v. Romsey Justices, Ex parte Gale, The Times, 24 January 1992, D.C.

Reg. v. Sawyer (1980) 71 Cr.App.R. 283, C.A.

Reg. v. Te Pou [1992] 1 N.Z.L.R. 522

Reichhold Norway A.S.A. v. Goldman Sachs International [2000] 1 W.L.R. 173, C.A.

Ringeisen v. Austria (No. 1) (1971) 1 E.H.R.R. 455

Sellar v. Highland Railway Co., 1919 S.C. (H.L.) 19, H.L.(Sc.)

Shannon v. Country Casuals Holdings Plc. (unreported), 23 October 1997; Court of Appeal (Civil Division) Transcript No. 1697 of 1997, C.A.

Smith v. Liverpool and London and Globe Insurance Co. (1887) 14 R. 931

Sramek v. Austria (1984) 7 E.H.R.R. 351

Wentworth v. Lloyd (1864) 10 H.L.Cas. 589, H.L.(E.)

Williamson v. Barbour (1877) 9 Ch.D. 529

APPLICATIONS for permission to appeal.

Locabail (U.K.) Ltd. V. Bayfield Properties Ltd. and another

Locabail (U.K.) Ltd. and another V. Waldorf Investment Corporation and others

In 1996 the plaintiff, Locabail (U.K.) Ltd., sought as legal mortgagee by assignment to enforce a possession order made against the first defendant, Bayfield Properties Ltd., in the Guildford County Court on 18 June 1986 in respect of property at Hawks Hill, Chertsey Road, Chobham, Surrey. Following her application made on 13 January 1997

the second defendant, Barbara Emmanuel, was joined as a party to the proceedings. By her re-amended defence and counterclaim dated 7 February 1997 she claimed a beneficial interest in the property in priority to the plaintiff's claim and that the possession order be set aside. On 9 March 1999 Mr. Lawrence Collins Q.C., sitting as a deputy judge of the High Court, gave judgment for the plaintiff and dismissed the second defendant's counterclaim. On 29 March 1999 the second defendant applied to the judge for orders that he disqualify himself from further hearing the action and direct a rehearing before a different judge. By his judgment dated 29 March he dismissed the application and refused leave to appeal from his decision.

By an application dated 10 May 1999 the second defendant sought permission to appeal on the grounds, inter alia, that the judge erred in law in that (1) he should not have held that the particular facts of the case viewed objectively did not give rise to a reasonable apprehension or

suspicion of bias on his part as judge in reaching his decision on 9 March 1999; (2) he wrongly held that the financial interest of other clients of his firm was insufficient to raise any reasonable apprehension that his decision might not have been impartial; he should have held that despite such an interest being indirect it was not remote nor speculative but created an obvious conflict of interest between the second defendant and the firm's other clients which either alone or coupled with the adverse decision he had given against the second defendant was sufficient to raise a reasonable doubt in the mind of a reasonable and informed observer as to whether she had received a fair and impartial assessment of her case; (3) he, while accepting that the Guide to the Professional Conduct of Solicitors, 7th ed. (1996), para.15.01 would have prevented him from acting as a solicitor for the second defendant in the litigation, held that no appearance of bias arose from his hearing the action; (4) he was wrong to discount the appearance of bias arising out of the claims made by his firm's other clients against the second defendant's former husband and those associated with him, since as a partner he would have had access in his firm to material on which allegations were made of their discreditable conduct such as might unfairly influence him against the second defendant and her witnesses; and (5) his disclosure of the press cutting was incomplete and misleading, neither the cutting nor his comment revealed the true nature of all relevant proceedings in which his firm was or had been engaged and accordingly he wrongly held that the second defendant, by her failure to object to his continuing to hear the case after he had drawn attention to the cutting, had waived of her right to object.

By a writ dated 23 April 1998 and an amended statement of claim, the plaintiffs, Locabail (U.K.) Ltd. and Locabail International Finance Ltd., began proceedings against the defendants, Waldorf Investment Corporation, Ares Emmanuel and Barbara Emmanuel, claiming possession as mortgagees of property at Hans House, 3, Hans Street, Chelsea, London, S.W.1. By her amended defence and counterclaim dated 17 June 1998 the third defendant denied the claims and asserted her entitlement to a 50 per cent. beneficial interest in the property. By his order made on 3 August 1998 Deputy Master Farringdon entered summary judgment for the plaintiffs under R.S.C., Ord. 14. By a notice dated 10 August 1998 the third defendant appealed and on 9 March 1999 Mr. Lawrence Collins Q.C., sitting as a deputy judge of the High Court, dismissed her appeal. On 29 March 1999 on her application the judge refused to disqualify himself on the ground of bias from further dealing with the matter and to direct a rehearing. He refused her application for leave to appeal. By a notice of appeal dated 10 May 1999 she applied to the Court of Appeal for permission to appeal on the same grounds as those she advanced in the first case.

The facts are stated in the judgment of the court.

Timmins V. Gormley

By a summons and particulars of claim dated 1 November 1995 and issued in the Liverpool County Court the claimant, Margaret Timmins, sought damages for negligence against the defendant, Timothy Gormley,

arising out of a road traffic accident. By his defence dated 20 November 1995 the defendant admitted liability but

disputed the particulars of injury and special damage. On 22 November 1995 judgment was entered for the claimant with damages to be assessed. By his order dated 3 June 1999 Mr. Recorder Braithwaite Q.C. awarded the claimant the sum of £22,7123 together with costs. By notice of application for permission to appeal dated 30 June 1999 the defendant sought to appeal on grounds, inter alia, that by reason of published materials written by the judge on the subject of damages in personal injury claims, his decision should be set aside for actual or apparent bias.

The facts are stated in the judgment of the court.

Williams V. H.M. Inspector of taxes and others

By a complaint made on 17 January 1996 Mrs. Dorothy Williams complained to an industrial tribunal of sexual harassment and racial discrimination suffered during her employment in 1991 and 1992 by the Commissioners of Inland Revenue at their Croydon office. By a complaint made on 17 April 1996 she further alleged that the employers' representatives, Miss Celia Woodward and Mr. C. S. Barnes, victimised and discriminated against her contrary to the Race Relations Act 1976 by failing properly to investigate her complaints of harassment and discrimination. On 7 May 1996 the London (South) Industrial Tribunal by its chairman Mr. D. Booth concluded that the first complaint should not proceed and on 19 November 1996 the tribunal (Mr. D. Booth, chairman, Miss J. G. Wright and Mr. A. McGuinness) dismissed her complaint of 17 April 1996. By a notice of appeal dated 9 January 1997 the complainant appealed to the Employment Appeal Tribunal, inter alia, on the ground that the chairman acted improperly and/or unlawfully and/or displayed bias or the appearance of bias by failing to disclose until challenged by the complainant during the hearing of her second complaint that he had been an employee of the Commissioners of Inland Revenue and that he had made prejudicial remarks concerning the hearing by the tribunal of complaints against the Commissioners. By its order dated 20 November 1998 the appeal tribunal (Lindsay J., Mr. W. Morris and Mrs. R. A. Vickers) dismissed her appeal and on 15 January 1999 refused her application for leave to appeal. By a notice dated 12 February 1999 the complainant applied to the Court of Appeal for permission to appeal from the appeal tribunal, inter alia, on the ground that appeal tribunal erred in law in not allowing her appeal on the ground of bias.

The facts are stated in the judgment of the court.

Regina V. Bristol Betting and Gaming Licensing Committee, Ex Parte O'Callaghan

By his order date 2 December 1997 Tucker J. granted the applicant, Terence O'Callaghan, leave to move for judicial review of decisions of the Bristol Betting and Gaming Licensing Committee (i) refusing his applications for the issue of witness summonses in respect of the application by Coral Racing Ltd. for the renewal of bookmaker licences, (ii) refusing to adjourn the hearing of the application for renewal of such

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licences and (iii) ordering that the applicant pay the costs of Coral Racing Ltd. in the sum of £5,000. By way of relief the applicant sought orders of certiorari and mandamus to quash the committee's decisions and to oblige it to reconsider and to issue the witness summonses. By notice of motion dated 11 December 1998 the applicant sought an extension of the time specified in R.S.C., Ord. 53, r. 5(5) for entering the originating motion for hearing. On 9 February 1999 Dyson J. declined to extend time and refused the applicant leave to appeal. By a notice dated 13 May 1999 the applicant sought permission to appeal on the ground, inter alia, that unknown to the applicant the judge was a director of a property company, the assets of which included premises of which Coral Racing Ltd. were tenants; that the judge did not disclose that interest before the hearing of the application, and that had he done so, the applicant would have objected to his hearing the application on the ground of apparent bias.

The facts are stated in the judgment of the court.

David Lloyd Jones Q.C. as amicus curiae. Three different categories of case may be distinguished: (1) where a

decision is shown in fact to have been influenced by prejudice, predilection or personal interest, actual bias exists the decision cannot be allowed to stand; (2) where the decision-maker has a direct pecuniary or proprietary interest in the outcome of the case before him he is automatically disqualified from hearing the case and any decision made by him cannot stand; and (3) situations which fall within the wider principle of judicial impartiality.

The rule with regard to actual bias is recognised as being on its own insufficient to protect against judicial bias since (1) it is undesirable that the decision-maker's state of mind should be investigated, given the confidential nature of the decision-making process; (2) the decision-maker may be unaware or unconscious of any bias; (3) actual bias is difficult to establish; and (4) the public interest in maintaining confidence in the integrity of the administration of justice requires the avoidance of the appearance of bias.

Two tests have been used to establish apparent bias: (1) whether there is a real danger of bias (see *Reg. v. Gough* 4 and *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139*)* and (2) whether a reasonable and fair-minded member of the public knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible. In the first test a real possibility of bias, not a probability, is required and the court personifies the reasonable man so that it is unnecessary to consider the question from the viewpoint of the informed observer.

The tests are based on the same broad principle, namely, that a judge in performing his judicial duty must bring to it not only an unbiased and impartial mind but the appearance of impartiality: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. Within that principle there is scope for differences of approach and emphasis: see *Reg. v. Rand* (1866) L.R. 1 Q.B. 230; *Rex v. Sunderland Justices* [1901] 2 K.B. 357; *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and*

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District Licensed Victuallers' Association [1960] 2 Q.B. 167; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937; *Reg. v. Uxbridge Justices, Ex parte Burbridge*, The Times, 21 June 1972; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg. v. Mulvihill* [1990] 1 W.L.R. 438 and *Arab Monetary Fund v. Hashim* (1993) 6 Admin. L.R. 348.

While the differences between the tests may not be great they are important both in principle and practice and may in certain cases lead to different results. The real danger test is the more stringent test, whereas the reasonable suspicion test gives more effect to the appearance of bias and allows a margin of error in evaluating the facts by concentrating not on whether there is a danger of bias as an objective fact but on whether a fair-minded and informed person might suspect that it existed. The operation of the reasonable suspicion test might accordingly enhance public confidence in the administration of justice. The real danger tends to substitute, for the doctrine of disqualification by reason of the appearance of bias, the doctrine of disqualification for actual bias modified by the adoption of a new standard of proof. The extent to which the real danger test accommodates the requirements of the appearance of impartiality is controversial: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142, *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311; *Hannam v. Bradford Corporation* [1970] 1 W.L.R. 937; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139 and *Webb v. The Queen* (1994) 181 C.L.R. 41.

Under the real danger test the inquiry is not directed to the actual state of the judge's mind but to the court's assessment of the possibilities in the context of the objective facts disclosed by the material in evidence. Thus, it may be shown that the matters alleged to create the risk of bias never came to the judge's attention and, therefore, could not have given rise to possible bias. On the reasonable suspicion test it may be that the material which would establish no real danger would also render any suspicion unreasonable; but in other circumstances the lack of knowledge might not be sufficiently shown to render belief of bias unreasonable.

The real danger test applies generally in England and Wales to all instances of apparent bias without distinguishing between different categories of decision-maker: see *Reg. v. Spencer* [1987] A.C. 128; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304 and *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* (unreported), 25 July 1996; Court of Appeal (Civil Division) Transcript No. 937 of 1996. It is the test reflected in section 24 of the Arbitration Act 1996: see *Laker Airways Inc. v. F.L.S. Aerospace Ltd.* [2000] 1 W.L.R. 113 and *Rustal Trading Ltd. v. Gill & Duffus S.A.* [2000] 1 Lloyd's Rep. 14. [Reference was also made to *K.F.T.C.I.C. v. Icori Estero S.p.A.*, 28 June 1991, vol. 6, 8/91, International Arbitration Report, C.A. Paris and *Prince Jefri Bolkiah v. KPMG* [1999] 2 A.C. 222.] That test is also applied by the Judicial Committee of the

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Privy Council on appeals from a number of jurisdictions. In Northern Ireland that test has not been applied to allegations of bias made against non-judicial or quasi-judicial bodies: see *In re Dallas' Application* [1996] N.I. 276 and *In re Cormac Moore's Application* (unreported), 21 January 1994, C.A.(N.I.). In New Zealand a modification of the real danger test has been applied: see *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *B.O.C. New Zealand Ltd. v. Trans Tasman Properties Ltd.* [1997] N.Z.A.R. 49.

However, the reasonable suspicion test continues to be applied in a number of other jurisdictions: see *Doherty v. McGlennan*, 1997 S.L.T. 444 and *Bradford v. McLeod*, 1986 S.L.T. 244 (Scotland); *Webb v. The Queen*, 181 C.L.R. 41; *Reg. v. Watson, Ex parte Armstrong* (1976) 136 C.L.R. 248; *Reg. v. Commonwealth Conciliation and Arbitration Commission, Ex parte Angliss Group* (1969) 122 C.L.R. 546; *In re Judge Leckie, Ex parte Felman* (1977) 52 A.L.J.R. 155; *In re J.R.L., Ex parte C.J.L.* (1986) 161 C.L.R. 342 and *Vakauta v. Kelly* (1989) 167 C.L.R. 568 (Australia); *B.T.R.. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union*, 1992 (3) S.A. 673 and *Moch v. Nedtravel (Pty.) Ltd.*, 1996 (3) S.A. 1 (South Africa); *Reg. v. S.(R.D.)* (1997) 151 D.L.R. (4th) 193 and *Committee for Justice and Liberty v. National Energy Board* (1976) 68 D.L.R. (3d) 716 (Canada); *Liljeberg v. Health Services Acquisition Corporation* (1988) 486 U.S. 847 and *Liteky v. United States* (1994) 510 U.S. 540 (United States of America)

The case law of the European Court of Human Rights does not suggest that the real danger test is wrong or inadequate, although the approach of that court in interpreting article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969) is closer to the reasonable suspicion test than to the real danger test: see *Campbell and Fell v. United Kingdom* (1984) 7 E.H.R.R. 165; *Pullar v. United Kingdom* (1996) 22 E.H.R.R. 391; *Piersack v. Belgium* (1982) 5 E.H.R.R. 169; *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266; *De Cubber v. Belgium* (1984) 7 E.H.R.R. 236; *Fey v. Austria* (1993) 16 E.H.R.R. 387; *Gregory v. United Kingdom* (1997) 25 E.H.R.R. 577; *Reg. v. Gregory* (unreported), 19 January 1993; *Kristinsson v. Iceland* (1990) 13 E.H.R.R. 238; *Langborger v. Sweden* (1989) 12 E.H.R.R. 416; *Demicoli v. Malta* (1991) 14 E.H.R.R. 47; *Borgers v. Belgium* (1991) 15 E.H.R.R. 92; *Procola v. Luxembourg* (1995) 22 E.H.R.R. 193; *Bryan v. United Kingdom* (1995) 21 E.H.R.R. 342; *Findlay v. United Kingdom* (1997) 24 E.H.R.R. 221; *De Haan v. Netherlands* (1997) 26 E.H.R.R. 417; *Incal v. Turkey* (unreported), 9 June 1998; *Delcourt v. Belgium* (1970) 1 E.H.R.R. 355 and *Bulut v. Austria* (1996) 24 E.H.R.R. 84.

The principles developed in the jurisprudence of the Court of Human Rights would be likely to be applied on any question of judicial bias which arose for consideration by the Court of Justice of the European Communities.

Where the judge has a direct pecuniary or proprietary interest in the outcome of the proceedings the result is automatic disqualification. In such a case it is irrelevant whether there is in fact actual bias; and there is no question of investigating, objectively, whether there is any real likelihood

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of bias or any reasonable suspicion of bias on the particular facts: see *Dimes v. Proprietors of Grand Junction*

Canal (1852) 3 H.L.Cas. 759; *Reg. v. Gough* [1993] A.C. 646 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. Bias is assumed because of the nature of the interest: see *Reg. v. Gough* [1993] A.C. 646; *Rex v. Sunderland Justices* [1901] 2 K.B. 357; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and De Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th ed. (1995), p. 525.

The rationale of the principle is that no man should be a judge in his own cause and if he has a direct proprietary or pecuniary interest in the outcome of the litigation public confidence in the administration of justice requires that his decision should not stand: see *Reg. v. Gough* [1993] A.C. 646 and *Webb v. The Queen*, 181 C.L.R. 41. The strictness of the principle as originally formulated (see *Reg. v. Rand*, L.R. 1 Q.B. 230; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41 and *Serjeant v. Dale* (1877) 2 Q.B.D. 558) has been relaxed in favour of a de minimis exception: see *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *B.T.R.. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union*, 1992 (3) S.A. 673. The interest must be direct, in the sense that it is not remote: see *Metropolitan Properties Co. (F.G.C.) v. Lannon* [1969] 1 Q.B. 577; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd*. [1996] 3 All E.R. 304 and *A. T. & T. Corporation v. Saudi Cable Co*. [2000] 1 Lloyd's Rep. 22; and contrast *Reg. v. Panel on Takeovers and Mergers, Ex parte Cheng Kai-man* (unreported), 30 October 1995. The rule enunciates an irrebuttable presumption of bias necessary to promote public confidence in the judicial system and the impartiality of decision-makers. Hence a judge's ignorance of the existence of a disqualifying interest is irrelevant. There are, however, suggestions, not in the English jurisdiction, that a judge beneficiary of a blind trust would not necessarily be disqualified. [Reference was made to *Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd*. [1999] V.S.C.A. 35; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847.]

The category to which automatic disqualification applies has been extended to a situation where a judge has a particular and substantial personal interest in the outcome of the cause before him: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. [Reference was also made to *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311.] The extended category is not clearly defined, with the result that the scope of the principle has become uncertain. [Reference was made to *D. v. Ireland* (1986) 51 D. & R. 117 and *Demicoli v. Malta*, 14 E.H.R.R. 47.] The extension is also difficult to reconcile with existing authority: see *Reg. v.Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, *Reg. v. Rand*, L.R. 1 Q.B. 230, and *Reg. v. Altrincham Justices, Ex parte N. Pennington* [1975] Q.B. 549. The principle, which was unlikely to apply to criminal cases (see *Reg. v. Mulvihill* [1990] 1 W.L.R. 438) while it was restricted to a direct

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pecuniary and proprietary interest, may now be applied to such cases. The extension may, however, be limited to the situation where the judge is committed to the well-being of a charitable organisation which is party to the proceedings or to the achievement of its objects. Any further extension of the principle would be undesirable.

A person with a right of objection on grounds of bias may waive his right so long as he acts freely and in full knowledge of the facts: see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256; *Shrager v. Basil Dighton Ltd*. [1924] 1 K.B. 274; *Rex v. Essex Justices, Ex parte Perkins* [1927] 2 K.B. 475; *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142 and *Vakauta v. Kelly*, 167 C.L.R. 568; and contrast *Najjar v. Haines* (1991) 25 N.S.W.L.R. 224. [Reference was also made to *D. v. Ireland*, 51 D. & R. 117 and *Pfeifer and Plankl v. Austria* (1992) 14 E.H.R.R. 692.] A party should not be permitted to refrain from objection when the matter is first brought to his attention but to object once a judgment adverse to him has been delivered. If matters emerge during a hearing which may properly form the basis of an application for the judge to recuse himself, the point should be taken immediately and failure to do so will amount to waiver: see *Vakauta v. Kelly*, 167 C.L.R. 568.

Hazel Williamson Q.C. for E. in the first and second cases. The judge should have granted permission to appeal

from his decision since it is inappropriate, if justice is to be seen to be done, that he should himself be the final arbiter of an issue of apparent bias raised against him; and since the grounds of the proposed appeal stand a real prospect of success and raise issues of general importance for the proper administration of justice.

A judge should not sit in any case where the circumstances could give rise to a perception of prejudice in the judicial system: see *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119. The test of apparent bias is whether, in the events which happened, there was a real danger of bias. The court recognises the importance of the perception of the ordinary public as founding confidence in the judicial system and applies the real danger test with flexibility so that there should be no material distinction in effect between that test and the reasonable apprehension or suspicion of bias test: see *Reg. v. Gough* [1993] A.C. 646; *Webb v. The Queen*, 181 C.L.R. 41; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311; *Arab Monetary Fund v. Hashim*, 6 Admin. L.R. 348; *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119 and *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139.

In applying the test the reviewing court will assess the question of real danger, or reasonable suspicion, in the light of all the factual material available. The absence of material facts necessary for the court's assessment will itself be of significance to the court in reaching its decision. Where the relevant facts are peculiarly within the knowledge of the

tribunal under review and are not disclosed to the reviewing court any doubt should be resolved in favour of disqualification.

The test of apparent bias in the case of a solicitor sitting as a judge can be no less strict than that imposed under the professional guidance for solicitors: the conflict rules set out in the Guide to the Professional Conduct of Solicitors, 7th ed. (1996), para. 15.01 would have prevented the judge acting as E.'s solicitor. It therefore would appear extraordinary to an intelligent and fair-minded member of the public if he could nevertheless adjudicate in a case in which she was a party. Far from there being any separation of the positions of solicitor and judge, there is a clear link: both are officers of the court.

No distinction can be drawn between the solicitor judge and his firm. The interests of the firm are the interests of the partners own interests and the knowledge of each is the knowledge of all. The court will view with concern the potential leakage of information within a large firm and will recognise the difficulty of establishing and maintaining the necessary safeguards: see *Prince Jefri Bolkiah v. KPMG* [1999] 2 A.C. 222. The perception of prejudice can arise not only from a perception of facts giving rise to an actual or potential conflict of interest, but also from a perception of exposure to possible prejudicial influences. The perception of prejudice can therefore arise from the fact that the judge is a partner in a firm which is acting in other matters which may reasonably be feared to expose him to comment or information which may colour his judgment directly or indirectly against a party. [Reference was made to *In re Howard Holdings Inc.* [1998] B.C.C. 549.]

The conflict rules make no exception for absence of knowledge of matters which could give rise to a conflict of interest. If an unappreciated conflict is subsequently discovered the solicitor, just as the solicitor-judge, must withdraw. If judgment has already been delivered it must be set aside if a fair-minded and informed member of the public would conclude that there was a suspicion that the judge was not impartial. If the result of his decision is startlingly adverse to the party alleging apparent bias the reviewing court may the more easily accept the allegation: see *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577.

Since the appearance of bias is tested objectively it is irrelevant whether the judge carried out a conflict search prior to hearing the case. The requirement of disclosure is not a duty of care but a positive precondition for his conduct of

a fair trial; it must therefore be strictly complied with. Even where a conflict search is made and reveals no conflict, the subsequent appearance of such a conflict will nevertheless reflect on the question of bias. The fact that the particular difficulty arises in the use of solicitors as part-time judges must not lead to relaxation of the strict requirements for openness and the objective lack of partiality which confidence in the judicial system requires. Where a solicitor judge discovers an apparent conflict of interest during a hearing he is obliged to make full inquiry into the matter and full disclosure to the parties.

The test of apparent bias is objective so that the judge's statement as to his state of mind or of knowledge is irrelevant. In principle such a statement should not be entertained by the reviewing court. Any explanatory statement the judge gives cannot be accepted at face value.

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Any cross-examination of the judge would be invidious and accordingly the court should investigate the matter for itself from the viewpoint of the reasonable ordinary person, assessing the objective facts available to it: see *Arab Monetary Fund v. Hashim*, 6 Admin.L.R. 348; *Alfred McAlpine Construction Ltd. v. Panatown Ltd.* (unreported), 25 July 1996 and *In re Judge Leckie, Ex parte Felman*, 52 A.L.J.R. 155. It is only if the objective facts justified the conclusion that he had no knowledge of the relevant matter that the court can apply the principle that the judge's ignorance will dispel any fear of apparent bias: see *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142. Alternatively, such a statement can only be entertained if it contains material capable of being examined in the context of all the relevant facts.

On the question of automatic disqualification, again the judge's position within his firm created a situation of conflict which required his automatic disqualification on established principles: see *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] A.C. 119.

E. has not waived her right of objection. There can be no waiver without full knowledge of the facts: see *Ex parte Pinochet Ugarte (No. 2)* and the *Auckland Casino case* [1995] 1 N.Z.L.R. 142. It is not a question of a party being put on notice by a partial disclosure such as the judge made here. It was the judge's responsibility to make full, relevant and voluntary disclosure; parties' relationship with the judge, by the very nature of the judicial process, is not one of equality; they cannot cross-examine him or exert pressure on him for further disclosure or fuller information. [Reference was made to *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd.* (1996) 135 A.L.R. 753.] Since there was no full disclosure E. never had the actual knowledge necessary for her to make her election whether to continue the hearing: see *Peyman v. Lanjani* [1985] Ch. 457.

Robert Jay Q.C. for the defendant in the third case. The law on apparent bias applies the real danger test as defined in *Reg. v. Gough* [1993] A.C. 646 and *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139. That test comes close to requiring the court to ignore appearances. At present the test is not that of reasonable suspicion of bias which is deployed in Scotland. The two tests are not identical but there may be little practical distinction between them: see *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; *Webb v. The Queen*, 181 C.L.R. 41 and *Roylance v. General Medical Council (No. 2)* [2000] 1 A.C. 311.

The test of real danger is arguably the more onerous and, in applying it, the court will ascertain all relevant circumstances before asking the question whether there is a real danger of bias. There is in this respect no real distinction between the court and the hypothetical reasonable man, save that, unlike him, the court will have all the available evidence and know the relevant circumstances. The issue which the court addresses has received various formulations: is the court satisfied that there is no danger of the alleged bias creating injustice; might the tribunal unfairly regard, or have so regarded, with favour or disfavour, the case of a party; is there a

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real danger that the tribunal was unconsciously influenced by pre-existing or prejudiced views; is there a real danger that the tribunal's decision was animated by unconscious extraneous prejudice or predilection? [Reference was made to the *Gough* [1993] A.C. 646 and *Dallaglio* [1994] 4 All E.R. 139 cases and *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167].

Provided that (a) the real danger test is properly interpreted to mean the court's reception, derived from all available evidence, of the possibility of the decision-maker being influenced by unconscious predilection or prejudice and (b) the reasonable suspicion test cannot be understood to mean the intuitive or gut reaction of the hypothetical reasonable man divorced from all or any of the relevant circumstances of the case, the real danger test is sufficiently flexible and the two tests are capable of being assimilated in their practical application. "Real danger" emphasises the condign rigour of the court's inquiry and, on authority, should be preferred.

The recorder's membership of the Association of Personal Injury Lawyers does not give rise to any real danger of bias, nor did his conduct of the hearing. However, his public expression of opinion in a series of articles which have come to the defendant's attention give rise to such a danger. As he sits as a part-time judge, there is a real danger that in approaching his judicial task he is not free from unwitting prejudice and/or pro-claimant predisposition. Where a judge's views are consistently expressed in the public forum in hyperbolic and partisan terms disclosing obvious predilections and where publication of those views occurs so near to the trial date a question will arise whether there is a possibility of those views unwittingly infiltrating the judicial process. In that situation, on a reasonable suspicion test, the defendant would succeed since-(i) it is rare to hold and express such views as firmly and passionately as the judge does, and (ii) parties are entitled to be confident that the judge is temperamentally capable of refraining from descending into the forensic arena. On the higher, real danger, test which requires an exceptional case to be established, the defendant can still succeed: see *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304.

Mrs. Williams, in person, made submissions confined to the merits of her application.

Judith Jackson Q.C. for the applicant in the fifth case. The judge's connection should have disqualified him from determining the application either automatically because of a direct interest (see *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L. Cas. 759 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119) or because of an indirect interest. The question, therefore, is whether there was a disqualifying interest. While the relevant interest need not be pecuniary it must be substantial: see *Ex parte Pinochet Ugarte (No. 2)* and *Rex v. Sunderland Justices* [1901] 2 K.B. 357. The connection must be with a party, and not with counsel: see *Laker Airways Inc. v. F.L.S. Aerospace Ltd.* [1999] 2 Lloyd's Rep. 45. The same principle of disqualification should apply whether the interest is direct or indirect.

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Two tests currently co-exist for establishing the latter interest, namely, the reasonable suspicion and real danger tests. [Reference was made to *Reg. v. Mulvihill* [1990] 1 W.L.R. 438; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119; *Reg v. Chesterfield Borough Council, Ex parte Darker Enterprises Ltd.* (unreported), 18 May 1992; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577; *Reg. v. Gough* [1993] A.C. 646; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139; *Reg. v. South Worcestershire Justices, Ex parte Lilley* [1995] 1 W.L.R. 1595; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd.* [1996] 3 All E.R. 304 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119.] The real danger test looks to the sufficiency of the alleged interest, both in terms of its substance and proximity. Where both are established it is no answer for the judge to assert that he was unaware of the connection. In any event, it would be unsatisfactory for him to do so since public policy militates against a complainant challenging, or the court investigating, the truth of any such assertion. [Reference was made to the *Gough* case [1993] A.C. 646and *Reg. v. Box* [1964] 1 Q.B. 430.]

There is here a continuing commercial relationship between the judge and a party involved in the case before him (see *Najjar v. Haines*, 25 N.S.W.L.R. 224) such that his ruling, which determined the proceedings adversely to the applicant, should be set aside.

Anthony Mann Q.C. and **James Barker** for the plaintiffs in the first and second cases. The judge had no direct pecuniary interest in the case. Therefore the allegation is apparent bias, and the applicable test in English law is the "real danger" test: see the *Gough* case [1993] A.C. 646and *Ex parte Dallaglio* [1994] 4 All E.R. 139. If the test were reasonable suspicion the result of the present case would be the same. Whichever the test, it applies on the basis of all the facts, not just those which give rise to the initial misapprehension on the complainant's part: see *Reg. v. S. (R.D.)* (1997) 151 D.L.R. (4th) 193. The reviewing court will take into account the knowledge and ability of the tribunal to ignore extraneous matters.

The reviewing court will consider whether the judge actually knew of the connection said to give rise to bias: see the *Auckland Casino case* [1995] 1 N.Z.L.R. 142; *Alfred McAlpine Construction Ltd. v. Panatown Ltd*. (unreported), 25 July 1996 and *Clenae Pty. Ltd. v. Australian and New Zealand Banking Group Ltd*. [1999] V.S.C.A. 35. If the link is unknown the danger of bias is the harder to establish. There is no absolute rule that the reviewing court should accept a statement from the judge as to his state of knowledge of facts relevant to the bias allegation. That court could not investigate the judge's motives and could not accept a statement that he was not biased, but it may accept a statement as to the extent of his knowledge at relevant times. It would then be for the court to assess that statement in the context of the case and to accept or reject it. [Reference was made to the *Gough* case [1993] A.C. 646; *Arab Monetary Fund v. Hashim*, 6 Admin.L.R. 348; *Reg. v. Uxbridge Justices, Ex parte Burbridge*, The Times, 20 June 1972; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41; *In re Judge Leckie, Ex parte Felman*, 52 A.L.J.R. 155 and *Liljeberg v. Health Services Acquisition Corporation*,

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486 U.S. 847]. In the instant case the real danger test is not satisfied. "Real" connotes "realistic." Rejecting *E.'s case* does not suggest bias against her. [Reference was made to *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1968] 1 W.L.R. 815; [1969] 1 Q.B. 577.] There is no suggestion of actual knowledge, nor is there any cogent and rational link between the judge's association with his firm and the case before him: see *Aussie Airlines Pty. Ltd. v. Australian Airlines Pty. Ltd*., 135 A.L.R. 753 and *Gregory v. United Kingdom*, 25 E.H.R.R. 577. The judge's ignorance of any connection is a complete answer to the complaint. The judge is not contaminated by his partnership within the firm. The imputation of the knowledge of one partner to another partner is not a universal principle. Were it otherwise the erection of Chinese walls would never be proper or possible in a partnership.

The solicitors' conflict rules are based on different considerations from the rules relating to bias. The former are founded on rules of law and equity that prevent a man from serving two masters; the latter are based on the proper administration of justice and on the principle that justice must be seen to be done. In sitting as a judge the solicitor steps outside his role as a solicitor. If he had contaminating knowledge and objection was taken to his sitting he would obviously recuse himself; but if he had no such knowledge he is not obliged to accede to an objection and to withdraw: see *Rex v. Essex Justices, Ex parte Perkins* [1927] 2 K.B. 475.

The question of waiver does not arise because the allegation of apparent bias cannot be made out. In so far as that question may be relevant, the judge's immediate disclosure was accepted and no further facts were necessary to enable E. to decide whether to waive any objection. Since she took no point on bias she waived her right to object.

Andrew Edis Q.C. and **Ivan Woolfenden** for the plaintiff in the third case. The recorder's approach throughout does not betray bias in favour of the claimant or disfavour against the defendant's case. A judge who deals with cases engaging a specialist area of the law in which he is expert will bring to his task a valuable expertise. He will inevitably have formed opinions on questions arising in that area of practice and his extra-judicial expressions of view should not lead litigants to question his impartiality. The defendant should have been aware of the recorder's

reputation so that there was no need for the recorder to disclose his writings at the outset of the trial. The articles complained of do not indicate an extreme view but rather indicate one that can be reasonably held. Nor do they indicate a view that would affect impartiality in the exercise of judicial functions.

Tess Gill, for the employers in the fourth case, was not called on.

William Norris Q.C. and **Lucy Moorman** for the interested party in the fifth case. The connection between the judge and the interested party was tenuous and remote in the extreme. He cannot be accurately described as being a party to the cause or of having a financial, proprietary or other interest in the outcome of the hearing before him: see *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759; *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119; *Reg. v. Gough* [1993] A.C. 646; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139; *Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd*. [1999] V.S.C.A. 35;

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A.T. & T. Corporation v. Saudi Cable Co. [2000] Lloyd's Rep. 22; *Reg. v. Secretary of State for the Environment, Ex parte Kirkstall Valley Campaign Ltd*. [1996] 3 All E.R. 304 and *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142. The matter before the judge concerned an ancillary question, and his judgment betrays no error of principle so that an appellate court should, on ordinary principles, not disturb the judgment. It would be absurd to suggest that there was a "real danger" or "reasonable suspicion" of bias. Although the real danger test is to be applied (see the *Gough case* [1993] A.C. 646) the same result would follow if the reasonable suspicion test applied.

Although the reviewing court may not always be able to determine the state of the judge's knowledge, it should inquire into the relevant circumstances and need not accept his statement of his knowledge at face value. [Reference was made to the *Gough* case and *Liljeberg v. Health Services Acquisition Corporation*, 486 U.S. 847.] Where the judge is wholly unaware of the connection until after he has determined the case no question of apparent bias arises.

Williamson Q.C., **Jay Q.C.**, **Jackson Q.C.** and **Lloyd Jones Q.C.** replied.

Cur. adv. vult.

17 November. LORD BINGHAM OF CORNHILL C.J. , LORD WOOLF M.R. and SIR RICHARD SCOTT V.-C. handed down the following judgment of the court. 1. This is the judgment of the court on five applications for permission to appeal. The applications have been listed and heard together since they raise common questions concerning disqualification of judges on grounds of bias. At the outset we acknowledge with gratitude the help we have received from Mr. David Lloyd Jones who has made submissions on the law as an amicus.

2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

3. Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case

the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the

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case law, is called "actual bias" are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

4. There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided. The principle was briefly and authoritatively stated by Lord Campbell in *Dimes v. Proprietors of Grand Junction Canal* (1852) 3 H.L.Cas. 759, 793-794, when orders and decrees made by and on behalf of the Lord Chancellor were set aside on the ground that he had had at the relevant times a substantial shareholding in the respondent company:

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence."

5. The rule has been expressed in slightly different terms in different cases. In *Reg. v. Rand* (1866) L.R. 1 Q.B. 230 Blackburn J. said, at p. 232: "There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter…"

6. In *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41 Slade J., giving the judgment of the court, said, at p. 47: "It is, of course, clear that any direct pecuniary or proprietary interest in the subject matter of a proceeding, however small, operates as an automatic disqualification."

7. The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice: see the *Dimes case*, 3 H.L.Cas. 759, in the passage quoted, at pp. 793-794, and *Reg. v. Gough* [1993] A.C. 646, 661,*per* Lord Goff of Chieveley.

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8. In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest. In the *Dimes* case the outcome of the litigation certainly could have had such an effect on the Lord Chancellor's personal position. In *Clenae Pty. Ltd. v. Australia and New Zealand Banking Group Ltd*. [1999] V.S.C.A. 35 it was held that the outcome of the litigation could not have had such an effect. That will often be the case where the judge holds a relatively small number of shares in a large

company and the sums involved in the litigation are not such as could, realistically, affect the value of the judge's shares or the dividend he could expect to receive. The correct approach was in our judgment taken by the majority in the Victoria Court of Appeal in the case cited where, giving the main judgment after reviewing English and Australian authority, Charles J.A. said, at paragraph 59 of the judgment:

"If there is a separate rule for automatic disqualification for financial interest, unrelated to a reasonable apprehension of bias, in my view the irrebuttable presumption of bias only arises (subject to questions of waiver or necessity) where the judicial officer has a direct pecuniary interest in the outcome of the proceeding."

9. Winneke P. agreed, at paragraph 3 of the judgment:

"… I agree with Charles J.A. that authority which binds this court does not compel us to conclude that it is the mere shareholding by a judicial officer ('judge') in a party which, alone, constitutes the 'disqualifying pecuniary interest,' but rather it is the potential interest, created by that shareholding, in the subject matter or outcome of the litigation which is the disqualifying factor."

10. While the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings "however small," there has in more recent authorities been acceptance of a de minimis exception: *B.T.R. Industries South Africa (Pty.) Ltd. v. Metal and Allied Workers' Union*, 1992 (3) S.A. 673, 694; *Reg. v. Inner West London Coroner, Ex parte Dallaglio* [1994] 4 All E.R. 139, 162; *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142, 148. This seems to us a proper exception provided the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification. In any case where the judge's interest is said to derive from the interest of a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself.

11. Until recently the automatic disqualification rule had been widely (if wrongly) thought to apply only in cases where the judge had a pecuniary or proprietary interest in the outcome of the litigation. That is what the *Dimes* case, 3 H.L.Cas. 759 concerned, although the statement of principle quoted above is not in terms so limited. In *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)*

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[2000] 1 A.C. 119, the House of Lords made plain that the rule extended to a limited class of non-financial interests. Lord Browne-Wilkinson said, at p. 135:

"My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties."

Lord Browne-Wilkinson added, at p. 136:

"It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or

disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."

12. The other members of the House agreed that the rule should be extended to the extent indicated, and Lord Hutton observed, at p. 145, that

"there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation."

13. In *Reg. v. Gough* [1993] A.C. 646 Lord Woolf suggested, at p. 673, that the courts should hesitate long before creating any other special category of automatic disqualification: "since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category."

---------- *[2000] Q.B. 451 at 475*

14. With that expression of view Lord Goff, it would seem, agreed, at p. 664, and it has earned support in the High Court of Australia: see *Webb v. The Queen* (1994) 181 C.L.R. 41, 75, *per* Deane J. In *Ex parte Pinochet (No. 2)* [2000] 1 A.C. 119, 139, Lord Goff did not envisage any wider extension. Since any extension of the automatic disqualification rule would also, inevitably, limit the power of the judge and any reviewing court to take account of the facts and circumstances of a particular case, and would have the potential to cause delay and greatly increased cost in the final disposal of the proceedings, we would regard as undesirable any application of the present rule on automatic disqualification beyond the bounds set by existing authority, unless such extension were plainly required to give effect to the important underlying principles upon which the rule is based.

15. Although disqualification under the rule in the Dimes case, 3 H.L.Cas. 759 and *Ex parte Pinochet (No. 2)* is properly described as automatic, a party with an irresistible right to object to a judge hearing or continuing to hear a case may, as in other cases to which we refer below, waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not.

16. In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias. Until 1993 there had been some divergence in the English authorities. Some had expressed the test in terms of a reasonable suspicion or apprehension of bias: see, for example, *Law v. Chartered Institute of Patent Agents* [1919] 2 Ch. 276, 290; *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256, 259; *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, 599, 602, 606; *Reg. v. Liverpool City Justices, Ex parte Topping* [1983] 1 W.L.R. 119, 123; *Reg. v. Mulvihill* [1990] 1 W.L.R. 438, 444. This test had found favour in Scotland (*Bradford v. McLeod*, 1986 S.L.T. 244), Australia (*Reg. v. Watson, Ex parte Armstrong* (1976) 136 C.L.R. 248) and South Africa (the *B.T.R. Industries case*, 1992 (3) S.A. 673). Other cases had expressed the test in terms of a real danger or likelihood of bias: *Reg. v. Rand* (1866) L.R. 1 Q.B. 230, 233; *Rex v. Sunderland Justices* [1901] 2 K.B. 357, 371; *Reg. v. Camborne Justices, Ex parte Pearce* [1955] 1 Q.B. 41, 51; *Reg. v. Barnsley Licensing Justices, Ex parte Barnsley and District Licensed Victuallers' Association* [1960] 2 Q.B. 167, 186; *Reg. v. Spencer* [1987] A.C. 128. Whatever the merits of these

competing tests, the law was settled in England and Wales by the House of Lords' decision in *Reg. v. Gough* [1993] A.C. 646. The gist

---------- *[2000] Q.B. 451 at 476*

of that decision is to be found in two brief extracts from the leading speech of Lord Goff. The first is, at p. 668:

"In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."

The second passage is, at p. 670:

"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him …"

17. This rule has been applied in a number of English cases and Privy Council appeals. It has not commanded universal approval elsewhere; Scotland (*Doherty v. McGlennan*, 1997 S.L.T. 444), Australia (*Webb v. The Queen*, 181 C.L.R. 41) and South Africa (*Moch v. Nedtravel (Pty.) Ltd.*, 1996 (3) S.A. 1) have adhered to the reasonable suspicion or reasonable apprehension test, which may be more closely in harmony with the jurisprudence of the European Court of Human Rights: see, for example, *Piersack v. Belgium* (1982) 5 E.H.R.R. 169; *De Cubber v. Belgium* (1984) 7 E.H.R.R. 236; *Hauschildt v. Denmark* (1989) 12 E.H.R.R. 266; *Langborger v. Sweden* (1989) 12 E.H.R.R. 416. We need not debate

---------- *[2000] Q.B. 451 at 477*

whether the substance of the two tests is different, as suggested in *Webb v. The Queen*, 181 C.L.R. 41. Nor need we consider whether application of the two tests would necessarily lead to the same outcome in all cases. For whatever the merit of the reasonable suspicion or apprehension test, the test of real danger or possibility has been laid down by the House of Lords and is binding on every subordinate court in England and Wales. This test appears to be reflected in section 24 of the Arbitration Act 1996: see *Laker Airways Inc. v. F.L.S. Aerospace Ltd.* [1999] 2 Lloyd's Rep. 45. In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done.

18. When applying the test of real danger or possibility (as opposed to the test of automatic disqualification under the *Dimes case*, 3 H.L.Cas. 759 and *Ex parte Pinochet (No. 2)* [2000] 1 A.C. 119) it

will very often be appropriate to inquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled. As the Court of Appeal of New Zealand observed in *Auckland Casino Ltd. v. Casino Control Authority* [1995] 1 N.Z.L.R. 142, 148, if the judge were ignorant of the allegedly disqualifying interest: "there would be no real danger of bias, as no one could suppose that the judge could be unconsciously affected by that of which he knew nothing …"

19. It is noteworthy that in *Reg. v. Gough* [1993] A.C. 646 evidence was received from the juror whose impartiality was in issue (see pp. 651G and 658D), and reliance was placed on that evidence (see p. 652F); both in the Court of Appeal and the House of Lords it was accepted that if the correct test was the real danger or possibility test the appeal could not succeed, since the allegedly disqualifying association had admittedly not been known to the juror at the time when the verdict had been returned, and therefore there was no possibility that it could have affected her decision: see pp. 652D, 660G and 670G. While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any

---------- *[2000] Q.B. 451 at 478*

knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision.

20. When members of the Bar are appointed to sit judicially, whether full-time or part-time, they may ordinarily be expected to know of any past or continuing professional or personal association which might impair or be thought to impair their judicial impartiality. They will know of their own affairs, and the independent, self-employed status of barristers practising in chambers will relieve them of any responsibility for, and (usually) any detailed knowledge of, the affairs of other members of the same chambers. The position of solicitors is somewhat different, for a solicitor who is a partner in a firm of solicitors is legally responsible for the professional acts of his partners and does as a partner owe a duty to clients of the firm for whom he or she personally may never have acted and of whose affairs he or she personally may know nothing. While it is vital to safeguard the integrity of court proceedings, it is also important to ensure that the rules are not applied in such a way as to inhibit the increasingly valuable contribution which solicitors are making to the discharge of judicial functions. Problems are, we apprehend, very much more likely to arise when a solicitor is sitting in a part-time capacity, and in civil rather than criminal proceedings. But we think that problems can usually be overcome if, before embarking on the trial of any assigned civil case, the solicitor (whether sitting as deputy district judge, assistant recorder, recorder or section 9 judge) conducts a careful conflict search within the firm of which he is a partner. Such a search, however carefully conducted and however sophisticated the firm's internal systems, is unlikely to be omission-proof. While parties for and against whom the firm has acted, and parties closely associated, would (we hope) be identified, the possibility must exist that individuals involved in such parties, and parties more remotely associated, may not be identified. When in the course of a trial properly embarked upon some such association comes to light (as could equally happen with a barrister-judge), the

association should be disclosed and addressed, bearing in mind the test laid down in *Reg. v. Gough*. The proper resolution of any such problem will, again, depend on the facts of the case.

21. In any case giving rise to automatic disqualification on the authority of the *Dimes case*, 3 H.L.Cas. 759 and *Ex parte Pinochet (No. 2)* [2000] 1 A.C. 119, the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve or the day of the hearing. Parties should not be confronted with a last-minute choice between adjournment and waiver of an otherwise valid objection. If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If

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objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. We find force in observations of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union*, 1999 (4) S.A. 147, 177, even though these observations were directed to the reasonable suspicion test:

"It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

22. We also find great persuasive force in three extracts from Australian authority. Mason J., sitting in the High Court of Australia, said in *In re J.R.L., Ex parte C.J.L.* (1986) 161 C.L.R. 342, 352:

"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

23. In *In re Ebner* (1999) 161 A.L.R. 557, 568, para. 37, the Federal Court asked:

"Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?"

24. In the *Clenae case* [1999] V.S.C.A. 35 Callaway J.A. observed, at paragraph 89(e):

---------- *[2000] Q.B. 451 at 480*

"As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her

head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."

25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v. Icori Estero S.p.A*. (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 C.L.R. 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

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26. We do not consider that waiver, in this context, raises special problems: see *Shrager v. Basil Dighton Ltd*. [1924] 1 K.B. 274, 293; *Rex v. Essex Justices, Ex parte Perkins* [1927] 2 K.B. 475, 489; *Ex parte Pinochet (No. 2)* [2000] 1 A.C. 119, 136-137; the *Auckland Casino* case [1995] 1 N.Z.L.R. 142, 150, 151; *Vakauta v. Kelly*, 167 C.L.R. 568, 572, 577. If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so. What disclosure is appropriate depends in large measure on the stage that the matter has reached. If, before a hearing has begun, the judge is alerted to some matter which might, depending on the full facts, throw doubt on his fitness to sit, the judge should in our view inquire into the full facts, so far as they are ascertainable, in order to make disclosure in the light of them. But, if a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is in our view enough if the judge discloses what he then knows. He has no obligation to disclose what he does not know. Nor is he bound to fill any gaps in his knowledge which, if filled, might provide stronger grounds for objection to his hearing or continuing to hear the case. If, of course, he does make further inquiry and learn additional facts not known to him before,

then he must make disclosure of those facts also. It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should.

Locabail (U.K.) Ltd. V. Bayfield Properties Ltd and another.

Locabail (U.K.) Ltd. and another V. Waldorf Investment Corporation and others

The background

27. Mr. Lawrence Collins is a solicitor and a senior partner in Herbert Smith. Since 1995 he has been head of Herbert Smith's litigation and arbitration department. Herbert Smith is a firm of some 145 partners. Mr. Collins became Queen's Counsel in 1997 and in the same year was appointed by the Lord Chancellor under section 9(4) of the Supreme Court Act 1981 to sit as a deputy High Court judge in the Chancery Division. He has sat on a number of occasions in that capacity.

28. In October and November 1998 Mr. Collins, sitting as a deputy High Court judge, heard two cases in each of which the plaintiff was Locabail (U.K.) Ltd. and in each of which Locabail was attempting to enforce charges securing repayment of advances made to Mr. Emmanuel, Mrs. Emmanuel's husband, or to companies controlled by him. In one case, the security consisted of Hans House in Knightsbridge. Hans House was owned by Waldorf Investment Corporation ("Waldorf"), a Liberian company controlled by Mr. Emmanuel. In the other case the security consisted of Hawks Hill, a country estate in Chobham, Surrey. Hawks Hill had been owned by Aurora Enterprises S.A., a Panamanian company also controlled by Mr. Emmanuel, but in 1995, by agreement between Locabail and Mr. Emmanuel (or his companies), was transferred to Bayfield

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Properties Ltd. ("Bayfield"), an Isle of Man company controlled by Mr. Emmanuel. Locabail's charge over Hawks Hill was replaced by a charge in favour of Allied Trust Bank to secure funds advanced by Allied Trust Bank to Bayfield for the purchase of Hawks Hill from Aurora.

29. Allied Trust Bank commenced mortgage proceedings for possession of Hawks Hill and obtained a possession order on 18 June 1996. A few days later Locabail took an assignment of the Allied Trust Bank charge and was substituted as plaintiff.

30. Mrs. Emmanuel claimed to be the beneficial owner of Hawks Hill. Her claim was based on representations alleged to have been made to her by Mr. Emmanuel prior to their marriage and on the expenditure by her of money in reliance on the representations. In January 1997 she became a defendant in the Bayfield action and applied to have the possession order set aside.

31. Hans House had been the matrimonial home of Mr. and Mrs. Emmanuel. It had been charged to Locabail. In April 1998 Locabail commenced mortgage proceedings for possession of Hans House. The defendants were Waldorf and Mr. and Mrs. Emmanuel. Summary judgment under R.S.C., Ord. 14 was obtained by Locabail in August 1998. Waldorf and Mr. Emmanuel consented to the order. Mrs. Emmanuel did not. She contended that Mr. Emmanuel had assured her that she had a one half share in Hans House, that in reliance on that assurance she had expended money on the property and that in consequence she had an equitable interest binding on Locabail. She had, however, signed a letter of consent to the charge and Locabail had been provided with a certificate from her solicitor stating that he had advised her separately and that she appeared to have given her consent voluntarily. So summary judgment for possession was given. After the order had been made Mrs. Emmanuel changed her solicitors, gave notice

of appeal and filed evidence in support of a contention that her consent had been given as a result of undue influence.

32. The trial of the Hawks Hill action, in which Mrs. Emmanuel was applying for the order for possession of Hawks Hill to be set aside, began on 19 October 1998. The trial lasted 16 days. The deputy judge reserved his judgment. Later, in November 1998, he heard Mrs. Emmanuel's appeal against the Order 14 judgment in the Hans House action. He reserved his judgment. Both judgments were given together on 9 March 1999. They were adverse to Mrs. Emmanuel. The deputy judge did not accept, either in relation to Hawks Hill or in relation to Hans House, that Mrs. Emmanuel was entitled to the equitable interests she had claimed. It is not necessary for the purposes of this judgment to describe why it was that he came to those conclusions.

33. On 29 March 1999, before the orders made on 9 March had been drawn up, Mrs. Emmanuel made an application to the deputy judge asking him to disqualify himself from further dealing with the two cases and to direct a rehearing before another judge. Mrs. Emmanuel's application was based upon the fact that Herbert Smith had been, and probably still was, acting for a Russian company, Sudoexport, which had claims against Mr. Emmanuel and against a company, Howard Holdings Inc., controlled by Mr. Emmanuel. Sudoexport had obtained a bankruptcy

order against Mr. Emmanuel and a winding up order against Howard Holdings Inc. Herbert Smith were acting for the liquidator of Howard Holdings Inc., as well as for Sudoexport. It seems that the company had substantial claims against Mr. Emmanuel. For reasons which we will expand upon later, Mrs. Emmanuel contended that the deputy judge, being a partner in Herbert Smith, was not a proper person to have been the judge in the cases in which Locabail was seeking to enforce the securities obtained from Mr. Emmanuel's companies. It was said that a reasonable person, knowing the circumstances, might reasonably feel doubts as to the ability of the deputy judge to be impartial and unbiased. The deputy judge gave judgment on the same day, 29 March, dismissing the application.

34. Mrs. Emmanuel has applied for permission to appeal against the judgments given on 9 March and also against the deputy judge's dismissal of her application on 29 March. She has filed, with her application for permission to appeal, a draft notice of appeal setting out the proposed grounds of appeal and a supplemental document giving details of the respects in which it is contended that the deputy judge's findings of fact and handling of evidence were unsatisfactory. The hearing before us, however, has been confined to a consideration of Mrs. Emmanuel's bias point. If she succeeds on that point, she is entitled to a new hearing before another judge of the Hawks Hill application and the Hans House appeal. If she fails on that point she is still able to prosecute her application for permission to appeal on the other grounds set out in her draft notice of appeal.

35. Mrs. Emmanuel's bias case is based on the solicitor/client relationship between Herbert Smith and Sudoexport and between Herbert Smith and the liquidator of Howard Holdings Inc. These matters came to light in the course of the hearing of the Hawks Hill case. The manner in which that happened appears from the deputy judge's 29 March judgment:

"It is not suggested that I knew of these matters prior to the commencement of the trial. On Day 7 of the trial in the Hawks Hill action"-Tuesday, 27 October 1998-"Mrs. Emmanuel produced further discovery of the file in the possession of the solicitors who had acted for her in her divorce proceedings against Mr. Emmanuel. Since her advisers in the Hawks Hill action had not previously seen the file, and since it inevitably contained privileged material, I did not sit for a substantial part of that day so that the matrimonial file could be examined by Mrs. Emmanuel's advisers and privileged material removed. The advisers to [Locabail] and I were provided with the remainder of the file towards the end of that day. The first document

in the file was a fax sent in June 1996 from Mr. Peter Taroulareas, the first husband of Mrs. Emmanuel, to her solicitors, attaching a press cutting from August 1995 about a bankruptcy order obtained against Mr. Emmanuel by Sudoexport."

The press cutting to which the deputy judge referred said, under the headline "Greek shipowner in bankruptcy puzzle," that: "Herbert Smith-

the top British solicitors working for Russian trading group Sudoexport-confirmed … that it had won a bankruptcy order against Emmanuel."

37. The article referred to Mr. Emmanuel's purchase from Sudoexport of a ship for U.S.$20m. and went on "The shipowning company was alleged to have collapsed owing the Russians U.S.$10m. … Sudoexport applied for the company to be wound up in London. The petition was opposed but Emmanuel was asked to pay Sudoexport's legal costs of £20,000. Emmanuel is alleged to have not done so and Herbert Smith, acting for the Russians, started proceedings for personal bankruptcy."

38. The shipowning company referred to in the article was Howard Holdings Inc., but it may be Mrs. Emmanuel did not know that until the deputy judge gave his 29 March judgment.

39. The deputy judge, having come across the press cutting during the course of his perusal of the matrimonial file in the evening of 27 October 1998, made an immediate disclosure on the morning of 28 October. We have been supplied with a transcript of what he said:

"*Judge*: Mr. Mann and Miss Williamson, I had a quick flick through Bundle T last night and I discovered on the second page for the first time that the firm of which I am a partner seems to have had something to do with attempting to get a bankruptcy order against Mr. Emmanuel. It is the first time I have heard of it, and I had nothing whatever to do with it."

40. Neither Mr. Mann for Locabail nor Miss Williamson for Mrs. Emmanuel made any response to the disclosure made by the deputy judge. Neither asked for time to consider the position more fully. Neither asked for any additional information about the matters the deputy judge had referred to. Each side, of course, had its own copy of the press cutting in Bundle T. Both sides were content for the hearing to continue. It did continue for a further eight days after which, as we have said, judgment was reserved and eventually given on 9 March 1999.

The issues

41. The arguments put forward in support of the contention that the deputy judge should have acceded to the 29 March application were essentially the same below as those advanced before us. Three points are made by Miss Williamson.

42. She submits that there was a conflict of interest between Mrs. Emmanuel and Herbert Smith's clients, Sudoexport and/or the liquidator of Howard Holdings Inc. The conflict of interest is constructed as follows: Sudoexport has money claims against Mr. Emmanuel. So does Howard Holdings Inc. in liquidation. Locabail is one of Mr. Emmanuel's creditors. If Mrs. Emmanuel's claims to equitable interests in the two properties were to succeed, there would be a reduction in the value to Locabail of its security and an increase in the unsecured debt owing by Mr. Emmanuel to Locabail. This would be detrimental to the ability of Sudoexport and the liquidator of Howard Holdings Inc. to obtain payment of the sums owing to them by Mr. Emmanuel. The deputy judge explained the point in his judgment: "if [Mrs. Emmanuel] failed, [Locabail]

would be removed as a creditor in competition with Sudoexport". There is, therefore, Miss Williamson submitted, a conflict of interest between Mrs. Emmanuel and Herbert Smith's clients.

43. Miss Williamson's second point was that the conflict of interest between Mrs. Emmanuel and Herbert Smith's clients would have disqualified Herbert Smith from acting as Mrs. Emmanuel's solicitor. She relied on para. 15.01 of the Guide to the Professional Conduct of Solicitors, 7th ed. (1996), published by the Law Society:

"A solicitor or firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients …"

44. Miss Williamson's submission was that if a conflict of interest prevented a solicitor from accepting instructions to act for someone, the conflict would be sufficient to disqualify the solicitor from sitting as a judge on a case in which that person was a party.

45. Miss Williamson's third point was based on the likelihood that, in the proceedings in which Herbert Smith had acted for Sudoexport and for Howard Holdings Inc. (in liquidation) against Mr. Emmanuel, allegations of a discreditable nature had been made against Mr. Emmanuel. This, submitted Miss Williamson, gives rise to a risk that Mrs. Emmanuel, and her witnesses in the Locabail litigation who were associates of Mr. Emmanuel, may in the eyes of the deputy judge have become tarnished by their association with Mr. Emmanuel.

46. These were the three main points relied on by Miss Williamson in support of her submission that there was a real danger that the deputy judge might, in hearing the Hawks Hill application and the Hans House appeal, have been biased against Mrs. Emmanuel.

47. There was an additional issue. When, on Day 8 of the hearing, the deputy judge made the disclosure recorded in the transcript, Mrs. Emmanuel could then have made an objection to the deputy judge continuing to hear the case. Or she could have asked for time to consider the position. She did neither, but allowed the hearing to continue to a conclusion. She could, after the Hawks Hill hearing had come to an end, have objected to the deputy judge hearing the Hans House appeal. She did not do so, and, without objection, he heard the appeal. Thereafter, during the three and half month delay before the reserved judgment was delivered, no bias objection was made. An inference that might be drawn is that Mrs. Emmanuel wanted to await the result of the two hearings, and only made her bias objection when she knew she had lost. So the question arises whether she must be taken to have waived any bias objection.

48. As to this, Mrs. Williamson's response was to submit, first, that the disclosure made by the deputy judge was not complete disclosure, second, that a waiver could only be effective when made by a person with full knowledge of the relevant facts and, third, that in view of Mrs. Emmanuel's incomplete knowledge of the circumstances of Herbert Smith's involvement in the litigation against her husband, she was never put to her election as to what she should do and waiver could not be raised against her.

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49. The "waiver" issue is one which, logically, falls to be considered after the bias issues have been considered.

The bias issues

50. This is not a case in which actual bias on the part of the deputy judge is alleged. Is it a case in which the judge has a sufficient pecuniary or proprietary interest in the outcome of the trial so as to attract the

automatic disqualification principle expressed in the *Dimes case*, 3 H.L.Cas. 759? If it is, then the deputy judge is automatically disqualified. If it is not, then it is a case to which the principles expressed in *Reg. v. Gough* [1993] A.C. 646 must be applied. It was suggested by Miss Williamson that this was a case to which the Dimes case applied. Her argument went like this. The deputy judge is a partner in Herbert Smith. Herbert Smith was acting for Sudoexport and Howard Holdings Inc. in litigation against Mr. Emmanuel. Success in achieving the maximum possible recovery from Mr. Emmanuel would enhance the goodwill of Herbert Smith and thereby tend to increase its profits. The deputy judge would share in the firm's profits. Miss Williamson suggested, also, the possibility that Herbert Smith might be acting under a conditional fee agreement with fees dependent on the level of recoveries extracted from Mr. Emmanuel. But in order to attract the *Dimes* consequence of automatic disqualification something more must, in our judgment, be present than the tenuous connection between the firm's success in an individual case on the one hand and the firm's goodwill and the level of profits on the other. And if the pecuniary or proprietary interest has to depend upon the existence of a conditional fee agreement of the unusual character suggested by Miss Williamson, there must be at least some evidence to suggest the existence of such an agreement. Here there is none. Miss Williamson's suggestion is wholly speculative and hypothetical. In our judgment this is not a case to which the *Dimes* principle of automatic disqualification applies. The *Gough* test must be applied and the court must ask itself whether "in the circumstances of the case… it appears that there was a real likelihood, in the sense of a real possibility, of bias" on the part of the deputy judge: see [1993] A.C. 646, 668, *per* Lord Goff.

51. In answering this question, the court must take into account the actual facts as disclosed by the evidence and, in particular, what it was that the judge knew at the time the case was being heard. In *Reg. v. Gough* evidence was received from a juror as to whether she recognised the name "Gough" as being the name of the neighbour whom she knew as "Steve." She said she did not. She said she had had no idea that her next door neighbour, "Steve", was the brother of the accused. This absence of knowledge of the connection between "Steve" and the accused formed part of the basis on which the House of Lords (and the Court of Appeal) assessed whether there was any real danger of bias.

52. In the present case, the deputy judge told the parties, when he made the disclosure on 28 October 1998, that he knew no more of the litigation in which Herbert Smith were acting than was disclosed by the article. No one then or since has suggested that that was not true. In his 29 March 1999 judgment the deputy judge referred to remarks made by

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Lord Denning M.R. in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon* [1969] 1 Q.B. 577, to the effect that a barrister or solicitor should not sit as a judge on a case to which one of his clients was a party, nor on a case where he was already acting against one of the parties, and continued:

"It is for that reason that I, and no doubt others who sit in a part time capacity, take steps to discover whether that is so. I should add that in the Hawks Hill action Bayfield Properties Ltd. (by then controlled by the mortgagees of its shares) consented to the possession order and took no further part in the proceedings; and that in the Hans House action Waldorf Investment Corporation and Mr. Emmanuel were not parties to the appeal: they did not appear in the action, and consented in writing to the possession order."

53. It is clearly to be inferred from this passage that the deputy judge, before he heard the Hawks Hill application and the Hans House appeal, had a conflict search carried out within Herbert Smith in order to make sure that his firm was not acting for or against Locabail or for or against Mrs. Emmanuel. He did not, it must also be inferred, make a conflict search to ascertain whether or not his firm was acting for or against Mr. Emmanuel.

54. In his 29 March judgment the deputy judge identified an important question:

"No doubt there may be cases in the future where, notwithstanding conflict searches, the fact that a large firm is acting for or against a party, or an entity connected with a party, will not be known to a deputy judge, and might not emerge until after judgment has been given. The question might then arise as to whether that would in itself require the judgment of a judge who did not know of the connection to be set aside."

55. This is a question that we have put to ourselves. In our view, once the hypothesis that the judge "did not know of the connection" is accepted, the answer, unless the case is one to which the *Dimes case*, 3 H.L.Cas. 759 applies, becomes obvious. How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest? In pressing her case on this point Miss Williamson argued that it was incumbent upon the deputy judge, who had acquired from the press cutting limited knowledge of a connection between his firm and Mr. Emmanuel, to make inquiries in order to discover and then to disclose to the parties the full circumstances of the connection. Unless this were done, she submitted, the real danger of bias test would be satisfied. We do not accept this. Miss Williamson, in our view, is confusing the *Dimes* approach with the *Gough* approach. If the *Dimes case* applies, that is if the judge has a sufficiently significant pecuniary or proprietary interest in the outcome of the trial, the knowledge or absence of knowledge of the judge is, in principle, irrelevant. If a judge with limited knowledge of some indirect connection between himself and the case does not make any further inquiries, there may be some risk, an outside chance, that inquiries, if made, would reveal some disqualifying pecuniary or proprietary interest.

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If there is in fact such an interest, the judge's lack of knowledge of it or forgetfulness about it will not enable the *Dimes* principle of automatic disqualification to be avoided. But if there is no such interest, and there is none in the present case, the *Reg. v. Gough* test must be applied and, for that purpose, all that is necessary is to ask whether, in the light of the judge's actual knowledge at the time of the hearing and of any other relevant facts established by the evidence, the real danger of bias test has been satisfied.

56. The matters relied on by Miss Williamson as demonstrating the requisite real danger must be considered cumulatively. There are three matters relied on. Each has been previously referred to in this judgment.

57. First, there is the point that Herbert Smith's clients, Sudoexport and Howard Holding Inc. in liquidation, had an interest in the failure of Mrs. Emmanuel's claims to beneficial interests in Hawks Hill and Hans House. The success of these claims would reduce the assets to which Locabail could look in order to obtain payment of its secured debts. The balance remaining owing to Locabail would increase the amount of the debts which would rank for dividend in Mr. Emmanuel's bankruptcy and reduce the amount of any dividend that creditors might receive. Hence the conflict. The point, when explained by Miss Williamson, was easy enough to follow. It was not one, however, which would immediately occur to even an informed reader of the press cutting disclosed on 28 October. It plainly did not occur to the deputy judge, nor did it occur to Mrs. Emmanuel or her lawyers. It did not occur to anyone at the time the disclosure was made that Sudoexport might have an interest in the failure of Mrs. Emmanuel's claims. All the facts on which the alleged conflict of interest depended were known at the time. The press cutting disclosed that Herbert Smith was acting for Sudoexport, that Sudoexport had many claims against Mr. Emmanuel and that Sudoexport had obtained a bankruptcy order against Mr. Emmanuel. Mr. Emmanuel's connection with Hawks Hill and Hans House was, of course, known to everyone. So was his potential indebtedness to Locabail. So was the fact that the deputy judge was a Herbert Smith partner. But the alleged conflict of interest occurred to no-one. Why should it have occurred to the reasonable onlooker?

58. Miss Williamson placed reliance on the Law Society's conflict rules. These, it was argued, would have disqualified the deputy judge-or Herbert Smith as a firm-from acting for Mrs. Emmanuel or for

Locabail in the Hawks Hill or Hans House litigation. We think that is probably correct. We see the force of Miss Williamson's submission that, if a conflict prevents a solicitor from acting for a party to litigation, the conflict must surely also disqualify the solicitor from sitting as a deputy judge in that litigation. But the submission is, in our opinion, too inflexible. Everything depends on the circumstances. If a serious conflict of interest becomes apparent well before the hearing is due to commence, it seems plain to us that the judge should not sit on the case. This is so whether the judge is a full-time judge or a solicitor deputy or a barrister deputy. On the other hand, if a conflict does not become apparent until very shortly before the hearing or during the hearing, the position may be different. The course the judge, or deputy judge, should take will depend on all the circumstances.

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Inflexible rules are best avoided. Plainly the judge should not sit, no matter what inconvenience to the parties may result, if he doubts his ability to be impartial. But, short of that, a number of variable factors will need to be taken into account. What is the nature of the conflict of interest? Are the parties willing for the judge to hear the case? Do they positively want him to hear the case rather than have to suffer an adjournment? Is another judge available to take on the case? If the case has already started, how long has it been going on and how much is left? What will be the expense consequences for the parties if the judge withdraws? How will it appear to the reasonable onlooker if the judge does not withdraw?

59. Of these questions perhaps only the first and the last are directly relevant to the *Gough* test. But it must be remembered that in the *Gough case* [1993] A.C. 646 the arguably damaging relationship between the juror and the accused's brother only came to light after the trial was over. In a case in which before or during the trial the facts relating to the alleged bias have been disclosed to the parties, it seems to us right that attention should be paid to the wishes of the parties. They are the principals. If they are content that the trial should proceed the judge should, in our view, except where he doubts his ability to be impartial, be very slow to abort the trial. If one party wants the trial to continue and the other wants it aborted, the judge must decide what to do, weighing all the factors and asking the questions to which we have referred. It follows that we do not accept that the discovery of a conflict of interest which, under the Law Society's conflict rules, would disqualify a solicitor from acting for one or other of the parties to a case necessarily bars the solicitor from hearing the case as a deputy judge or requires a hearing already started to be aborted or a judgment given on the case to be set aside. Everything depends on the circumstances of the particular case.

60. The second point relied on by Miss Williamson is based upon the deputy judge's interest in fees earned by Herbert Smith. The point has already been discussed in this judgment. It is as tenuous and insubstantial for the purposes of the *Gough* test as it is for the purpose of establishing that the deputy judge had a sufficient pecuniary or proprietary interest in the outcome of the litigation to attract automatic disqualification.

61. Miss Williamson's third point was based upon the belief that, in the Sudoexport litigation against Mr. Emmanuel and the litigation against him brought by the Howard Holdings Inc. liquidator, discreditable allegations about him were likely to have been made, and upon a consequent fear that these allegations might tarnish Mrs. Emmanuel and her witnesses in the eyes of the deputy judge. This point has, in our judgment, no merit at all. First, Mrs. Emmanuel, who is estranged from her husband, has in hearings before the deputy judge herself made discreditable allegations about him. Second, as the deputy judge rightly pointed out in his 29 March judgment, it is the duty of a judge to put out of mind irrelevant or immaterial matters, particularly those of a prejudicial character. Knowledge by a judge of such matters goes nowhere towards establishing a real danger of bias.

62. In considering the cumulative weight of these matters, there are one or two other submissions made by Miss Williamson that should be mentioned.

63. She submitted that the deputy judge's statement on 28 October that he knew no more of the Sudoexport matters than was contained in the press cutting should not be entertained. His state of knowledge, she submitted, was irrelevant. This submission is contrary to authority. In *Reg. v. Gough* [1993] A.C. 646 an affidavit from the juror as to the juror's state of knowledge was accepted.

64. Mr. Mann, counsel for Locabail, submitted that there was no absolute rule as to whether or not the court should accept a statement from the judge as to his or her state of knowledge of facts relevant to a bias allegation. He submitted that although the court could not investigate the judge's motives, and so could not accept a statement from the judge that he was not biased, the court could accept, and if necessary test by reference to the facts of the case, statements by the judge as to what he knew or did not know at the relevant time. We think this is right and in accordance with authority. If the judge's statement about his knowledge is, objectively viewed, cogent, then that is the basis on which the reasonable onlooker, or the court personifying the reasonable onlooker, will ask whether there was any real danger of bias. If the judge's statement is, objectively viewed, an improbable one, then that is how the reasonable onlooker will approach it.

65. Miss Williamson challenged the cogency of the deputy judge's statement that he knew nothing more about the Sudoexport litigation than was contained in the press cutting. She submitted that, in the circumstances, "the mere fact that the firm is dealing with the matter which is a conflicting matter must give rise to an expectation that the [solicitor judge] will know at least something about it." We regard this proposition, when applied to a firm like Herbert Smith with around 145 partners and over 300 assistant solicitors, as wholly unreal. We do not think there was any such expectation.

66. We regard the deputy judge's statement that he had not known of the matters disclosed in the press cutting until he read it as eminently believable. There is nothing that casts doubt on the statement. Moreover no doubt as to the accuracy of the statement was raised by Mrs. Emmanuel or her lawyers either at the time or at any time until after judgment had been given against her.

67. In our judgment the reasonable onlooker, and the court personifying the reasonable onlooker, would accept the deputy judge's statement about his knowledge and, on that basis, would find no difficulty in concluding that there was no real danger that the judge had been biased.

Waiver

68. In our judgment, Mrs. Emmanuel and her lawyers had to decide on 28 October what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another

judge. They could have told the judge they had no objection to him continuing with the hearing. In the event they did nothing. In doing nothing they were treating the disclosure as being of no importance. The hearing then continued for a further seven days, judgment was reserved, the Hans House appeal was heard, judgment was reserved, and judgment in both cases was given three and half months later. During all this period Mrs. Emmanuel and her lawyers did nothing about the disclosure that had been made on 28

October. They only sprang into action and began complaining about bias after learning from the deputy judge's judgment that Mrs. Emmanuel had lost.

69. Mrs. Emmanuel's application for permission to appeal and draft notice of appeal raise a large number of objections to the 9 March judgment expressed over several pages. We are concerned with none of these objections. They may or may not be well founded. The deputy judge may or may not have been unfair to Mrs. Emmanuel in the way in which he dealt with her evidence and that of her witnesses. These are matters which must be raised with another court on another occasion. We are concerned only with the complaint based upon an appearance of bias allegedly produced by Herbert Smith's involvement in the litigation against Mr. Emmanuel. This involvement was, in its essentials, disclosed on 28 October. It was not open to Mrs. Emmanuel to wait and see how her claims in the Locabail litigation turned out before pursuing her complaint of bias. Miss Williamson protests that on 28 October not enough was disclosed to put Mrs. Emmanuel to her election. We disagree. The essentials of the conflict of interest case that is now relied on were to be found in the press cutting. Mrs. Emmanuel wanted to have the best of both worlds. The law will not allow her to do so.

70. We agree with the reasons given by the deputy judge in his 29 March 1999 judgment for dismissing Mrs. Emmanuel's bias application. We refuse permission to appeal from that judgment.

Timmins V. Gormley

71. This case has caused us particular concern. The defendant, Timothy Gormley, seeks permission to appeal against the judgment of Mr. Recorder Braithwaite given on 3 June 1999. At the Liverpool County Court the recorder awarded the claimant, Margaret Timmins, £227,123.

72. Mr. Robert Jay who represents the defendant made his submissions with admirable moderation and precision. In addition to relying on a number of other grounds of appeal, the defendant contends that the judgment of the recorder should be set aside for apparent bias, that is, a real danger of bias on the part of the recorder. In support of his allegation of bias Mr. Jay relies on certain articles written by the recorder which he submits indicate that there is a real danger that the recorder at the time of the trial was or could have been influenced by an unconscious but settled prejudice against the insurers of the defendant who are the real defendants in this case. Mr. Jay also submits that the findings which the judge made were so favourable to the claimant that they provide support for this allegation of bias.

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73. The action arose out of a traffic accident on 14 October 1994. The claimant commenced proceedings on 1 November 1995. She claimed damages for her injuries. These include injury to her cervical and thoracic spine. She also claimed special damages, which included continuing loss of earnings. She initially limited her claim to £25,000. Promptly on 20 November 1995 a defence was filed. The defence admitted negligence but not the damages. On 22 November 1995 the claimant obtained judgment for damages to be assessed. The defendant was guilty of no delay. However, it was not until 19 March 1999 that the claimant filed her final schedule of special damage. By that time the sum specified had grown to £199,413, including past loss of earnings amounting to £32,120 and future loss of earnings amounting to £133,750. The future loss of earnings was calculated on the basis that the claimant would never work again. A counter-schedule was filed on behalf of the defendant. This accepted the arithmetical calculation of the claim but put in issue the claimant's alleged inability to work.

74. In general it would not be unfair to say that the recorder determined almost every issue in favour of Mrs. Timmins. He found that before the accident she was a happy and fulfilled person. There were indications in the medical evidence that she was not a reliable historian. The recorder indicated in his

judgment that he had "a suspicion" that part of the reason for this was that "doctors sometimes do not have the time to listen and to understand what is troubling somebody." He thought that on all matters relevant to his judgment Mrs. Timmins was in fact actually telling him the truth. The recorder considered that the defendant's doctor was "slightly dismissive" of the claimant's difficulties. He preferred the claimant's medical evidence to that of the defendant. He concluded that although the defendant relied on a video which the defence had arranged to be taken, it did not support his case but, on the contrary, showed the claimant was severely handicapped by her ongoing problems. The accident had left her "crippled" in a "holistic sense." It had spoilt her life. The recorder indicated, in case there was an appeal, that the transcript would not be able to convey the flavour of the manner in which the claimant gave evidence.

75. In addition to his practice in personal injury cases, primarily but not exclusively on behalf of claimants who are seeking damages for personal injuries, Mr. Braithwaite is a relatively prolific writer in the area in which he practises. He is a consultant editor of the well known and respected textbook *Kemp & Kemp, The Quantum of Damages*. Mr. Braithwaite in a letter to the court points out that it is a fundamental part of the policy of that book that it should not favour either claimants or defendants. He has written extensively on personal injury topics in almost all the publications devoted to that subject. He has also lectured, appeared on television and acted abroad as an expert on English personal injury law.

76. The flavour of the four articles relied on as suggesting bias can only be properly assessed by reading them as a whole. However, that in *The Lawyer* of 21 June 1999, which is after the trial, is probably the most revealing. It examines the Access to Justice reforms in the context of personal injury and clinical negligence claims. It suggests that the reforms are unrealistic in their expectations of defendants. It is not credible that

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they "would recognise that it was their responsibility to give the claimant real quality of life, whatever the cost. And they would refrain from attacking a claimant's credibility without good cause. If someone's life had been ruined they would do their utmost to deliver fair and adequate compensation within a reasonable time frame." (See p. 28.) The Access to Justice approach, Mr. Braithwaite considered, was likely "to remain a dream." It was inconsistent with the adversarial system in which lawyers had spent their lives. "The chances of them changing behaviour overnight at this stage are as unlikely as that of global insurers willingly [opening] their coffers to pay paralysed and brain-damaged accident victims the sums to which they are justly entitled." The article suggests that "delaying tactics" are often premeditated, in the hope that the case will just go away; that when an offer is eventually made it is intended that the victim will accept a smaller sum than is deserved, in order to put an end to the ongoing stress of the litigation process. "Denying liability in cases where it is clear that liability should not be questioned-for example where drivers have already been convicted of dangerous or drunk driving-is common." Mr. Braithwaite adds that it is only with the assistance of determined lawyers that claimants are likely to obtain a just settlement. He also makes adverse comments on experts who specialise "in personal injury as 'defendant' experts." The article does however end with an acknowledgement that to a limited extent lawyers of good quality and insurers who are decent and humane are coming together to resolve disputes without the intervention of the courts and the reforms may be a catalyst which will accelerate this trend.

77. The next article upon which Mr. Jay relies is an article in a special issue of *Quantum* (Double issue 4 and 5, 4 September 1998) devoted to the decision of the House of Lords in *Wells v. Wells* [1999] 1 A.C. 345. That decision resulted in successful personal injury claimants receiving substantially increased damages for future long term care and long term loss of earnings. The article contained a contribution from the recorder and a contribution from a solicitor who was expressing "the defendants' view." The recorder considered the decision a "wonderful victory" for claimants generally and for Mr. Kemp who had been arguing for the change reflected in the decision of the House of Lords for many years.

78. Neither of the articles to which we have referred so far are couched in language which can be criticised as being inappropriate. They do make clear that the recorder is very sympathetic to the position of claimants who are pursuing claims for personal injuries. The earlier article in addition indicates that the recorder strongly disapproves of insurers who in his eyes adopt unacceptable practices. However it cannot be said it is inappropriate for a judge to hold firm views as to insurers who adopt tactics of this nature. After all, the Civil Procedure Reforms were in part designed to prevent practices of the sort of which the recorder complains occurring in the future. The recorder has reservations as to whether the reforms will bring about the change of culture which is necessary. He is entitled to have reservations. While it does lack balance, the article does not exhibit such a lack of proportion that it can be regarded as showing a blinkered approach. As to the *Wells v. Wells* article, it could be said that the decision

was rectifying a previous state of affairs which was not fair to claimants and the recorder was entitled to welcome the decision.

79. The next article relied upon by Mr. Jay was also in *Quantum* (Issue 3, 10 August 1998). It contains a description of a case which the recorder had recently successfully conducted on behalf of a claimant. It is highly critical of the conduct of the defendant's insurers in that case. It refers to them in trenchant terms as not doing anything to assist the claimant in her plight. The article describes the defendant's "team" as apparently lacking compassion and perception and their conduct as reminding him "just how badly these cases can be managed." The final article appeared in *Personal and Medical Injuries Law Letter*, vol. 15, No. 7, July 1999. This time the article is a report on a case in which the recorder was not personally involved. The case concerned a claim by a tetraplegic. It suggests that the defence team had targeted the case "intending to create a precedent to discourage plaintiffs generally, and apparently set out to attack both the plaintiff and his experts" when the particular plaintiff had an excellent record. The recorder indicates that the case has lessons for plaintiffs' lawyers: "First, we should not allow ourselves to be deterred by intimidatory tactics by defendants. Second, if a plaintiff's claim is carefully researched and properly presented, it ought to succeed." It is not possible for us to say whether the recorder's criticisms are or are not justified. However, we note that the plaintiff was successful in obtaining judgment for a very substantial sum. It was a much larger sum than the defendant's insurers were prepared to pay.

80. When considering the weight which should be attached to these articles, it is necessary to bear in mind that they are only a small selection of the recorder's extensive writing on the subject of personal injuries. They have been perfectly properly selected because it is thought they support the defendant's contention that the recorder is a committed advocate of the cause of claimants generally.

81. Mr. Jay makes no specific complaints about the manner in which the case was conducted by the recorder.

82. In relation to the conduct of the trial, Mr. Edis, on behalf of the claimant, has the advantage that the recorder very properly gave full disclosure of information which might have resulted in the defendant asking for the case to be tried by another judge. He did not choose to do so. The recorder disclosed that he was a member of the Association of Personal Injury Lawyers (APIL). He also disclosed that he was aware that there had been a payment into court and the amount of that payment, and finally that he had previously cross-examined the defendant's expert in a manner which had caused offence to that expert. The defendant was only informed of these matters shortly before the hearing when the case was transferred to the recorder. This disclosure by the recorder is properly relied on as showing that he was aware of his responsibilities to the defendant. If objection had been taken the case would probably have had to be

adjourned. But the defendant was not then aware of the articles now said to show a real danger of bias, and cannot be said to have waived any objection to which they may give rise.

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83. Mr. Jay disclaims any reliance on the fact that the recorder is a member of APIL, an organisation which normally represents claimants rather than defendants.

84. Although the judgment of the recorder was from the claimant's point of view in very favourable terms, having heard Mr. Edis's submissions we do not consider that the judgment in itself provides any direct support of the allegation of apparent bias. The findings the recorder made are not so surprising that they support the allegation.

85. The defendant's case on bias therefore turns on the statements that the recorder made in the articles to which we have referred. It is not inappropriate for a judge to write in publications of the class to which the recorder contributed. The publications are of value to the profession and for a lawyer of the recorder's experience to contribute to those publications can further rather than hinder the administration of justice. There is a long established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions. There is nothing improper in the recorder being engaged in his writing activities. It is the tone of the recorder's opinions and the trenchancy with which they were expressed which is challenged here. Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind. This is the position notwithstanding the fact that, as Mr. Edis submits, there can be very real advantages in having a judge adjudicate in the area of law in which he specialises. But if this is to happen it must be recognised that his opinions as to particular features of the subject will become known. The specialist judge must therefore be circumspect in the language he uses and the tone in which he expresses himself. It is always inappropriate for a judge to use intemperate language about subjects on which he has adjudicated or will have to adjudicate.

86. Assistance in this situation is provided by the decision of the High Court of Australia in *Vakauta v. Kelly*, 167 C.L.R. 568. In that case, in the course of a trial for personal injuries, the judge had made intemperate remarks about the medical evidence. The majority of the court came to the conclusion that the remarks would have excited in the minds of the parties a reasonable apprehension that the judge would not bring an unprejudiced mind to the resolution of the matter before him. In the judgment of the majority (Brennan, Deane and Gaudron JJ.) it was stated, at pp. 570-571:

"It is inevitable that a judge who sits regularly to hear claims for damages for personal injury will form views about the reliability and impartiality of some medical experts who are frequently witnesses in his or her court. In some cases and notwithstanding the professional detachment of an experienced judge, it will be all but impossible to put such preconceived views entirely to one side in weighing the evidence of a particular medical expert. That does not, however, mean that the judge is disqualified from hearing the particular action or any other action involving that medical expert as a witness. The requirement of the reality and the appearance of impartial justice in

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the administration of the law by the courts is one which must be observed in the real world of actual litigation. That requirement will not be infringed merely because a judge carries with him or her the knowledge that some medical witnesses, who are regularly called to give evidence on behalf of particular classes of plaintiffs (eg members of a particular trade union), are likely to be less sceptical of a plaintiff's claims and less optimistic in their prognosis of the extent of future recovery than are other medical witnesses who are regularly called to give evidence on behalf of particular classes of defendants (eg those whose liability is covered by a particular insurer). If it were so infringed, the administration of justice in

personal injuries cases would be all but impossible … On the other hand, there is an ill-defined line beyond which the expression by a trial judge of preconceived views about the reliability of particular medical witnesses could threaten the appearance of impartial justice."

87. Those remarks were made in the context of a case in which comments were made during a trial. Here we are concerned with comments made in articles written in close proximity to the trial. The issue is however the same.

88. Did the recorder cross the "ill-defined" line to which that judgment refers? We have already given an indication of the nature of the articles. The only other factor to which it is necessary to draw attention is that in this particular case the insurers had not behaved in the irresponsible manner of which the recorder so vehemently complained. They had admitted liability promptly. They had made a payment into court and had only contested issues which it was reasonable for them to contest on the evidence which was available to them. The recorder had recognised that some insurers do behave responsibly. The comments which he made about the conduct of insurers would have been more justified in the past than they are today. Today, many insurers and their legal advisers, particularly those legal advisers who are members of FOIL (the Forum of Insurance Lawyers, the counterpart for defendants' representatives of APIL, which has made a significant contribution to the recent reforms) conduct litigation in accordance with the "Overriding Objectives" set out in Part 1 of the Civil Procedure Rules.

89. We have found this a difficult and anxious application to resolve. There is no suggestion of actual bias on the part of the recorder. Nor, quite rightly, is any imputation made as to his good faith. His voluntary disclosure of the matters already referred to show that he was conscious of his judicial duty. The views he expressed in the articles relied on are no doubt shared by other experienced commentators. We have, however, to ask, taking a broad common sense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leaned in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we. We accordingly grant permission to appeal on this ground, allow the

defendant's appeal and order a retrial. We should not be thought to hold any view at all on the likely or proper outcome of any retrial.

Williams V. Inspector of taxes and others

90. Mrs. Williams, who appears in person but with the assistance of a *McKenzie* friend (see *McKenzie v. McKenzie* [1971] P. 33), seeks permission to appeal from the decision of the Employment Appeal Tribunal of 20 November 1998 dismissing her appeal from a decision of an industrial tribunal.

91. The background to the appeal is that on 17 January 1996 Mrs. Williams made a complaint of sexual harassment and race discrimination by various individuals at the tax office of the Inland Revenue at which she worked in Croydon. On 17 April 1996 she made a further complaint that two individuals together with the Commissioners of Inland Revenue had committed an act of race discrimination against her by failing properly to investigate a grievance she had and by submitting a report which was not consistent with her grievance. By a decision of 7 May 1996, Mr. Booth, the chairman of the industrial tribunal, sitting alone, held that it was not just and equitable to allow Mrs. Williams's application of 17 January 1996, which related to events in 1991 and 1992, to proceed. However, in relation to her second application, he decided that there should be a preliminary hearing into the question (raised by the Inland Revenue) whether Mrs. Williams had failed to co-operate in an inquiry into her allegations of sexual harassment to such an extent

that she had brought the dismissal of her complaints upon herself, with the consequence that her complaints lacked any prospect of success and were therefore scandalous, frivolous or vexatious.

92. On 24 June 1996 an industrial tribunal chaired by Mr. Booth sitting with two other members, unanimously decided that the application should proceed.

93. However, the same industrial tribunal on 19 November 1996 unanimously decided to dismiss her application. The tribunal came to the conclusion that Mrs. Williams had not discharged the onus which was upon her, that her complaints had been thoroughly and impartially and fairly investigated internally and that there was no evidence from which the tribunal could draw an inference of race discrimination.

94. Mrs. Williams had been employed by the Inland Revenue at the tax office from 1985 until she took nine months maternity leave in March 1994. It was this period to which her complaint related. Mr. Booth had also worked for the Inland Revenue from 1958 to 1961 in a junior position. In her submissions to us, Mrs. Williams emphasised that it was because of the knowledge of the workings of the Revenue which Mr. Booth displayed at the hearings, that she and the *McKenzie* friend challenged the chairman as to whether he had been employed by the Revenue. Mr. Booth then said that he had worked for the Inland Revenue from 1958 to 1961 in a junior position. Mr. Booth says he invited any response from Mrs. Williams but none was forthcoming.

95. Having heard Mrs. Williams's submissions which she put forward very clearly and courteously, we did not consider it necessary to call on the

---------- *[2000] Q.B. 451 at 498*

employers to address us. It was for this reason that we did not invite submissions from Mrs. Williams in reply.

96. We entirely agree with the conclusion of the Employment Appeal Tribunal that no right thinking person knowing of the connection of Mr. Booth with the Inland Revenue would feel that there was any danger of bias in this case. The suggestion that there might be was fanciful. In coming to that conclusion we take into account the fact that one of the points made by Mrs. Williams in her grounds of appeal is that there was also a risk of prejudice resulting from the chairman projecting on to her case his displeasure with her "counsel" (the person who was assisting her at the hearing). It is fanciful to suggest that the chairman's employment by the Revenue over 30 years ago could have affected his view. The chairman made jocular remarks that her representative "had come to bash the Revenue" and that "my colleagues and I would always be happy to hear cases involving the Revenue" but these remarks do not suggest bias as Mrs. Williams contends, and she made no such suggestion at the time. The earlier decisions were substantially in Mrs. Williams's favour and the decision of 19 November 1996 was unanimous.

97. In *Mrs. Williams's case*, having considered all her grounds of appeal, we do not consider it right to grant her permission to appeal.

Regina V. Bristol betting and gaming licensing committee,

Ex parte O'Callaghan

98. Mr. O'Callaghan contends that on 10 September 1996 he placed two £25 "correct score accumulator" bets at a betting shop operated by Coral Racing Ltd. ("Corals") in Cardiff. He expected, as a result of one of those bets, to be paid £259,200. However Corals declared that bet to be void because it

had not been photographed. Since that time Mr. O'Callaghan has been conducting a campaign which is no doubt designed to place pressure on Corals to meet what Mr. O'Callaghan regards as their obligation.

99. On 22 May 1997 a hearing was due to take place before the Bristol Betting and Licensing Committee into the renewal of bookmakers' permits. Mr. O'Callaghan says that on the previous day his wife wrote to the court asking for an adjournment because he was unfit to attend for medical reasons. A medical certificate was enclosed. Despite a further letter the adjournment was refused and Corals were granted their renewed permit. An award of costs of £5,000 was made against Mr. O'Callaghan.

100. He initially tried to appeal to the Crown Court but having been informed that he had no right to appeal he made an application for judicial review. Leave was granted on 2 December 1997 to apply for judicial review by Tucker J. The application should have been entered and served on the respondents, namely the Bristol Betting and Gaming Licensing Committee and Corals, within 14 days (R.S.C., Ord. 53, r. 5(5)), that is, by 16 December 1997. This did not happen, and it was not until 9 February 1999 that Miss Jackson appeared on behalf of Mr. O'Callaghan before Dyson J. seeking to extend the period of 14 days. The reasons for the delay were connected with difficulties that Mr. O'Callaghan was having

in obtaining legal aid. There were further difficulties with the solicitors whom he initially instructed and subsequently he instructed another firm, his present solicitors, who still have the conduct of the case.

101. On 16 July 1998, prior to the hearing before Dyson J., the Bristol Betting and Gaming Licensing Committee had extended Corals' permits for three years. This was notwithstanding Mr. O'Callaghan's further application for an adjournment pending the outcome of an application for judicial review.

102. The fact that the permit had been extended meant, as Dyson J. pointed out in his judgment, that the reality of the judicial review proceedings was a dispute as to the lawfulness of the decision to order Mr. O'Callaghan to pay £5,000. Having expressed sympathy for Mr. O'Callaghan's personal position, Dyson J. decided that because of the modest sum of money which was then involved, it would not be right to grant an extension of time. He therefore refused the application and it is from that decision that Mr. O'Callaghan wishes to appeal.

103. On 28 March 1999 "The Sunday Times" published an article which stated that Dyson J. was a director of Dyson Properties Ltd., a company which owned rented properties in Yorkshire, Greater Manchester and Cheshire and that the tenants of the company included Corals. Mr. O'Callaghan, in an affidavit, says that he subsequently learnt that Corals and its associated companies are tenants of a number of properties owned by Dyson Properties Ltd. and Gown and Mantle Ltd. of which Dyson J. is also a director.

104. It is now contended on behalf of Mr. O'Callaghan that if Dyson J. had disclosed his connection with Corals, he would have objected to his hearing the application. It is said that either Dyson J. was disqualified from hearing the application because it is a "*Dimes* situation" or that it is a situation where there was a real danger of bias on the part of Dyson J.

105. In accordance with the normal procedure adopted by the Court of Appeal when allegations are made against a judge, Dyson J. was informed of what was being relied on by Mr. O'Callaghan. By letter to this court of 28 June 1999 he confirmed that he had been a non-executive director of Dyson Properties Ltd. since the late 1980's; that it is a family property investment company, which was formed by his parents

many years ago; that it holds commercial properties in the North of England; that, apart from himself, the current directors are his mother and brother; that all shares are held by members of the family (which include the judge); that he is not involved in the management of the company; that his role is limited to giving occasional advice to his brother; and that Gown and Mantle Ltd. is a wholly-owned subsidiary of Dyson Properties Ltd. (This last statement may not be entirely accurate, because it appears that the judge may also hold shares in this company). The judge adds that until he read the article in "The Sunday Times" he "was not aware that Corals was one of the company's tenants" and that the rent payable by Corals for the only shop of which it is a tenant of the company represents slightly more than four per cent. of the total rent currently receivable by the company.

106. The Lord Chancellor gives guidance to judges on their appointment. At the time of Dyson J.'s appointment, the guidance

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provided that no judge should hold a *commercial directorship*. But the guide added:

"There is, however, normally no objection to a judge holding shares in commercial companies, or taking part in the management of a family estate or farming his own land. Equally, there are some forms of non-commercial directorships which a judge may hold without objection."

107. The current guide of October 1998 is in similar terms.

108. It cannot be said that this is a case where the strict principle of automatic disqualification laid down in *Dimes v. Proprietors of Grand Junction Canal*, 3 H.L.Cas. 759 and *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 2)* [2000] 1 A.C. 119 applies. Miss Jackson submitted that if the judicial review proceedings had continued they could have had a significant effect upon Corals and in consequence adversely affected that company's ability to meet its obligations to the Dyson family companies. We do not agree. The judicial review proceedings by the time they came before Dyson J. were only concerned with the issue of £5,000 costs. It would be absurd to suggest that recovery or non-recovery of this sum could affect Corals' ability to pay the rent of its shop in Leeds. It was suggested that the court in the judicial review proceedings could grant Mr. O'Callaghan a declaration which would be helpful in his dispute with Corals. However, we cannot see any basis for such a declaration. Once Corals' betting permits had been renewed, the judicial review proceedings could only have relevance with regard to costs. It cannot be said that the judge had anything more than a nominal and indirect interest because of his directorship and shares in the company. Such an interest does not establish a bar to the judge sitting.

109. If (as we hold) Mr. O'Callaghan cannot succeed under the strict rule of automatic disqualification, he certainly cannot succeed under the real danger rule. There is absolutely no reason to doubt or question the judge's statement that he was unaware that Corals were a tenant of his family company. His role was non-executive and there is no reason why he should know of the tenancy. Even if the judge did know, there could not be any real danger of bias. The interest was so minimal that no reasonable and fair minded person sitting in court and knowing the relevant facts would have considered there was a real as opposed to fanciful danger of a fair trial not being possible. The order which the judge made, having regard to the gross delay and the limited issue raised by the application, was well within his discretion, which in our view he exercised correctly.

110. We would dismiss the application for permission to appeal.

Orders accordingly.

D. E. C. P.

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Baker v Quantum Clothing Group and others [2009] EWCA Civ 566

CA, CIVIL DIVISION

SMITH, JACOB LJJ

16, 17, 18 MARCH, 5 JUNE 2009

5 JUNE 2009

Natural justice — Judge — Bias — Application for recusing on basis of apparent bias — Judge sitting on constitution of Court of Appeal hearing appeal in respect of noise-induced deafness in textile industry — Judge being honorary President of British Tinnitus Association — Judge suffering from mild form of tinnitus — Association having connections with claimant's solicitors — Whether connection sufficient to cause fair-minded and informed observer to conclude real possibility of bias

J Hendy QC, T Huckle and R O'Leary for the Appellant

R Owen QC and S Beard for the First Respondent

C Purchas QC and C Foster for the Second Respondent

T Stewart for the Third Respondent

Wake Smith; Weightmans LLP; Hill Hofstetter; Halliwells

JACOB LJ:

[1] This is the joint judgment of Smith LJ and myself.

[2] On 22 May 2009 judgment in the main appeal was handed down by Smith LJ on behalf of the Full Court consisting of Sedley, Smith LJJ and me. Largely we found for the Claimants in what are taken as test cases about noise-induced deafness in the textile industry. Whilst judgment was reserved we received applications from the Respondents that the court should recuse itself on the grounds that Sedley LJ was in a position of apparent bias. Sedley LJ considered this application and concluded that he did not feel it necessary or appropriate to recuse himself. He told the Respondents that, if they wished to persist in their application, it would be considered by Smith LJ and myself. We concluded that this was not a case for recusal and so the main judgment was handed down. At the hand-down it was indicated that the applications would be refused and that our reasons would be given later. These are our reasons.

THE LAW

[3] The most recent House of Lords authority on the subject of apparent bias is *Helow v Secretary of State for the*

Home Department [2008] UKHL 62, [2009] 2 All ER 1031, [2008] 1 WLR 2416. It was an asylum case involving a sympathiser with the Palestinian Liberation Organisation who claimed that she feared attack by Israeli agents. The Judge on appeal from the Immigration Appeal Tribunal was a member of the International Association of Jewish Lawyers and Jurists. The magazine of that association had carried a number of articles and pronouncements which were extremely pro-Israeli and markedly antipathetic to the PLO. The House of Lords held that there was no reason for the judge to recuse himself.

[4] To our minds the facts of that case were much stronger than those relied upon here (see below). Yet they were not enough to justify a holding of apparent bias or want of objective impartiality on the part of the judge. One can conveniently take the principles as set out by Lord Hope:

> "39 The basic legal test applicable is not in issue. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the Association: *Porter v Magill* [2002] 2 AC 357. The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair-minded and informed observer is 'neither complacent nor unduly sensitive or suspicious', to adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para 53, which was approved by my noble and learned friends, Lord Hope of Craighead and Baroness Hale of Richmond, in *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781, paras 17 and 39."

HISTORY OF THE APPLICATION

[5] The main appeal commenced on 16 March 2009. The Claimants' solicitors were Messrs Wake Smith and their leading counsel Mr John Hendy QC. Messrs Weightmans were the solicitors for Quantum plc the first Respondent and their leading counsel was Mr Robert Owen QC. Because of the test nature of the proceedings, Meridian/Courtaulds (solicitors Hill Hoffstetter, leading counsel Christopher Purchas QC) and Pretty Polly (solicitors Halliwells, counsel Mr Toby Stewart) were permitted to take part: questions affecting other live cases involving these parties would be decided.

[6] At the outset of the hearing, Sedley LJ disclosed that he was Hon President of the British Tinnitus Association ("BTA"). The relevant transcript reads:

> "SEDLEY LJ: While I remember, before we go any further, it occurred to me at the weekend that I had better declare that I am President of the British Tinnitus Association. Does anybody mind? It is a voluntary self-help organisation that brings clinicians and patients together. It has no axe to grind at all in liability or litigation terms. Is that all right?
>
> MR OWEN: Certainly my Lord.
>
> MR PURCHAS: I cannot think there is any possible ground –
>
> SEDLEY LJ: If you do think of something, make sure I know fairly soon."

No objection was made by Mr Stewart.

[7] So the three Respondents did not object to Sedley LJ sitting, knowing of his position as Hon President of the BTA. The hearing was completed on 18 March. Judgment was reserved.

[8] Just over seven weeks later, the court received a letter from Weightmans dated 5 May 2009. We set it out in full:

> "On the first day of the hearing Sedley LJ disclosed in open court that he is President of the British Tinnitus Association ('BTA') (which he described as a honorary role) and invited the parties to state if they had any objection to his sitting on the appeal.
>
> On the basis of that single piece of information our clients – the Respondents – were content to waive any objections that they might otherwise have raised.

Since that time further information has come to light which causes our clients and ourselves real concern.

That further information comprises the following:

(i) it was in November 2007 that Sedley LJ became President of the BTA.

(ii) the BTA is a charitable organisation whose aims include:

a. raising tinnitus awareness

b. campaigning to achieve a better deal for those affected by tinnitus. [BTA 'Objectives and Activities']

(iii) The Appellant in this case, Ms Baker, has mild tinnitus allegedly consequent upon noise exposure and if she is successful in her appeal, will succeed in establishing damages for both damages to her hearing and tinnitus.

(iv) Sedley LJ himself suffers from mild tinnitus (extract from Conference Speech 2007).

(v) Within months of Sedley's LJ ascent to presidency of the BTA, Wake Smith & Tofield ('Wake Smith') (the Law firm representing Baker) became the sole linked/nominated firm to the BTA.

(vi) The BTA publicly describe Wake Smith as *'leaders in their field of compensation'*.

(vii) The lead solicitor for Wake Smith (Chris Fry) has co-authored a paper on tinnitus and compensation posted on the BTA website.

(viii) The co-author of the paper is one Andrew McCombe, ENT Surgeon, who was the Claimant's lead medical expert in the seven test cases heard in the High Court in Nottingham, (October/November 2006).

(ix) Wake Smith advertise on their own website their association with the BTA.

(x) The 2008 BTA medico-legal conference was organised by Wake Smith.

Many of these matters (i), (ii), (v), (vi), (viii), (ix), (x) suggest a web of links between the professionals involved in the case – solicitors and expert – on the Appellant's side, with the BTA – and hence, albeit indirectly, with Sedley LJ. The BTA's own publications make clear that, at the very least, they assist in the provision of information to persons who may wish to bring compensation claims.

Conscious of our duty of candour owed to the court we should make it clear that, apart from items (iv), (vii) and (viii), these matters were identified before the conclusion of the hearing and the advice of Leading Counsel then instructed was that it would not be in our client's interest to raise them in support of an application for recusal. Our clients accepted Leading Counsel's advice.

Items (iv), (vii) and (viii) were, however, *not* discovered until a fortnight had passed since the hearing, and our clients waiver, either by word on day 1 or by continued participation in the hearing thereafter, was accordingly not made with the full knowledge now available.

Applying the test now laid down by the House of Lords in *Porter v Magill* and without needing to suggest that Sedley LJ would have dealt or would deal with the appeal other than on its merits, we and our clients putting ourselves, as that test requires, in the shoes of a fair minded and informed observer would suggest that there is a real possibility of bias when:

a. a Judge suffers from the same condition as is in issue – in terms of responsibility (or not) for it – in the appeal;

b. the Judge does not himself disclose this – while disclosing other facts perceived by him to be relevant to his ability to sit;

c. this occurs in the context of the web of links to which we have already referred."

[9] The letter concluded by suggesting the appeal should be relisted before another panel.

[10] By letter of 13 May 2009, Halliwells supported Weightmans' letter. They sought to attach blame to the conduct of Wake Smith. They said "we must express our surprise and disappointment that Wake Smith did not disclose their relationship with the BTA on the first day of the appeal". In that context, they referred to the wasted costs of the appeal.

[11] Also on 13 May, Hill Hoffstetter supported Weightmans and made their own application for a fresh hearing before a fresh panel. They too sought to blame Wake Smith ("Notwithstanding the fact that the constitution of the court was known . . ., Wake Smith failed to identify their own connection with the BTA and therefore, indirectly with Sedley LJ"). They made many of the same points as Weightmans, supporting the overall "web of links" allegation.

[12] Also on 13 May, Wake Smith responded in detail to the applications. They first said that Sedley LJ had mentioned that he had mild tinnitus at the outset of the hearing. The transcript does not record this. I have no recollection of this being mentioned; Smith LJ does. In view of the uncertainty on this issue, we will proceed on the basis that he did not. They then submitted that Sedley LJ obviously had a special interest in tinnitus – otherwise he would not have accepted the honorary presidency. That led to a paragraph about why the fact that he had the condition did not constitute apparent bias. We return to this subject later.

[13] The Wake Smith letter then at length dealt with the "web of links" allegation. We set it out in full:

"The matter of Sedley LJ's association with the BTA was raised fairly and squarely by him at the outset of the appeal hearing. As we recall it, counsel for all Respondents (including very eminent and experienced leading counsel for Courtaulds and Quantum as well as junior counsel for PP) were invited to consider and given the opportunity of time to take instructions. On instruction given in court (including senior representatives of the solicitors' firms and insurer representatives) that opportunity was declined and the court was told that no issue was or would be taken by the Respondents as to Sedley LJ's membership of the appeal panel. There was no reason why further information could not have been sought of the details of the judge's relationship with the BTA at that stage. Moreover, in an aside during the hearing, Mr Byard (Weightmans) told Mr Fry (Wake Smith) that Weightmans had checked the BTA website and it is obvious that they had ample opportunity to do so during the remainder of the appeal hearing, let alone in the period since.

The information which it is suggested has 'now' come to light is readily available within minutes of accessing the BTA's website.

It is clear that the website is an information resource with no emphasis on making compensation claims, although as part of general information, Wake Smith (as well as Irwin Mitchell) are mentioned as firms who can advise on legal issues. However, the Professional Advisors Committee of the BTA does not include any lawyers, and makes clear at http://www.tinnitus.org.uk/index.php?g=PAC that its aims are to promote and help to monitor proper research into the condition.

There is no Claimant/Defendant 'slant' on the site or the BTA as a whole, and the inclusion of Mr McCombe on the Professional Advisors Committee does not imply that he takes any particular stance. It is known to us that Mr McCombe regularly advises Defendants in hearing loss cases. Part of the reason for choosing him as an expert for these test cases was that he was not perceived to be particularly identified with 'the Claimant side'.

Sedley LJ did not become honorary president in 2007 but 2006 according to the website. He follows Lord (Jack) Ashley of Stoke, founder president in 1991, and Lord McLennan of Rogart in that role.

Wake Smith are not the solicitors to the BTA or their 'nominated solicitors' whatever that is intended to mean. If the BTA has solicitors they are not Wake Smith. There is no financial (or other business) relationship between Wake Smith and the BTA. The BTA agreed to permit Wake Smith to have a link on their website in order that those accessing the site could seek legal advice from the firm amongst others. Irwin Mitchell also have a link on the website. We assume that if any of the Respondents' solicitors acted for Claimants in deafness cases and wished to advertise their services on the BTA website,

they would also be permitted to have a link. Wake Smith offers a legal advice line to members of the BTA, on a variety of legal issues, and as a result a very limited number of enquiries have been received across the range of legal services and not just personal injury and occupational illnesses. In that respect we have only one or two 'open matters'.

The references to Wake Smith on the BTA website are two in number and reasonably difficult to find other than by specific search for 'Wake Smith'. The firm's website is (incorrectly) referenced under 'Other sites of interest' at the very end of the links page at http://www.tinnituus.org.uk/index.php?g=node/19. No indication is given as to what form of litigation they conduct or whether they act for Claimants or Defendants (cf the Irwin Mitchell reference). There is also a link at the page giving information about compensation at http://www.tinnitus.org.uk/index.php?g=node/35 (whose content was essentially written by Messrs Allen and Tucker of Irwin Mitchell in 2004) to the article referred to co-authored by Mr Fry and Mr McCombe. That article presents a factual description of the sorts of claims for benefit and compensation that can be made and examples of awards by references to the JSB guidelines and some Lawtel case notes. It points out that each case must be considered on its facts and offers the services of Wake Smith for advice on 'whether or not you have a claim'.

Wake Smith has no organisational role within or on behalf of the BTA, and had no part in organising the 2008 BTA conference, though the firm did take a stand at the conference as an advertiser and Mr Fry attended and listened to various lectures.

Sedley LJ had attended the 2007 BTA conference and gave a short introductory address as the new president (the note of this copied with the Weightmans letter is set out at http://www.tinnitus.org.uk/files/Transcript%20of%Conf.pdf), but Wake Smith were not represented at that conference and did not at either conference have any contact with the judge. Indeed, there has been no contact between the firm and Sedley LJ in the context of their respective limited associations with the BTA. We have no knowledge of any contact at all between the firm and the judge other than in the context of the appeal hearing in March and otherwise in the ordinary course of presenting cases before the Court of Appeal, including the case *Furniss v Firth Brown Tools* [2008] EWCA Civ 182.

As we understand it, the BTA is a non-partisan association justifying great authority and respect for its work supporting research into tinnitus. As the website home page makes clear:

The British Tinnitus Association is a world leader in providing support and advice about tinnitus. We provide accurate, reliable and authoritative information, much of it written by medical professionals or clinical researchers. Most of it is available on this website and is free to download and use (if we've been of help you might consider a *donation* to help us help others; we rely on public support for funding). We have our own *research programme* and provide *bursaries* for UK professionals to pursue their interest in tinnitus. Our *Professional Advisers Committee* includes some of the leading UK professionals working on tinnitus, and we seek to promote 'Better Tinnitus Awareness' through *information leaflets*, a confidential helpline (operated by staff with over 50 years of cumulative experience), school education programmes, *training courses*, and an *annual conference*.

So far as we are aware the BTA takes no significant role with respect to legal issues and its activities are overwhelmingly concentrated upon medical issues with respect to tinnitus. We cannot find the reference to 'campaigning to achieve a better deal for those affected . . .' but in any event such a reference has to be considered in this context. We would hope that the

BTA's aims and efforts are supported by all right-thinking people including the Respondents'."

[14] Following these submissions, Sedley LJ made the following written statement:

"1. In view of the content of the objections which have now been raised to his sitting as a member of the court hearing this appeal, Sedley LJ makes the following observations.

2. Had Sedley LJ or any member of the court considered his presidency of the BTA to be disqualifying factor, he would have stood down. Neither he nor they did so. Nor was it submitted from the Bar at the start or in the course of the appeal that he should do so.

3. Insofar as reliance is now placed on material derived from the BTA's website, Sedley LJ makes the following observations:

(a) The objects of the BTA are those quoted in Wake Smith's letter and not those described in paragraph (i) of Hill

Hofstetter's letter. It is a voluntary and charitable organisation which brings together patients and health professionals and sponsors research into tinnitus, which is as often spontaneous as traumatic in origin.

(b) Sedley LJ accepted the honorary post of President of the BTA in 2006 with the knowledge and agreement of the Master of the Rolls Judges today value some engagement, albeit formal, with the outside world.

(c) None of the facts (if they are facts) set out at paragraphs (v) to (x) of Weightman's letter and (ii) – (v) and (vii) of Hill Hofstetter's letter are known to Sedley LJ.

(d) He does not regard the fact that he himself has mild tinnitus as a disqualifying factor in the present proceedings any more than if a judge who has back trouble tries a spinal injury case or a judge who is a motorist tries a running down case.

(e) While he is embarrassed by the garbled transcription of his introductory words at the BTA conference, which was published without his approval, it reflects his entirely honorary role in the association.

(f) For avoidance of yet further issues he also wishes it to be known that in 2008, at a dinner of the Industrial Law Society at which he was the guest speaker, he nominated the BTA to receive one half of the proceeds of a sweepstake on the length of his speech. The winner of the sweepstake did the same with his half.

4. For these reasons, as well as because of the lateness of the application, Sedley LJ does not propose to recuse himself from the case. These observations are, however, to be sent to the parties, who may submit any comment on them by midday on 20 May. Smith and Jacob LJJ will then decide whether the objection to his participation should be upheld.

This procedure is not to be regarded as in any sense a precedent for the processing of objections of this kind."

[15] Following receipt of that statement, the Applicants wrote to the court persisting in their applications and enclosing various materials. However, no attempt was made to challenge the factual aspects of Wake Smith's submission.

NOVELTY OF THE APPLICATION

[16] Before considering the substance of the applications in detail, we draw attention to the fact that the complaint here is not that there is a connection between Sedley LJ and Mrs Baker but an indirect link between the and LJ Mrs Baker's solicitor. This is a novel type of application in our experience. We do not think that a tenuous connection between a judge and a firm of solicitors in the case could ever be regarded by the well informed observer as a giving rise to a possibility of bias. In *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451, [2000] 1 All ER 65, [2000] IRLR 96, in para 25, the Court of Appeal sought to give practical guidance about the kind of situations in which the judge ought to or need not recuse himself. One of the factors, which would not normally give rise to the need for recusal was the "previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him". We observe that the connection alleged in this application, which relies on an indirect link between Sedley LJ and Wake Smith (via the BTA) is far more tenuous than the link between a judge and a firm of solicitors by whom he has previously been instructed.

CONCLUSIONS ON THE "WEB OF LINKS"

[17] Sedley LJ made it plain that he had no knowledge of any of the matters on the BTA Website constituting the so-called "web of links". In those circumstances, we do not think that any fair-minded reasonable observer would consider that there was any real possibility that he might be biased arising from the so-called "web of links". We are surprised that the applications have been pursued thereafter as they have been.

[18] But even if the facts giving rise to the "web of links" relied upon had been known to Sedley LJ it would not have moved that observer to conclude that there was any real possibility of bias. We will explain that conclusion by reference to the website. But before doing so we must record a matter of concern. By a letter of 20 May, when renewing its application, Hill Hoffstetter sent further submissions, an extract from the transcript and "a bundle of

selected documents". The bundle is paginated. It consists of pages downloaded from the BTA website and an attachment to the site downloadable separately as a pdf file entitled "BTA Compensation Advice". What is disturbing is that these pages are interleaved with those from the BTA website, thereby giving the impression that they are all from the BTA website. In fact, pp 1 – 13 are from the BTA website, pp 14 – 20 from the Wake Smith pdf, pp 21 – 26 from the BTA website and the last pages of the bundle are from the Wake Smith pdf. Only by noting the address at the bottom is the reader alerted to what the fact that the Wake Smith pdf is not itself part of the BTA website.

[19] We turn first to the BTA website, for the extra information said to constitute the "web of links" is derived from this.

[20] First there is the nature and purpose of the BTA (item ii of the Weightmans letter). The suggestion is that it is a campaigning organisation aiming to achieve a better deal for those affected by tinnitus. If there is any innuendo in this suggestion that the BTA is an organisation for helping potential Claimants, that would be clearly unjustified. The website provides under the heading "Welcome" a short description of the BTA. Wake Smith quote it in full in their letter so there is no need to repeat it. On the next two pages under the heading "About the BTA" there is a fuller description of its activities. These include a freephone helpline, support of research, a quarterly magazine, the aim of raising awareness of the condition, the running of Therapy Days, and so on. No reasonable person would draw the inference that this was an organisation designed to help Claimants. The objects and purpose of the BTA are quite unrelated to litigation and would not cause a reasonable person to think that anyone associated with the BTA might be biased towards a Claimant with tinnitus.

[21] Given that tinnitus can be caused by noise exposure and is a known form of industrial injury, it is not surprising that the BTA site has information about compensation. It also has information about a range of other relevant subjects – under the heading "Information" there are 31 topics. Compensation is just one of them.

[22] If one goes to that topic one sees that it was partly provided by a named partner of Irwin Mitchell a firm of solicitors, and partly by Wake Smith. For more detail the Wake Smith pdf we have referred to can be downloaded. The advice about compensation actually given on the site can be summarised thus: go to a solicitor who knows what he is doing. It tells the reader what sort of questions to ask to find out if he does. There is no "steer" to Wake Smith or Irwin Mitchell.

[23] The next point for consideration is item (v) of Weightman's letter. It appears to suggest some sinister connection between Sedley LJ becoming Hon President in 2007 ("Within months of Sedley's LJ ascent to the presidency of the BTA") and Wake Smith becoming "the sole/nominated firm to the BTA". In fact, the date is wrong by a year; Sedley LJ became the Hon President in November 2006. Moreover, Wake Smith is not the "sole/nominated firm to the BTA". They were not and are not nominated by the BTA. They are not and never have been the BTA's solicitors. Quite wrongly, Hill Hofstetter assert in their letter of 13 May that "(iv) Wake Smith have been and are legal advisers to the BTA since Sedley LJ became President in 2006."

[24] It is true that there is a link on the BTA website to Wake Smith's website. But the reasonable observed would wish to see that link in its true context which is as follows. On the BTA website there is a heading "Useful Website Links". There is then a disclaimer (not mentioned by any of the Applicants) which says:

> "Provision of these website links does not constitute endorsement by the BTA of their content, products or services.
>
> When clicking on the links you will leave the BTA website."

[25] The list of links comes under various sub-headings. It is sufficient to set out the first few to give an idea of the range. The first sub-heading is "International Tinnitus Organisations" (14 are provided). "Tinnitus and Hyperacusis Centres" (5); "UK Tinnitus Self Help Groups" (8); and "Sites for Younger People" (6) are the next three. There are 8 other headings providing altogether 37 more links which it unnecessary to specify. The final heading is "Other Sites of Interest". There are 11 of these, a miscellaneous ragbag, including self help groups, the Charity Commission and Age Concern. It ends with Wake Smith's and Irwin Mitchell's.

[26] So there is a link. But it is not the sole link or even the sole link to a firm of solicitors. Weightman's point (vi) is connected with point (v). It is that "the BTA publicity describes Wake Smith as leaders in their field of compensation". So it does (the quotation is not exact, but no matter). That description is provided next to the link to the Wake Smith website.

[27] In our judgment, no fair-minded observer would draw an inference of any substantial connection between Wake Smith and the BTA from this linkage on the BTA website. The suggestion of a connection between Wake Smith and Sedley LJ is fanciful.

[28] Point (vii) draws attention to the fact that a partner in Wake Smith has co-authored the paper on compensation "posted" on the BTA website. It appears to us to be a sensible paper giving balanced information. It is obviously not a BTA document. Its provision on the site is far from suggesting a significant tie-up between Wake Smith and the BTA – even farther from suggesting any connection between Sedley LJ and Wake Smith.

[29] Point (viii) is about Mr McCombe who gave expert evidence for the Claimant. He was a co-author of the paper on compensation. No attempt was made at trial to suggest that Mr McCombe was biased. Why the point is raised now we are unable to understand – and we are unable still less to see why it suggests any connection with Sedley LJ at all.

[30] Point (ix) is about Wake Smith's website. It says "The Industrial Diseases Team is delighted to be associated with the BTA (link given). The BTA is a leader in providing support advice and information about BTA." This little bit of puffery would not concern the reasonable, fully-informed observer, quite apart from the fact that it has nothing to do with Sedley LJ.

[31] Weightmans final point (x) is simply, and inexplicably, wrong. Contrary to what is asserted, the 2008 BTA medico-legal conference was not organised by Wake Smith. The firm had a stand there and no more.

[32] The upshot of all this is that the "web of links" is quite without substance. The objection on this basis should never have been made, and once made should have been dropped as soon as Sedley LJ had made his statement.

THE TINNITUS OBJECTION.

[33] We turn to the objection based on the fact that Sedley LJ himself suffers from mild tinnitus and we are accepting for present purposes that this was not disclosed. It too is a point of no substance. It amounts to a contention that no judge with any particular disability should hear a case involving that disability. A judge with poor eyesight or only one eye could not hear a case about an eye injury, a judge in a wheelchair could not hear a case about an injury which made the victim wheelchair bound and so on. And, taken to its logical conclusion, the argument would meant that a disabled judge could not hear a case about disability living allowance, or a woman judge hear a case about sexual discrimination against a woman. The examples multiply.

[34] This objection, like that of the "web" has no substance. Coupling the one objection with the other makes no difference: zero plus zero is zero. The objections here are well on the far side of being "unduly sensitive or suspicious".

THE DELAY

[35] Sedley LJ said outset that "if you think of something make sure I know fairly soon". In those circumstances it is particularly surprising that Weightmans say they only discovered certain of the matters relied upon two weeks after the hearing. We have unchallenged evidence from Mr Fry of Wake Smith leading to the clear inference that Mr Byard of Weightmans had visited the BTA website during the hearing. Even accepting that the matters concerned were only found two weeks later, there is no explanation of why they were not found earlier. Further, it is

astonishing that, having found the material, the Applicants took no action for a further five weeks. We draw the inference from this delay that the matters now relied on were not, at the time of discovery, seen as serious.

[36] Finally, we think that this objection simply comes too late. It is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable.

[37] For all these reasons, we refused recusal. The applications were without merit.

Judgment accordingly.

End of Document

JSC BTA Bank v Ablyazov (Recusal) [2012] EWCA Civ 1551

CA, CIVIL DIVISION

MAURICE KAY V-P, RIX, TOULSON LJJ

6, 12, 28 NOVEMBER 2012

28 NOVEMBER 2012

Practice — Pre-trial or post-judgment relief — Bank bringing claim against various defendants, including applicant (A) for fraud — Trial of claim being imminent — Trial judge also being involved in previous interlocutory applications concerning case — A applying for order that trial judge recuse himself — Whether application to be granted

Natural justice — Judge — Bias — Apparent bias — Bank bringing claim against various defendants, including applicant (A) for fraud — Trial of claim being imminent — Trial judge also being involved in previous interlocutory applications concerning case — A applying for order that trial judge recuse himself — Whether application to be granted

C Béar QC and J Sheehan for the Appellant

S Smith QC, T Akkouh and E Gillett for the Respondent

Addleshaw Goddard LLP; Hogan Lovells International LLP

RIX LJ:

[1] This appeal (See para 94 below.) is about the refusal of a judge to recuse himself as the nominated judge of trial in circumstances where he has had to hear, prior to trial, an application to commit one of the parties for contempt of court, and has found a number of contempts proven, leading to a sentence of 22 months' imprisonment. The question raised is whether in doing so the judge put himself out of the running, so to speak, as the judge of trial on the basis that, by reason of what is called pre-judgment, there would appear to the fair-minded and informed observer a real possibility of bias. This is the doctrine of apparent bias: see *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465. No one is suggesting that the judge is actually biased.

[2] The litigant and Appellant is Mr Mukhtar Ablyazov who until early in 2009 had been the chairman of the Respondent bank, JSC BTA Bank (the “bank”), a major bank in Kazakhstan but now supported by its creditors. The bank has alleged that Mr Ablyazov has defrauded the bank of almost US$5 billion, and that he has done so by entering into specious but fraudulent transactions, such as loan transactions, with companies in which it is said that he was ultimately interested. Mr Ablyazov for his part asserts that the claims are an unjustified attempt by the President of Kazakhstan to destroy him as a political opponent and as a leading figure in Kazakhstan's democratic opposition.

[3] The bank commenced its litigation by obtaining a worldwide freezing order against Mr Ablyazov and others. Since then the judge of the commercial court who has had the predominant role in the conduct of this litigation has been Teare J. The judge has had unrivalled experience of this litigation and has been called upon to produce many judgments in it (Mr Ablyazov's solicitor has counted 26 such judgments). Pursuant to the original freezing order Mr Ablyazov has been required to make disclosure of all his assets and to refrain from dealing with them. Mr Ablyazov has made partial disclosure of assets, but the value of that disclosure is not very great in comparison with the value of the allegedly purloined billions. To assist in the uncovering of Mr Ablyazov's assets the judge has appointed receivers on the basis that Mr Ablyazov could not be trusted to comply with the court's orders: [2010] EWHC 1779 (Comm), [2010] EWCA Civ 1141.

[4] In March 2011 the judge dealt with a lengthy case management conference. As a result three of the eight cases proceeding in the commercial court were selected for trial and shortly thereafter a date for trial before the judge was fixed to commence in November 2012. It is the practice in complex cases in the commercial court for there to be continuity of a designated judge for both interlocutory matters and final trial: see para D4 ("Designated judge") of the Admiralty and Commercial Courts Guide at p 319 of volume 2 of Civil Procedure 2012.

THE CONTEMPT PROCEEDINGS

[5] On 16 May 2011 the bank applied to commit Mr Ablyazov for contempt of court. A series of 35 contempts were alleged but as a matter of case management the judge limited the application to three allegations, one each under the separate headings of (a) non-disclosure of assets, (b) lying during cross-examination, and (c) dealing with assets: see [2011] EWHC 1522 (Comm), [2011] EWCA Civ 1386. The non-disclosure allegation concerned Bubris Investments Ltd ("Bubris", a BVI company); the lying allegation concerned companies which owned a number of English properties, and also the so-called "Sch C" companies, viz FM Co Ltd (a Marshall Islands company) and Bergtrans Contracts Corp and Carsonway Ltd (both BVI companies); the dealing allegation concerned assets held by Stantis Ltd (a Cypriot company) which were assigned to Nitnelav Holdings Ltd. The judge found these allegations proven, on the criminal standard of proof, so that he was sure of them. In effect he found that all these companies were owned by Mr Ablyazov. He found, however, that one of the English properties concerned, 79 Elizabeth Court, and the company which owned its shares, were not proven to be Mr Ablyazov's.

[6] The judge gave three judgments in the committal application: one dealing with the alleged contempts of court, one dealing with sentence, and one dealing with the further consequences for the litigation as a whole, the so-called "unless" judgment. The contempt judgment was handed down on 16 February 2012 ([2012] EWHC 237 (Comm)) and sentence was dealt with by a further extempore judgment given that same day. The unless judgment was given on 29 February 2012 ([2012] EWHC 455 (Comm)).

[7] In his contempt judgment the judge concluded that over the relatively narrow range of matters investigated, Mr Ablyazov had failed to disclose assets, had lied to the court, and had dealt with his assets in breach of the freezing order: and that in defending the committal application had relied on false witnesses and forged documents. The judge said (at para 80):

> ". . . notwithstanding the clarity and firmness with which Mr Ablyazov gave much, though not all, of his evidence I concluded that I could place little weight on his denials and could only accept what he said if it was supported by reliable contemporary evidence."

[8] In his unless judgment the judge debarred Mr Ablyazov from defending the claims made against him in eight associated commercial court actions and struck out his defences in them *unless* within a stated period he both surrendered to custody and made proper disclosure of all his assets and dealings with them. The order that Mr Ablyazov surrender to custody had been made necessary by his failure to turn up for judgment on 16 February 2012 (although he had said through his counsel that he would). He became a fugitive and had disappeared. The stated period for surrender was until 9 March 2012, and for disclosure until 14 March 2012, save that the sanctions for non-compliance would not take effect until seven days after any dismissal of any appeal.

[9] Mr Ablyazov did appeal, from all three judgments, and his appeal came before us in July 2012. On 25 July 2012 we informed the parties that the appeals had failed, for reasons to be reserved, save that it had not yet been decided whether the order for surrender to custody should also have been made the subject of an unless order. Our formal order was also reserved.

[10] On 6 November 2012 our judgments were handed down, having been previously sent out in draft to the parties about a week earlier: [2012] EWCA Civ 1411. We dismissed all appeals (the appeal against the attachment of an "unless order" to the order that Mr Ablyazov surrender himself to custody was decided by a majority, otherwise we ruled unanimously). In dismissing the committal appeal, I had occasion to say this:

> "100 As this series of coincidences, misfortunes, errors, misunderstandings and inexplicable developments multiply, the court is entitled to stand back and ask whether there is in truth a defence or defences as alleged [to the committal allegations], even if no burden rests on Mr Ablyazov, and the burden remains on the bank, or whether there is at any rate the realistic possibility of such, or on the other hand whether the court is being deceived. The trial judge decided that it was being deceived by witnesses without credibility. It is not for this court to say that he was wrong without strong grounds for doing so, grounds which have simply not been formulated."

[11] In dealing with the appeal against sentence, I went on to say:

> "106 . . . Moreover, Mr Ablyazov's contempts have been multiple, persistent and protracted, have embraced the offences of non-disclosure, lying in cross-examination, and dealing with assets, and have been supported by the suborning of false testimony and the forging of documents."

[12] Finally, in dealing with the appeal against the judge's "unless" order, I said this:

> "189 . . . It cannot be just, fair, or proportionate, to permit a contemnor to avoid the consequences of his contempt by the expedient of disappearing from sight (but not from the ability to communicate with his lawyers). As the judge said, it is a matter of choice for Mr Ablyazov. He may have his trial on the merits, if he complies with the court's orders. The court has denied him nothing except his ability to ignore the court's orders indefinitely. On the contrary, the order was made in an attempt to persuade Mr Ablyazov to comply with the freezing order 'and so ensure a fair trial in the full sense of that phrase' (at 76)."

[13] It was an essential part of Mr Ablyazov's appeal to this court that, even if, contrary to his primary contention, any findings of contempt survived, nevertheless the unless orders should be abrogated so that he could be permitted to continue to defend the proceedings against him at trial, if necessary from the unknown location to which he had taken refuge and assisted by means of a video link. A similar dispensation had been accorded to his brother-in-law, Mr Syrym Shalabayev, who had also become a fugitive from a committal sentence for contempt of court in proceedings against him, but who had been allowed by the judge to give evidence in support of Mr Ablyazov in the latter's contempt proceedings, and to be cross-examined, by video link, from an unknown hiding place. It was therefore inherent in Mr Ablyazov's contempt of court appeals that he wished the trial, then fixed to commence before the judge in November 2012, to take place with his participation as a Defendant.

[14] Whether, however, Mr Ablyazov intended to seek to maintain his participation if he lost his appeals totally, so that he could only continue to defend the claims against him if he surrendered to custody, made proper disclosure, and sought such relief against sanctions as he might be able to obtain, remained unrevealed; but must be highly unlikely.

THE RECUSAL APPLICATION

[15] Following the judge's judgments on the committal application in February 2012 and again in the interim between disclosure of the result of Mr Ablyazov's appeal against those judgments and the publication of this court's full reasons for its decision, Mr Ablyazov continued to participate in proceedings in the commercial court. In particular a pre-trial review fixed originally for 13 June 2012 was adjourned with his consent and refixed for 2 October 2012. On 26-30 July 2012 the judge heard applications made by both the bank and Mr Ablyazov. The bank sought a declaration that Mr Ablyazov had acted in further default of the freezing order by dealing with his assets, and also sought an order that he reverse certain pledges he had made over valuable properties. Mr Ablyazov requested the court to grant permission retrospectively for such pledges, on the basis that even if made in breach of

the letter of the freezing order, they were within its spirit. The judge remarked in his judgment currently under appeal (at para 21):

> "Although the Long Vacation was about to start with much pre-trial work to be done and it was known that a pre-trial review had been fixed for 2 October 2012 no suggestion was then made that Mr Ablyazov intended to make an application that I should recuse myself."

To which I would add: no application was made by Mr Ablyazov that the judge should recuse himself.

[16] On 2 and 3 October 2012 the pre-trial review took place. (In the meantime the judge had given judgment on 21 September 2012 on the applications heard at the end of July.) A detailed timetable was discussed. For part of that hearing Mr Charles Béar QC attended on behalf of Mr Ablyazov. He provided the judge with a skeleton argument dated 28 September 2012 in which he stated that Mr Ablyazov would not be participating in the pre-trial process because he would not be participating in the trial. This was because, subject to any appeal to the Supreme Court from this court's decision on the contempt of court appeals, "It follows that MA's defence will be struck out, subject to any potential further appeal" (para 2 of Mr Béar's skeleton argument). If there were any such appeal, however, Mr Ablyazov would seek an adjournment of the trial. There was again no suggestion that Mr Ablyazov intended to make an application that the judge should recuse himself. No such application was in fact made. The judge was due to begin his pre-trial reading on 29 October.

[17] The recusal application was made only on 19 October 2012. Mr Ablyazov's solicitor made a witness statement, but it contained no evidence in explanation of the lateness of the application. The judge heard the application on 25 and 26 October. He asked Mr Duncan Matthews QC, who was appearing for Mr Ablyazov, if he wished to say anything in explanation of the delay. He submitted that a decision to ask a judge to recuse himself was made with extreme caution, that the last piece of the jigsaw was the judge's decision of 21 September 2012, and that Mr Ablyazov required a reasonable time to make up his mind. The judge recorded in his judgment that there was nothing about his rulings on 21 September that could have affected the matter and that the submission that the application depended on the outcome of those rulings lacked realism.

THE JUDGE'S JUDGMENT

[18] The judge gave two reasons for refusing to recuse himself. First, there had been a waiver of any right to apply for his recusal. Secondly, there was in any event no real possibility of any bias. Although the question of waiver was considered first, and the judge introduced the question of apparent bias by saying that it was strictly unnecessary to deal with it, he did deal with it fully, rejected it in terms, and concluded by making it clear that he rejected the application on both limbs. He said:

> "55 In the result, having considered Mr Matthews' submissions, I am not persuaded that the fair-minded observer would conclude that there was a real possibility that I would be biased when deciding the issues at trial in the sense of being influenced against Mr Ablyazov for reasons extraneous to the legal or factual merits of the case. I naturally accept Mummery LJ's wise advice (In *AWG Group v Morrison* [2006] 1 WLR 1163 at 9: 'prudence naturally leans on the side of being safe rather than sorry'.) that it is better to be safe than sorry but I have not been persuaded that there is even a real doubt about as to whether the fair-minded observer would conclude that there is a real possibility that I would be biased when deciding the issues at trial.
>
> 56 In any event, had I concluded that there was either a real possibility that I would be biased, or a real doubt as to whether I might be biased, I would have been compelled to dismiss the application that I should recuse myself on the grounds that Mr Ablyazov had waived his right to make such an application."

[19] As for the question of apparent bias, the judge expressly considered the following authorities: *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Bahai v Rashidian* [1985] 3 All ER 385, [1985] 1 WLR 1337, [1985] NLJ Rep 1033; *Symphony Group v Hodgson* [1994] QB 179, [1993] 4 All ER 143, [1993] 3 WLR 830; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, [2000] IRLR 96; *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, [2001] ICR 564; *Sengupta v Holmes* [2002] EWCA Civ 1104; *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465; *Lawal v Northern Spirit* [2003] HRLR 29; *Phillips v Symes (No 3)* [2005] EWCA Civ 533, [2005] 1 WLR 2986; *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163; *Helow v Secretary of State for the Home Department* [2008] UKHL

62, [2009] 2 All ER 1031, [2008] 1 WLR 2416, and *Secretary of State for the Home Department v AF (No 2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528. He also considered three authorities in the European Court of Human Rights, namely *Hauschildt v Denmark* (1989) 12 EHRR 266; *Thomann v Switzerland* [1996] ECHR 17602/91, and *Morel v France* (2000) 33 EHRR 47. He referred to what has been said in the authorities about the tension between the principles that justice must be seen to be done and that litigants must not be allowed to pick their own judges or disrupt proceedings unfairly; and about the role of the fair-minded and informed observer. He found assistance in the considerations that findings against a litigant do not by themselves give rise to an appearance of bias, but that the influence of matters "extraneous to the legal or factual merits of the case" (see *AF (No 2)* at para 53) might do. He asked himself by reference to the possibility of an "overlap" between issues previously considered and issues yet to be considered (cf *Hauschildt* and *Sengupta)* to what if any extent there was an overlap between matters that he had already considered in the interlocutory and in particular in the committal proceedings and matters that he would have to decide at trial: and he concluded that the overlap was a narrow one.

[20] On this appeal, it has not been submitted that the judge applied the wrong principles or overlooked any relevant principle, but rather that his application of the principles to the facts of the case led to erroneous conclusions. Thus Mr Ablyazov's grounds of appeal on the subject of apparent bias read as follows:

> "2 The Judge was wrong to find that there was no lack of (apparent) impartiality. In particular:
>
> (a) Having correctly found that the issues at committal and at trial overlapped, the Judge was wrong in principle to rely on the potential for differences in the evidence arising on those issues . . . .
>
> (b) The Judge was wrong in principle to consider that the greater range of issues to be determined at trial, compared with the issues determined on committal, was a factor negativing apparent prejudgment . . . .
>
> (c) The Judge was wrong to place any or any significant reliance on the absence of any allegation of unfairness affecting the Judge's determination of previous applications and on the fact that MA had given no indication of a complaint up to and including the Pre-Trial Review on 2 October 2012 . . .
>
> (d) The Judge was wrong to find that the possibility of pre-judgment in respect of MA's credibility was academic in circumstances where he is not giving evidence at trial . . . ."

The grounds referred in this passage to only three paragraphs of the judge's judgment, viz 37, 38 and 45.

[21] As for the material in grounds 2(a) and (b), the judge said this:

> "37 It is likely that the reasoning that I followed to reach decisions as to Mr Ablyazov's ownership of certain companies on the contempt application will be urged upon me by the Bank with regard to other companies which feature in the actions but which did not feature in the contempt application. However, the fair-minded observer would also bear in mind the following matters. First, whether or not a particular company was owned by Mr Ablyazov pre-2009 will depend upon whether an inference to that effect can be drawn from the circumstantial evidence available in relation to that company. The evidence in relation to each company may not be the same; cf the evidence in relation to Bubris, the English real estate and the Schedule C companies which I had to consider in the contempt application . . . Indeed, it was because the evidence differed in relation to each asset that I was not persuaded that Mr Ablyazov owned Rocklane Properties Ltd, the owner of the flat in Elizabeth Court. Second, the issues which I determined on the contempt application were much narrower than the matters which will have to be proved by the Bank to establish its cause of action against Mr Ablyazov. Ownership of a company is part of what must be proved at trial but is not the entirety of what muct be proved. The other matters which must be proved (eg the provisions of Kazakh law which governed Mr Ablyazov's conduct and Mr Ablyazov's conduct pre-2009 with regard to the disputed transactions) have not been considered by me at all."

[22] The judge also said this at paras 38 and 45 (complained about in ground 2(c) and ground 2(d) respectively):

> "38 The fair-minded observer, noting the above matters and also noting that (a) no allegation had been made that I have unfairly determined any of the previous applications and that (b) up to and beyond the pre-trial review on 2 October 2012 Mr Ablyazov gave no indication that he feared that I had or would pre-judge the case against him, would conclude, in my judgment, that there was no real possibility that I would be biased against him at the trial by reason of pre-judgment. That the fair-minded observer might be influenced by the absence of a complaint by the person seeking recusal when deciding whether there was a real possibility of bias is suggested in *Locabail* . . . at paragraph 57.

> 45 In any event the question of Mr Ablyazov's credibility seems to me to be academic in circumstances where he has said that he will take no part in the trial and where, therefore, there will be no evidence from him. The fair-minded observer, on being told that, would surely conclude that any views I had expressed on the contempt application as to Mr Ablyazov's credibility were irrelevant to his assessment of the possibility of bias because I will not be called upon at trial to assess any evidence of his."

[23] On the issue of waiver, the judge referred to *Locabail*, *Baker v Quantum Clothing Group* [2009] EWCA Civ 566, and *AF (No 2)*. It is not in dispute on this appeal that a right to object to a judge on the ground of the appearance of bias can be waived, if done with full knowledge of the relevant facts and the right to object, and if done clearly and unequivocally. In this respect the judge reasoned as follows:

> "27 By not seeking an order that I recuse myself at the pre-trial review on 2 October 2012 Mr Ablyazov represented that he had no objection to my trying the case. By that time he had full knowledge of my findings on the contempt application since February 2012. If ever there was a time when he would be expected to give notice of an application that I should recuse myself from the trial if that were his intention then the pre-trial review was it. (Indeed, I consider that he should have given notice of his intention at the time he agreed to vacate the pre-trial review fixed for June 2012 but it is unnecessary to base myself on that in the light of the pre-trial review on 2 October 2012.) By failing to do so he represented that he had no such intention and must be regarded as having waived his right to apply for my recusal on the basis of those findings (and on the basis of such decisions and comments as I had made before February 2012). Since he also had full knowledge of my findings on the applications heard at the end of July 2012, by 21 September 2012 he must also be regarded as having waived his right to apply for my recusal on the basis of those findings on 2 October 2012 when he appeared by counsel at the pre-trial review and gave notice of an intention to seek an adjournment but no notice of any intention to seek my recusal."

[24] In this respect, Mr Ablyazov's grounds of appeal similarly complain only about the application of the familiar principles of waiver, not of any doctrinal error. It is submitted that the judge was wrong to find an unequivocal representation out of mere silence. It is also submitted that any waiver could be retracted.

THE TRIAL

[25] The trial commenced on 7 November 2012. The bank is the Claimant, and there are three Defendants who are represented: Mr Zharimbetov, Mr Khazhaev, and Usarel Investments Ltd. Mr Ablyazov, who had made it clear at the pre-trial review that he would not be represented, has given instructions for a limited representation:

> "for the purpose of considering, and if appropriate seeking to make representations in relation to, any applications or matters arising, other than in relation to Mr Ablyazov's substantive defence of the claims against him . . . The decision to attend trial on the above basis has respectively been taken under protest" (his solicitor's letter of 6 November 2012).

Those instructions may have been given because he had been advised that under CPR 39.3 a failure to attend trial may be visited with the striking out of a defence.

[26] The trial is due to last fourteen weeks.

SUBMISSIONS

[27] On behalf of Mr Ablyazov, Mr Béar has submitted, essentially by reference to the main judgment in the contempt proceedings, that the judge has been involved in such pre-judgment of issues overlapping with issues which would arise at trial that apparent bias has been established. He focuses in particular on three aspects of that pre-judgment: first, on the judge's acceptance that the bank had proved Mr Ablyazov's ownership of certain companies, an issue of ownership which would arise again at trial, albeit in connection with other assets. Secondly, he submits that the methodology, the reasoning process by which the judge reached his conclusions, including the judge's rejection of the credibility of Mr Ablyazov and his witnesses, will be repeated. Thirdly, he submits, in general, that the fair-minded observer will not be able to conclude that a judge who has already found a Defendant guilty of concealment of his assets, lying and forgery, can avoid giving the appearance of bias in a subsequent trial. It needs, however, to be repeated that he does not say that the judge is actually biased, or that he has ever, in the numerous hearings which he has conducted or judgments which he has written, given to Mr Ablyazov anything other than fair and impartial treatment (even if his conclusions remain disputed). Nor does he complain about the language in which the judge has expressed himself, with a single exception, when the judge, during the July

hearing, said that he would have to proceed “with a certain degree of caution” in relation to Mr Ablyazov's evidence, since “When Mr Ablyazov says 'Black is black', the court has got to consider whether black truly is black”.

[28] In connection with these submissions, Mr Béar relies in particular on the following authorities. In terms of Strasbourg jurisprudence, he refers to *Hauschildt v Denmark* where, in a criminal case, it was held that a judge who had been party to numerous pre-trial hearings where detention on remand was confirmed on the basis of a law which required a “particularly confirmed suspicion” of guilt ought to have recused himself from sitting on the trial. He also referred to *Morel v France*, in a civil case where the European Court of Human Rights (ECtHR) found no breach of art 6(1), for the dictum that bias would have been displayed “if the matters dealt with by the insolvency judge during the observation stage were analogous to those on which he ruled as a member of the trial court” (at para 47). Thirdly, he referred to *Depiets v France* (2006) 43 EHRR 55 where, in a criminal case, two of the judges in the Cour de Cassation who had earlier sat on an appeal from a decision to commit the Defendant to stand trial sat again on an appeal from the court which had convicted him. The Cour de Cassation, in rejecting a submission of apparent bias by reason of pre-judgment, pointed out that the questions of law which had arisen on each occasion had been different and added (at para 41): “In other words, the issues they were called upon to consider in the second appeal were not analogous to those they had been required to deal with in the first appeal”.

[29] However, Mr Béar was not able to point to a single Strasbourg authority, in a civil case, in which the Strasbourg court had found a judge to have been required to recuse himself for apparent bias on the ground of pre-judgment by reason of his being involved in preliminary hearings prior to trial.

[30] As for English authority, Mr Béar relies principally on *Sengupta v Holmes*, where this court had to consider its own procedure whereby a judge of this court might have refused permission to appeal on paper and later found himself listed to hear an appeal which had been granted by another member of the court on renewal of the application. This court there rejected the submission that there was a problem of apparent bias in such a situation. In his judgment, Laws LJ considered the Strasbourg authorities at length, including *Hauschildt*. He reasoned that a trial judge could not sit on appeal from his own judgment, at any rate where “he has committed himself to a view of the facts which he himself had the responsibility to decide”, stating that such a state of affairs was comparable to the situation in *Hauschildt* (at para 32). Mr Béar relies on that observation. Laws LJ went on to conclude, however, that such a situation did not apply to an appeal court judge who merely had to express a provisional view – provisional because of the procedure for renewal of the application at an oral hearing – as to the possible merits of an appeal. Mr Béar also relied on a passage in Keene LJ's judgment where he said (at para 44): “What cases like *Hauschildt* do bring out is the need to see whether a judge is in reality having to decide the same question on which he previously reached a determination: see para 52 thereof”.

[31] Mr Béar also relied on the Australian case of *Livesey*, which was concerned with professional misconduct, and thus was of a quasi-criminal status. It appears that the charge of misconduct went to the New South Wales court of appeal. The High Court of Australia held that a decision to disbar a barrister could not stand where the court of appeal hearing the barrister's case included two judges who had previously, in other proceedings arising out of the same subject-matter, criticised the conduct of all involved, including the barrister (albeit he was not involved as a party or a witness in those earlier proceedings). The earlier case had concerned the conduct of a law student in obtaining bail for an accused. The later case concerned (in part) the barrister's own role in those events. The two judges as members of the earlier court had each criticised the barrister as being an active and knowing participant in the law student's misconduct. The barrister wished to call the law student as a witness. The two judges in the earlier proceedings had expressed themselves in strong terms that the law student's evidence should be rejected. The barrister's counsel objected to the presence of the two judges concerned on the court of appeal, but the court had ruled that there was no need for them to recuse themselves.

[32] The High Court disagreed. Its judgment included the following passage (at 299-300):

> “Necessity and the extraordinary case (see, eg, *ex parte Lewin; Re Ward* [1964] NSWR 446, at p 447) make it impossible to lay down an inflexible rule; each case must be determined by reference to its own particular circumstances. It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable

> apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact or about the credit of a witness whose evidence is of significance on such a question of fact."

[33] On the question of waiver, Mr Béar submitted that no unequivocal waiver could be derived from the equivocal condition of silence. In this respect he referred to *The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925, [1985] 2 Lloyd's Rep 18, a case concerned with the question of whether delay had created an agreement to abandon an arbitration, where Robert Goff LJ had said (at 937):

> "We should add that we see the same difficulty in invoking the principle of equitable estoppel in such circumstances. It is well settled that that principle requires that one party should have made an unequivocal representation that he does not intend to enforce his strict legal rights against the other; yet it is difficult to imagine how silence and inaction can be anything but equivocal."

[34] Mr Béar also relied on two decisions, one from Strasbourg, and one in our Supreme Court, to illustrate the inadequacy of silence in this context. In *Bulut v Austria* (1997) 24 EHRR 84 a lawyer's failure to respond to a written question from the court as to whether there was any objection to the presence of a judge who may have been technically excluded by operation of law was held not to amount to a waiver: but the silence of the lawyer in the presence of the client and in the face of the court was recorded in the trial record as an agreement to waive the technical difficulty. That was another criminal case. In *McGowan v B* [2011] UKSC 54, [2011] 1 WLR 3121, 2012 SC (UKSC) 182 the issue was whether there had been waiver by silence of a suspect's right to be attended by a lawyer when interviewed by the police. The Supreme Court considered the comparative jurisprudence in both the ECtHR, and in America arising from the famous decision of the US Supreme Court in *Miranda v Arizona* (1966) US 436. In doing so it cited the following observation from the American jurisprudence "But a valid waiver will not be presumed simply from the silence of the accused after warnings are given . . . Presuming waiver from a silent record is impermissible . . ." (*Miranda* at 475).

[35] In this connection Mr Béar also referred to *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615, [2002] 3 All ER 1041, where the Privy Council held that Scottish accused had not tacitly waived their right to trial by an independent and impartial tribunal by mere participation without objection in their hearings before temporary sheriffs (who as a class had been held not to be sufficiently independent of the executive). Lord Bingham examined the uncertainties of the development of the issue as to whether temporary sheriffs were independent, and concluded that in such a state of the law the accused and their agents were not to be presumed to have appreciated their right to object, with the result that an inference of tacit waiver could be made (at para [38]). Similarly, Mr Béar submitted, this is not an "undoubted right to object" case in which a mere failure to object may be much more significant.

[36] In any event, Mr Béar resisted the idea that there was any obligation on Mr Ablyazov to make an application for the judge to recuse himself in advance of the opening day of the trial itself. In his submission, the moment of truth for such an application, or what Mr Béar described as the "watershed moment", did not arrive until that time. It would only have been different if the judge had expressly raised the question of whether or not the parties had any objection to him continuing as the designated judge of trial. Only that express raising of the issue, or the arrival of the day of trial, could require Mr Ablyazov to make his election. For the rest, it must be assumed, for that was a natural explanation for his silence, that Mr Ablyazov was still in the process of making up his mind whether to object or not.

[37] Alternatively, the law, guided by Strasbourg jurisprudence relating to the fundamental and particularly sensitive nature of the right to an impartial tribunal guaranteed by art 6, should require, as a prerequisite to the possibility of waiver, that a judge raises the issue of recusal himself. That would ensure that the litigant was fully informed of his rights, and would also provide assurance, through complete transparency, that there was what Mr Béar described as no subjective problem.

[38] In any event, Mr Béar submitted, Mr Ablyazov lacked the knowledge of the right to object which was critical to any concept of waiver. No inference could be drawn as to what, if any, advice Mr Ablyazov had received. Moreover –

> "There is a considerable difference between lawyers' advice that a party has an objection and a judicial acknowledgment of its existence, particularly in an area such as this where there is no simple bright-line test and therefore matters of judgment and degree are inevitably involved."

[39] Finally, any waiver should not be considered to be permanently binding. In effect, it could be recalled, or the effect of the representation should not be regarded as automatically binding, but should be subject to a test of whether it is reasonable in all the circumstances to hold the party to his waiver. In this connection it was submitted, at any rate in Mr Béar's skeleton argument, that the question of waiver was still somewhat of an open question in Strasbourg jurisprudence (even if entrenched, as he accepted, in English law, see *Locabail*, a decision, however, arrived at in the era before the coming into force of the Human Rights Act 1998). In any event, any waiver, to be effective for ECHR purposes "requires minimum guarantees commensurate to its importance" (*Suovaniemi v Finland* (application no 31737/96, decided 23 February 1999), cited in *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 All ER (Comm) 1, [2007] Bus LR 1052at paras [56]ff). Such minimum guarantees require a concept of reasonable proportionality, given the public interest involved. In the present case it should be borne in mind that a risk of pre-judgment strikes at the heart of a judge's ability to arrive at a proper judicial determination; that the point was not expressly considered at the time of the pre-trial review on 2 October 2012; that the impact of Mr Ablyazov's failure to take the point on that occasion was limited, especially in circumstances where the judge had not yet begun his pre-reading, even as of 25-26 October, when he heard the recusal application; and that enquiries recently made of the commercial court's listing officer suggested that a new judge might be available, if necessary, to begin his pre-reading by the end of November or early December.

[40] On behalf of the bank, Mr Stephen Smith QC submitted that the judge was right for the reasons which he had given. He emphasised however the following considerations. Mr Ablyazov had made no objection to the judge's involvement in the proceedings despite numerous significant hearings which have taken place before and since his confirmation as judge of the trial as long ago as March 2011. No objection had been made to the judge's conduct of the proceedings, despite several visits to this court on appeal from the judge's rulings. In the circumstances the obvious inference to be derived from Mr Ablyazov's late application was that he was simply attempting to derail the trial. For that reason, and because Mr Ablyazov had made it clear at the pre-trial review that he would not be participating in the trial, Mr Ablyazov had clearly waived any possible issue of apparent bias, and even lacked any proper standing to complain. In any event, several authorities had made the point that earlier adverse findings or observations in pre-trial proceedings would not readily raise a real possibility of bias: see for instance *Arab Monetary Fund v Hashim* (unreported, 28 April 1993) at p 10 of the transcript, or *Locabail* at para 25. In any event, any overlap between the issues and findings of the contempt judgment and the issues at trial was narrow and speculative: in particular the judge had not there considered at all the circumstances which needed to be established to found the bank's causes of action for fraudulent transactions; and of the two dozen or so companies whose ownership was in issue at trial, only two, the Sch C companies Bergtrans and Carsonway (see 5 above), had been previously considered.

[41] Furthermore, to the extent that previous findings created issue estoppels, such as the findings as to the ownership of Bergtrans and Carsonway, the judge, like any judge, would be bound in any event. As for credibility, that would not be in issue at a trial in which Mr Ablyazov did not participate. Moreover, under CPR 39.3, a Defendant who does not attend trial may have his defence struck out.

[42] As for waiver, Mr Smith submitted that Mr Ablyazov's situation in the proceedings was not one of mere silence: he had participated in the proceedings, and in the pre-trial review, knowing of the judge's prior judgments and that he would conduct the trial, and undoubtedly in possession of knowledge and advice that he was entitled to object to a judge on the ground of bias or apparent bias, and under an obligation "to help the court to further the overriding objective" (CPR 1.1 and 1.3).

[43] As for the consequences of waiver, it was an election which concluded the matter. The Strasbourg court, like the English court, recognised the concept of waiver of even the fundamental art 6(1) right: and that this was so had been recognised by the Privy Council in *Millar v Dickson* at paras 53ff, citing, for instance, *Bulut v Austria* (1996) 24 EHRR 84. In the present case, the consequences of permitting the withdrawal of Mr Ablyazov's waiver would be extremely serious: the trial, which had already started, would be lost, even though all the other parties to it,

including the other Defendants, wished it to go ahead, and even though one of those Defendants had stated that he would be unable to support the financial consequences of a second preparation for trial. At the very least, the trial would have to be postponed to 2013, with unknown consequences for the availability of counsel. The unfairness to all the other parties, and the waste of resources of both the parties and the court, would be huge. The cost of the adjournment could in theory be visited on Mr Ablyazov, but he had given up paying his costs liabilities since February 2012.

JURISPRUDENCE OF APPARENT BIAS

[44] There is a large jurisprudence concerning apparent bias, but there was no issue in the present case, or below, as to the applicable principles, to be found in the cases cited by the judge. Nor, as may sometimes occur, was there any issue as to the nature or knowledge of the fair-minded and informed observer (*cf Belize Bank Ltd v A-G of Belize* [2011] UKPC 36, [2012] 3 LRC 273 and *Case Comment* [2012] 71 CLJ 247; and see also *Southern Equities Corp Ltd v Bond* [2000] SASC 450). In the circumstances the relevant jurisprudence is to be found in authorities which either specifically discuss the problem of pre-judgment or else make useful general observations as to the circumstances in which objection to a judge is or is not likely to be justified.

[45] Among the latter are the following, to be found collected in *Locabail*. Although prepared just before the coming into effect of the Human Rights Act 1998 (but see 463E/G for the wealth of Strasbourg jurisprudence which was cited), or the ultimate distillation of the apparent bias test in *Porter v Magill*, the judgment of this court in *Locabail*, prepared by Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C, covering five separate cases which had been listed and heard together so that the issues concerning disqualification of judges on the ground of bias could be thoroughly examined, and considered with the assistance of an amicus curiae (see para 1), remains a tour de force of helpful learning.

[46] Thus the observations of foreign courts which this court in *Locabail* found particularly apposite and which are relevant to the current problem before us include the following:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial" (*President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147 at 177, cited at para 21).

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour" (*per* Mason J, *In re JRL, ex parte CJL* (1986) 161 CLR 342 at 352 (HCA, cited at para 22).

[47] As for the general observations of the *Locabail* court itself, I would refer for present purposes to the following:

> "19 . . . Nor will the reviewing court pay any attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."

[48] The *Locabail* court, as have many other authorities, cautioned about the fact-specific nature of the problems which arise in this area of the law. Lord Bingham said:

> "25 It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided."

[49] As for observations specifically directed towards the problem of pre-judgment, the *Locabail* court said this:

> "25 . . . By contrast, a real danger of bias might well be thought to arise . . . if in a case where the credibility of any individual were in issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (*Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same or a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every case must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

[50] It was the third case considered in *Locabail*, namely *Timmins v Gormley* (see at 491 – 497), which concerned the problem of pre-judgment. There the trial judge, a recorder otherwise in practice at the personal injury bar, had not previously been concerned with the issues of that litigation, but he had shown himself, particularly by his published writings, to be predisposed to favour the interests of Claimants in personal injury cases over the interests of Defendants and in particular Defendants supported by insurers. The recorder had disclosed certain matters at the start of the trial, but not his writings (see at para 82). No complaint was made as to the conduct of the trial, and so the Defendant's case on bias turned on the articles in question. In particular attention was focussed on what was said to be the intemperate tone of the language used. The court said: "It is always inappropriate for a judge to use intemperate language about subjects on which he has adjudicated or will have to adjudicate" (at para 85). The court found assistance in the High Court of Australia case of *Vakauta v Kelly* (1989) 167 CLR 568 at 570-1, where the majority (Brennan, Deane and Gaudron JJ) said that there was an ill-defined line beyond which the expression of preconceived views about the reliability of medical experts come across by a judge in the course of his work could threaten the appearance of impartial justice. The *Locabail* court found the case of *Timmins v Gormley* a difficult and anxious one to resolve, but ultimately concluded (at para 89):

> "We have, however, to ask, taking a broad common sense approach, whether a person holding the pronounced pro-Claimant anti-insurer views expressed by the recorder in the articles might not have unconsciously leaned in favour of the Claimant and against the Defendant in resolving factual issues between them. Not without misgivings we conclude that there was on the facts here a real danger of such a result."

[51] In *Sengupta v Holmes* this court had to consider a very particular problem of pre-judgment arising out of the procedure whereby applications for permission to appeal to this court are conducted. One (Lord Justice for convenience, I will use that term as including a lady justice) considers the application on paper. If the application is refused, the Applicant has a right to renew his application orally (it may be to one or more lords justice). The court before whom the Applicant renews his application may comprise the same as Lord Justice had already dealt with the application on paper, or the court may include that and Lord Justice another, or the original may Lord Justice not be present upon renewal. If permission is granted on renewal, as may well occur, the original who Lord Justice had refused permission may be listed to sit on the appeal. The test for granting an application is that there is a real prospect of success on appeal, or some other compelling reason for permitting an appeal. So, in theory, a who Lord Justice has decided, when considering the application on paper, that there is *no* real prospect on appeal, may be called upon to reconsider that decision either on oral renewal of the application or at an actual appeal permitted by another lord justice. In *Sengupta v Holmes* it was that last possibility which had occurred. Laws LJ had refused the application on paper, the application had been granted on renewal by Simon Brown and Tuckey LJJ, and the appeal was listed to be heard before Laws, Jonathan Parker and Keene LJJ. There was an objection to Laws LJ sitting on the appeal. The case concerned a claim to judicial review of a decision at a preliminary stage of medical disciplinary proceedings. The issue was treated as a matter raising a general principle, with no relevant special considerations. The court was assisted by submissions by an amicus curiae and by further submissions made on behalf of the Lord Chancellor, who was permitted to intervene.

[52] The leading judgment was given by Laws LJ himself. He considered three relevant English cases concerned with the procedure for obtaining permission to proceed. He also considered a fair number of Strasbourg authorities, including *Hauschildt*.

[53] In his conclusions (at paras 26ff), Laws LJ stated the problem of pre-judgment as "an apprehension that the judge will approach the case with a closed mind" (at para 30) or that "it is reasonably feared that he cannot or will not revisit the issue with an open mind" (at para 31). He described the *Hauschildt* or *Livesey* situation as one where the judge "has committed himself to a view of the facts which he himself had the responsibility to decide" in the sense of a judge who had decided the factual merits of a case at trial and then sought to sit on the appeal. He continued:

> "33 In some such cases the judge's inability to open his mind on the appeal would not be just apparent, but real: if after a careful and professional review of all the evidence, given by witnesses whom, so to speak, he has looked in the face, he has arrived at the conviction that the party in question is a crook or a rogue, guilty as charged (whether the case is criminal or civil), he might not *conscientiously* be able to put himself back into a state of mind where he has no preconceptions about the merits of the case.
>
> 34 There may also be cases, though one hopes there will not be, in which a judge called on to make a preliminary decision expresses himself in such vituperative language that any reasonable person will regard him as disqualified from taking a fair view of the case if he is called upon to revisit it."

[54] However, Laws LJ contrasted those sorts of cases with the application to appeal procedure, where the appeal court judge merely had to take a provisional view on a decision made in the court below, knowing that, if he refused permission, the question could well be revisited in an oral hearing, in a situation where, upon the provision of fresh information or argument, there would be an opportunity for further reflection. In this connection he also referred to "the central place accorded to oral argument in our common law adversarial system" (at para 38). In agreeing, Keene LJ also spoke of the decision made on paper as "a potentially provisional decision" (at para 45). He contrasted the situation in "cases like *Hauschildt*" saying that they brought out "the need to see whether a judge is in reality having to decide the same decision on which he has previously reached a determination . . ." (at para 44).

[55] A case closer to the situation of our case was that of *Arab Monetary Fund v Hashim* (CA, unreported, 28 April 1993) where the judgment of the court was given by Sir Thomas Bingham MR. The Plaintiff Fund was seeking to recover $50 million which it alleged that its former director-general, Dr Hashim, had misappropriated from it. That action also began, as such actions generally do, with a world-wide freezing order. Hoffmann J became the designated judge. Dr Hashim complained to the Vice-Chancellor that in the course of interlocutory applications the judge had made up his mind against him. The Vice-Chancellor considered that there was no ground for that complaint at all, but as a matter of indulgence directed that while Hoffmann J should continue to hear interlocutory applications, a different judge would conduct the trial. Hoffmann J was then appointed to the court of appeal and Chadwick J took his place as designated judge. He conducted the pre-trial review and was subsequently seven days into the trial when Dr Hashim drafted a letter to the Lord Chancellor to have him removed on the ground of apparent bias. However, the letter (which in being directed to the Lord Chancellor was misconceived) was never sent, apparently on legal advice. The trial continued for several more weeks, and then Dr Hashim applied to the judge to recuse himself on the ground of apparent bias. The opening weeks of the trial had been dogged by numerous further interlocutory applications, and Dr Hashim was concerned with the result of them. But he was also concerned with a remark which the judge had made in another case and which had been reported to him. Chadwick J refused to recuse himself, and his judgment was appealed.

[56] This court refused to give permission to appeal, but considered the application in a full judgment. In the course of that judgment, Bingham MR said this:

> "In accordance with the practice now adopted in cases of this magnitude, a judge was assigned to deal with the string of interlocutory applications which were expected before trial. Such an arrangement has the obvious benefit of avoiding the wasteful duplication of time and effort necessarily involved if a series of different judges has to master the pleadings, issues and previous history of a complex case. But such an arrangement is intended to have an additional benefit: that the judge, being familiar with the case as it develops, will play a creative and directional role, concentrating attention on the issues which matter, discouraging unnecessary interlocutory diversions and highlighting the apparent strengths and weaknesses of the parties' respective cases."

Bingham MR went on to say:

> "Would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the Applicant was not possible? Most, if not all, of the cases in which this test has been discussed have

been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in *Vakauta v Kelly* (1988) 13 NSWLR 502 at 513A:

'. . . In considering the content of the apprehended bias principle the court must look to, inter alia, two things: what are the norms or standards relevant to the kind of case before it; and whether, on the facts, the requirements have been fulfilled.'"

[57] Bingham MR also said this:

"In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the other. There are a number of possible explanations for this, the most obvious being that the successful party has shown greater judgment, determination and knowledge of the rules than its opponent. Mr Ross-Munro accepted, as we understood, that no inference of apparent bias could be drawn from the fact that most, or all, interlocutory applications had been decided against Dr Hashim. We agree. He also disclaimed any attack on the correctness of Chadwick J's interlocutory decisions. This we find puzzling. It must, we think, be hard to show consistent unfairness in the absence of consistent error."

[58] Yet another aspect of the problem of pre-judgment can in theory arise in circumstances where, following an appeal, a matter is remitted to a court or tribunal for reconsideration. This can happen not infrequently, either where a retrial is necessary, or where an arbitration award may have to be remitted to the arbitrators, or where the appeal court has to remit a matter to an expert tribunal. On occasions the appeal court is asked to say whether the matter should return to the same judge or tribunal, and sometimes the appeal court says that it should not. It often does so on no articulated principle, but guided by a sense that, if the judge or tribunal has erred sufficiently, the matter should be revisited afresh by a new judge or tribunal. One case in which the question was debated by reference to the principles of apparent bias and led to a developed judgment was *Secretary of State for the Home Department v AF (No 2)* [2008] 1 WLR 2528, see at paras 52ff. Sir Anthony Clarke MR referred to *Sengupta v Holmes* and other authorities mentioned herein and said:

"53 The general principle is not in dispute . . . . The court must first ascertain all the circumstances which bear on the suggestion that the judge was (or would be) biased. It must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias; that is that the judge might have been (or be) influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case . . . .

55 However, as I read the authorities, it all depends on the facts. I do not think that the mere circumstance that the judge has reached conclusions which are adverse to a party of itself leads to the conclusion that there is an appearance of bias . . . .

56 However there are many cases in which issues of fact are remitted to the trial judge to consider or reconsider in the light of, say, a decision of an appellate court. It is a matter for judgment in each case whether the test identified above is satisfied. It seems to me to be very unlikely that the circumstances of successive hearings under section 3(10) of the PTA [Protection of Terrorism Act 2005] in respect of successive control orders would be such that a fair-minded observer would think that a judge who considered the first one might not be able fairly to consider the second one. On the contrary, it seems to me that justice is likely to be best served by having the same judge. I see no reason in principle why, in the ordinary case, a judge should not be able to consider the evidence available at the second hearing afresh entirely fairly, whether or not he had previously reached a conclusion in respect of an earlier control order where some of the evidence was the same.

57 That is not to say that there might not be particular circumstances which might lead to the conclusion that that was not so. Whether there are or not will depend on the circumstances of the case concerned."

[59] In *Davidson v Scottish Ministers* [2004] UKHL 34, 2004 SLT 895, [2004] HRLR 34, Lord Bingham addressed this subject again. He emphasised the importance of the "objective judgment":

"6 . . . Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since bias

suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.

7 . . . it has however been accepted that justice must not only be done but must also be seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear to be so. The judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge's judgment, and must appear to be so."

[60] I turn to the Strasbourg authorities. In *Hauschildt v Denmark*, the particular problem was that, in a criminal case, one of the trial judges had on a number of separate pre-trial occasions invoked a provision of Danish law, for the purposes of keeping the Defendant on remand, which required the judge to be satisfied that there is a "particularly confirmed suspicion" that the Defendant had committed the crimes of which he had been accused. Thus, in concluding that there was an objectively justified fear of apparent bias, the ECtHR reasoned:

"50 . . . In the court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.

51 Nevertheless, special circumstances may in a given case be such as to warrant a different conclusion. In the instant case, the court cannot but attach particular importance to the fact that in nine of the decisions concerning Mr Hauschildt's detention on remand, Judge Larsen relied specifically on section 762(2) of the Act . . . .

52 The application of section 762(2) of the Act requires, *inter alia*, that the judge be satisfied that there is a 'particularly confirmed suspicion' that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is 'a very high degree of clarity' as to the question of guilt. Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous."

[61] In general, however, the Strasbourg cases illustrate the normal principle enunciated in *Hauschildt* that previous involvement in interlocutory aspects of a criminal prosecution does not justify a concern of apparent bias. Reflective perhaps of such cases is *Thomann v Switzerland* where the accused was tried in absentia and then, upon his being apprehended and granted a retrial, was tried again by the same judges. The ECtHR rejected a claim of apparent bias. It said:

"35 The court does not find these arguments persuasive. As the Federal Court explained (see para 13 above), judges who retry in the Defendant's presence a case that they have first had to try *in absentia* on the basis of the evidence that they had available to them at the time are in no way bound by their first decision. They undertake a fresh consideration of the whole case; all the issues raised by the case remain open and this time are examined in adversarial proceedings with the benefit of the more comprehensive information that may be obtained from the appearance of the Defendant in person . . .

36 Furthermore, if a court had to alter its composition each time it accepted an application for a retrial from a person who had been convicted in his absence, such persons would be placed at an advantage in relation to Defendants who appeared at the opening of their trial, because this would enable the former to obtain a second hearing of their case by different judges at the same level of jurisdiction. In addition, it would contribute to slowing down the work of the courts as it would force a larger number of judges to examine the same file, and that would scarcely be compatible with conducting proceedings within a 'reasonable time'."

[62] *Morel v France* is the only Strasbourg authority relied on in this connection by Mr Béar in the civil sphere. The objection of the appearance of bias failed. The ECtHR said:

"45 In that regard, the court reiterates that the answer to that question varies according to the circumstances of the case; it is for that reason that it is not bound by the decisions cited by the Applicant and delivered in other circumstances, one in a different sphere, and the other on another aspect of multi-stage proceedings distinct from the present one.

Furthermore, the mere fact that a judge had taken decisions before the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope of the measures taken by the judge before the trial. The fact that a judge has detailed knowledge of the case likewise does not mean that he is prejudiced in such a way that he cannot be regarded as impartial when the case comes to trial. Nor, lastly, does the fact that a judge makes a preliminary assessment of the available data mean that he is pre-judging the final assessment. The final assessment must be made with the judgment and be based on the evidence adduced and discussed at the hearing . . . ."

The court went on to say that bias would be shown "if the matters dealt with by the insolvency judge during the observation stage mere [*sc* were] analogous to those on which he ruled as member of the trial court" (at para 47), but that the judge in question was at the two stages "faced with two quite separate questions" (at para 48). The concept of "analogous" issues was also deployed in the criminal case of *Depiets v France.*

[63] Finally, I return to *Livesey*, the case in the High Court of Australia which has been influential in English jurisprudence (although more for its general observations than for its decision), and on which Mr Béar has placed particular reliance. I refer to paras 31-32 above where its facts and the passage relied on by Mr Béar are set out. I would make five observations about that case. First, it involved disciplinary proceedings which are quasi-criminal. Secondly, the criticisms that had been made of the accused barrister had been made in his absence (although that is a matter which could cut either way). Thirdly, the case involved the special circumstances where the subject matter was the same in both sets of proceedings but the accused were different, and the barrister was in a very real sense pre-judged in the first set of proceedings in which he was not a witness. Fourthly, there was no need for the appeal court to have on it judges who had sat in the first appeal. Fifthly, the High Court of Australia expressly mentioned with approval but distinguished *ex parte Lewin; Re Ward* [1964] NSWR 446 (see para 32 above) as a case where considerations of necessity supported a different result. There, a landlord had sought possession from numerous tenants of an arcade, and the claims for possession came before a magistrate one by one. In an earlier hearing in which a tenant had made a strong attack on the landlord's bona fides, the magistrate, albeit in moderate language, had rejected that attack.

[64] A second tenant complained of his case coming before the same magistrate. The magistrate refused to recuse himself and the matter went to McClemens J in the Supreme Court of New South Wales. He also rejected the objection based on apparent bias and pre-judgment. His judgment concluded that any suspicion that the magistrate would not act judicially on the evidence as it was placed before him "would be merely flimsy and capricious" and then continued as follows (at 455):

> "No judicial officer has a vested interest in any one of his decisions and if the circumstances arise where it is proper that he has to reconsider it he should do so and if he thinks it wrong say so. If there had been anything to indicate that the magistrate [had] adopted an attitude which was not completely judicial prohibition would unhesitatingly have gone. On the other hand, sometimes consideration of common sense requires that judges and magistrates do have before them litigation of the same type. This can make for efficiency and can make for greater justice because the judge or magistrate can become familiar with the particular field in which he has to work; for instance, it would be almost impossible for a judge on the common law side quickly and efficiently to take over from one of the land and valuation judges. Similarly circumstances may arise in which it would be intensely desirable that all of a particular bracket of cases should be heard by one judicial officer, but in relation to these matters no rules can be laid down except ordinary rules of justice and fairness directed to the efficient discharge of judicial business."

DISCUSSION: APPARENT BIAS

[65] The authorities suggest the following conclusions. First, although the principles of apparent bias are now well established and have not been in dispute in this case, the application of them is wholly fact sensitive. Secondly, a finding of pre-judgment has been rare. *Livesey* and *Timmins v Gormley* (one of the *Locabail* cases) are examples, but their circumstances bear no relationship to the circumstances of this case. Thirdly, although discussion of pre-judgment issues are not uncommon in Strasbourg jurisprudence, they tend to fall within the criminal sphere where special problems arise in civil law countries through the use of examining magistrates at earlier stages of the criminal process, and the use of judges to decide guilt at both trial and appeal levels (the appeal is a complete rehearing of guilt and innocence). Mr Béar has told us that he has as yet found no Strasbourg authority in which a doctrine of pre-judgment has been used to disqualify a judge in civil proceedings. Fourthly, although no doubt matters of mere convenience cannot palliate the appearance of bias, and the application of the doctrine of apparent bias is not a matter of discretion (See *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163 at 6, 20. That was not a case of pre-judgment, but arose out of the judge's long family acquaintanceship with a board director of one of the parties, who was going to be called as a witness.) (as distinct from assessment on all the facts of the case), it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge. Fifthly, no example of a designated judge being required to recuse himself or herself

has been found. In *Arab Monetary Fund v Hashim* Bingham MR said that the replacement of Hoffmann J by a different judge for trial was an "indulgence to Dr Hashim", where he had shown "no grounds whatsoever for a change of judge". Sixthly, a case for recusal may always arise, however, where a judge has previously expressed himself in vituperative or intemperate terms. That, however, has not been alleged in this case.

[66] That is not to say, however, that special problems may not arise in civil cases, where, for instance, a judge has had to be exposed during pre-trial applications to such things as significant privileged documentation. That, however, is not in question here. But there must also have been cases where a judge has given summary judgment, has been reversed on appeal, and has continued to try the case, without objection, as occurred in *Equitable Life Assurance Society v Ernst & Young* [2003] EWCA Civ 1114, [2005] EWHC 722 (Comm), [2003] 2 BCLC 603 (Langley J). Moreover, in family matters, it is common practice for the same judge to try both fact-finding hearings and the determinative care assessment: see *In re B (Children) (Care Proceedings) (CAFCASS intervening)* [2008] UKHL 35, [2009] AC 11at paras 74 – 76, [2008] 4 All ER 1 *per* Baroness Hale of Richmond.

[67] One significant development, however, which has been noticeable in recent times in very large and strongly fought civil litigation is the application for committal. As in this case, such an application can become a substantial "trial within a trial" all of its own. Moreover, even short of such an application, there may be need for pre-trial cross-examination of a deponent on his affidavit, as may occur in litigation which commences with a freezing order, and as has also occurred in this case. Therefore, for either or both of those reasons, a principal litigant, or an important potential witness, may be cross-examined even in advance of trial. No case brought to our attention has previously considered whether the situation of a judge who has heard such pre-trial evidence and may have had to come to conclusions about it has raised a problem of pre-judgment apparent bias.

[68] Special considerations may arise in such cases. Where a judge has had to form and express a view as to the credibility of a party or an important witness as a result of such cross-examination, should that require the recusal of that judge from further involvement in the litigation, even where he does so, as in this case, in moderate terms? Committal applications have to be judged on the criminal standard of proof, so that, where such an application has resulted in a finding of contempt of court, the judge has applied a standard of proof higher than that of a civil trial.

[69] On the other hand, in any event the findings of the judge are part of the *res gestae* of the proceedings. They are, as it were, writings on the wall, and would need to be considered (subject to appeal of course), for any relevance, in any subsequent proceedings and at trial, by the same judge or by any other judge. They may not even be appealed, or, as in this case, they may be appealed and upheld, so that in either event it is not possible to say that the judge was in error. In this connection, certain findings might give rise to issue estoppels, which would not only have to be taken into consideration by any judge at trial but would be binding on him, as Mr Béar accepts. What then is the difference between the judge who bears in mind his own findings and observations, and another judge who reads what the first judge has written, as he must be entitled to do? Mr Béar submits that in the case of the first judge who has heard and written, the impact of what he has learned is the more direct, immediate and powerful, and that that is a critical distinction. However, it seems to me that, unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge – other than that he is more experienced in the litigation.

[70] In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in *ex parte Lewin*, approved in *Livesey)*. He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being "influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case" (*AF (No 2)* at para 53). I have also found assistance in this context in Lord Bingham's concept of the

"objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments.

[71] Mr Béar has relied on the language used by the ECtHR in *Morel v France* about "analogous" issues, or by Teare J's consideration of the concept of an "overlap". He submits that the issues at trial will be "analogous" and that they will overlap the issues considered in the committal proceedings. In my judgment, however, concepts of analogy or overlap are too general and amorphous to give definitive shape to the doctrine of pre-judgment in what must always be a fact-sensitive enquiry. In *Sengupta* Keene LJ spoke, by reference to *Hauschildt*, of a judge having to decide "the same question". Identity of issue is a test easier to apply than analogy or overlap: but at any rate in civil matters, absolute identity will lead in the direction of issue estoppel and will not matter. As Mr Béar accepted, *Hauschildt* was of course a criminal case, and there is understandably a real difficulty in a judge deciding in effect the *ultimate issue of guilt or innocence* at a merely pre-trial hearing and then going on to judge that same issue at trial. In England that particular difficulty is avoided by introducing the jury only at the trial stage and being cautious as to what evidence may be placed before it. In sum, I find such concepts of analogy, overlap, and even identity, difficult theoretical concepts with which to work in this necessarily fact-sensitive area.

[72] However, even if I do seek to apply the concept of overlap, in my judgment the judge was right to say and Mr Smith was right to submit that the overlap between the issues at the committal proceedings and at trial will be small. First, the judge has not considered at all the allegations that Mr Ablyazov fraudulently pillaged the bank by manipulating cash into the hands of companies which he controlled by means of loans and other such transactions: in other words he has not considered the essential causes of action on which the bank has based its claims. Secondly, although it will be necessary to consider in this connection whether Mr Ablyazov did own or control the companies which were the recipient of payments from the bank, of the two dozen or more such companies whose ownership will have to be considered at trial, only two were considered at the committal proceedings, namely Bergtrans and Carsonway. Thirdly, when the judge comes to consider all such questions of alleged fraud and ownership as a whole, in the light of all the documentary and other evidence in the case, any issues decided in the committal proceedings, whatever role they might play will inevitably be a relatively small one.

[73] It follows that the gravamen of Mr Béar's submissions comes back to the question of the significance of the judge's expressed view that the credibility of Mr Ablyazov and the witnesses who supported him at the committal hearing was found wanting. However, for whatever that counts against the much more extensive tapestry of all that will be investigated at trial, Teare J will be in essentially the same position as any other judge who will be referred to the judgments of Teare J and of this court on the contempt of court question. It is ultimately not unlike a jury being entitled to know, under appropriate legal safeguards, that a Defendant whom they are trying has been disbelieved by another jury in some previous and different trial.

[74] It is also relevant for the fair-minded and informed observer to know that, for all the prior involvement of Teare J as the designated judge, there is no suggestion of unfairness against him. Mr Béar's sole complaint has been of the judge's single remark in July of this year, in the course of argument, about wanting to be cautious about Mr Ablyazov's description of black as black. That is a colourful way of putting an obvious point which will arise for any judge. The fair-minded and informed observer will however know that over years of familiarisation with this case the judge has proceeded cautiously and judicially. With his two dozen and more interlocutory judgments there can be few judges whose scrupulousness and conscientiousness and fairness have been more put to the test and not found wanting than this judge. In my judgment, the fair-minded and informed observer would not consider that there was any real possibility of bias in this case on the part of the judge. He or she would rather conclude that this late objection to the judge hearing the trial, made some eight months after the judge's judgments in the committal proceedings, was made not so much from a fear of bias but in a desire to put off the trial at, so to speak, close to expiry of the twelfth hour. As Lord Bingham CJ said in *Locabail* at para 25 "The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." And as he also said at para 26 "It is, however, generally

undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should."

[75] Those considerations, as well as the more general matters referred to at para 65 above, have to be borne in mind as well as the precautionary principle that it is better to be safe than sorry. As it is, in the present case I am satisfied that it would be safe to proceed with Teare J as the trial judge, and there is in my mind about that question no doubt the benefit of which needs to be given to Mr Ablyazov.

[76] In sum, I have formed my own view, independently of the judge's conclusion, that, irrespective of waiver, the fair-minded and informed observer would consider that there was in this case no real possibility of bias.

JURISPRUDENCE OF WAIVER OF APPARENT BIAS

[77] The leading case is again *Locabail*. There Lord Bingham CJ said:

> "26 We do not consider that waiver, in this context, raises special problems: see *Shrager v Basil Dighton Ltd* [1924] 1 KB 274, 293; *R v Essex Justices, ex parte Perkins* [1927] 2 KB 475, 489; *ex parte Pinochet (No 2)* [2000] 1 AC 119, 136-137; the *Auckland Casino* case [1995] 1 NZLR 142, 150, 151; *Vakauta v Kelly*, 167 CLR 568, 572, 577. If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so."

[78] The issue of waiver arose in the first two cases heard under the name of *Locabail* (the two *Locabail* cases themselves). The deputy judge, who was a senior partner in a large firm of solicitors, learned in the course of proceedings that his firm was acting in ancillary litigation. He disclosed this to the parties before him. Mrs Emmanuel, one of those parties, raised no objection until judgment was given against her. Lord Bingham CJ said this:

> "68 In our judgment, Mrs Emmanuel and her lawyers had to decide on 28 October what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another judge. They could have told the judge they had no objection to him continuing with the hearing. *In the event they did nothing.* In doing nothing they were treating the disclosure as being of no importance . . . . [*emphasis added*]
>
> 69 . . . It was not open to Mrs Emmanuel to wait and see how her claims in the Locabail litigation turned out before pursuing her allegation of bias. Miss Williamson protests that on 28 October not enough was disclosed to put Mrs Emmanuel to her election. We disagree. The essentials of the conflict of interest case that is now relied on were to be found in the press cutting. Mrs Emmanuel wanted to have the best of both worlds. The law will not allow her to do so."

In that case, therefore, silence in the face of disclosure was a waiver. Perhaps I should emphasise that that was silence added to participation in the proceedings.

[79] In *Millar v Dickson* the plea of waiver failed. However, that was a case where the right to object (to the use of temporary sheriffs) was obscure and uncertain. Therefore it could not be said that there was such disclosure as put the party to his election. Lord Bingham said:

> "31 In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression . . . .
>
> 36 . . . But it is in my opinion impossible to accept that the qualification of temporary sheriffs was generally known to be open to serious question and that the agents were subject to no misapprehension attributable to some established view of what the law was . . . I doubt very much if the outcome of *Starrs* was widely foreseen . . . .
>
> 38 . . . But the point is whether the agents on behalf of the accused made a voluntary, informed and unequivocal election not to claim trial before an independent and impartial tribunal and not to object to the respective temporary sheriffs as a tribunal not meeting the requirements of article 6(1). They could only have done this if they had appreciated, or must be taken to have appreciated, the effect of the decision in *Starrs* or the real possibility of a decision to that or similar effect. In

> my regretful conclusion there is no evidence, and nothing in the judicial decisions before the Board, which would entitle us to find that the accused or their agents appreciated this nor is the Board entitled to infer that they must have done. A finding or inference to the opposite effect is in my view much more compelling."

[80] Lord Hope of Craighead, with whose reasons the other members of the Board also agreed, dealt with the submission that Strasbourg jurisprudence did not allow for the waiver of the art 6(1) right to an independent and impartial tribunal. He held that it did: see at paras 53ff.

[81] *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, [2004] IRLR 218 (unreported, 24 July 2003) is an example of waiver by tacit continuation in proceedings. Although the waiver decision was obiter, for no apparent bias was found, it was fully reasoned. The judgment of the court (Ward, Waller and Hale LJJ) contained this:

> "36 . . . Waiver would never operate if 'full facts' meant each and every detail of factual information which diligent digging can produce. Full facts relevant to the decision to be taken must be confined to the essential facts. What is important is that the litigant should understand the nature of the case rather than the detail. It is sufficient if there is disclosed to him all he *needs* to know which is invariably different from all he *wants* to know."

[82] In *McGowan v B* the issue of waiver was considered in the context of a suspect being interviewed at a police station. He was told of his rights to legal assistance prior to and at interview, but he declined the opportunity, and thus was interviewed without legal advice. Could his answers at interview be relied on at trial? This issue led to a reference in which the question asked was whether there was necessarily a breach of art 6(1) because, without legal advice, the accused was not in a position to know whether he wished to waive legal advice. Strasbourg jurisprudence was specifically considered, as was the *Miranda v Arizona* jurisprudence from the United States. The Supreme Court held that legal advice was not necessary to a waiver, and remitted the question of whether there was a waiver to be decided by the sheriff at trial. The particular difficulties of suspects at a police station were adverted to in this passage in Lord Hope's judgment:

> "47 . . . The court must be alive to the possibility that the words of the caution, and advice that the detainee has the right to a private consultation with a solicitor before any questioning begins . . . may not be understood by everyone . . . . [I]t should not be taken for granted that everyone understands the rights that are being referred to. People who are of low intelligence or are vulnerable for other reasons or who are under the influence of drugs or alcohol may need to be given more than standard formulae if their right to a fair trial is not to be compromised."

The judgments also confirm that Strasbourg jurisprudence allows for the express or tacit waiver of art 6(1) rights (other than to a fair trial) provided that such waiver is informed, voluntary and unequivocal and is attended by minimum safeguards commensurate with the importance of the right being waived (see headnote 2).

[83] In my judgment, save for this further confirmation that Strasbourg jurisprudence does allow for the waiver of rights under art 6(1), and that such waiver may be done tacitly as well as expressly, *McGowan v B* is not of direct assistance to the present case. There is no analogy between the categories of suspects at a police station referred to by Lord Hope and Mr Ablyazov in the present case. Mr Ablyazov is an educated, extremely able, and experienced businessman and litigant. He has been advised throughout this litigation by cohorts of experienced solicitors and counsel.

[84] As for *Suovaniemi v Finland* to which Mr Béar has referred, that confirms (i) that the right to court proceedings may be waived in favour of arbitration; (ii) that the independence and impartiality of an arbitrator may be waived by continuing with the arbitration with knowledge of the grounds of complaint; and (iii) that the formula of "sufficient guarantees commensurate with the importance" of the waived right is satisfied where "throughout the arbitration the Applicants were represented by counsel" (at p 6).

DISCUSSION: WAIVER

[85] The essence of Mr Ablyazov's case of apparent bias involved focus on the judge's contempt judgment and its consequences in the committal proceedings. Thus in his skeleton argument dated 23 October 2012 in support of Mr Ablyazov's recusal application Mr Duncan Matthews QC wrote this:

> "2 The application is made against the background of the Judge's detailed involvement in these proceedings to date, from his initial grant of a freezing order in the Drey Proceedings in August 2009 to his committal of Mr Ablyazov for contempt in

> February 2012, and the consequential issues to which that has given rise. Mr Ablyazov's position is that, for the reasons set out in this skeleton argument and in Leedham 6, it would be inappropriate for the Judge to proceed to hear the trial of the Main Actions due to startin November 2012, and instead that the trial should be re-listed to take place before a different Judge of the Commercial Court.
>
> 3 The application is made in reliance on basic principles of natural justice, so that:
>
> (1) It is inappropriate for a judge who has heard and determined a committal application against a Defendant, which involved a detailed inquiry into matters relating to that Defendant and relevant to a later trial, to hear that later trial, at the risk of justice not being seen to be done; and
>
> (2) The doctrine of apparent bias . . . .
>
> 4 There is considerable overlap between these two principles. To some extent, the first may be considered as a subset of the second arising in a particular context."

[86] The skeleton continued on the theme of the committal proceedings from para 5 through to para 29. From para 30 to para 41 the skeleton cited the jurisprudence of apparent bias, and from para 42 to para 45 the skeleton applied those principles to the facts of this case, again concentrating on the judge's view of Mr Ablyazov's credibility and what was described as:

> "a material overlap, in a broad sense, between certain of the issues in the Main Actions and the issues which the Judge has already considered in these proceedings, principally in the context of the Receivership Application (Which preceded the committal application) and the Committal Application . . .".

From paras 46ff the skeleton turned to the judge's involvement in "post-committal proceedings", but these paragraphs concentrated attention on the surrender, disclosure and unless orders of 29 February 2012 (at para 47) and concluded with the submission that –

> "48 . . . this course of events would give rise to a legitimate apprehension on the part of a fair-minded and informed observer that the Judge may unconsciously be predisposed against Mr Ablyazov. In other words, such an observer would conclude that the reaction of the Judge to the fact that Mr Ablyazov has gone into hiding risked being more strongly adverse that the reaction to be expected of a different judge, by reason of the Judge's own personal involvement in making the orders designed to secure Mr Ablyazov's apprehension."

[87] Despite this focus on the events of the judge's three judgments of February 2012 in the committal proceedings, it was not until 19 October 2012 that Mr Ablyazov applied to the judge to recuse himself. In the meantime Mr Ablyazov had continued to participate in the proceedings and had participated in the pre-trial review of 2 October 2012, even if only for the purpose of explaining that since he would not be participating in the trial, he would not be actively participating in the immediate pre-trial process. It was said that it was "anticipated that MA will seek to appeal to the Supreme Court, and also that he will seek an adjournment of the trial pending the appeal . . .". However, there was no application to recuse on that occasion.

[88] It is not clear to me that a litigant who was saying that he would not be participating in the trial was in a position to request the judge to recuse himself. However, be that as it may, the question arises whether Mr Ablyazov's failure to request recusal at all times from the February judgments down to 19 October 2012, and in particular as late as the pre-trial review of 2 October 2012, while still participating in the proceedings, is consistent with a subsequent request for recusal based in essence on the February judgments.

[89] Mr Béar submits that the failure to apply for recusal was mere silence and thus equivocal. In my judgment, however, the situation was totally unlike the position in *The Leonidas D*, where one party sought to construct an agreement to abandon an ongoing, if stalled, arbitration out of mere silence. That was the familiar scenario of "letting sleeping dogs lie". In the present case, there was no mere silence, but participation in proceedings before a judge whom it was known, on Mr Ablyazov's own case, had conducted himself in such a way as to give rise to the appearance of bias. Moreover, there was a duty to speak, arising out of Mr Ablyazov's duty to help the court to further the overriding objective (CPR 1.3). It was contrary to that duty to allow the court and the other parties to waste time and resources in preparing for a trial which, if the judge of trial had to be replaced, could not start on the fixed date, but would have to be adjourned, in all probability into the following year with uncertainty as to when it could be refixed. The situation was similar to the familiar case where some disclosure is made to the parties by the

judge, and there is no request to the judge to recuse himself. In the present case the disclosure, on Mr Ablyazov's own analysis, came at latest with the judge's three judgments of February 2012 in the committal proceedings. It may be asked, what more was required of the judge, by way of disclosure, in the light of Mr Ablyazov's own grounds for alleging apparent bias? It is unrealistic to suggest that the judge had to go on to ask whether there was any objection to him remaining the judge of trial.

[90] Mr Béar submits that the watershed moment had not yet arrived, before the start of the trial itself. There is no authority to that effect. It may often happen, of course, that some disclosure is made at the start of a trial. But equally often, some disclosure is made in advance of trial, as soon as the judge realises from reading the papers that there is something which he considers needs to be disclosed. In the present case, however, the relevant disclosure, on Mr Ablyazov's own case, came at latest in the judge's February judgments. It was then for Mr Ablyazov to state his position.

[91] Mr Béar submits that there is no evidence that Mr Ablyazov knew of his right to object to the judge continuing as the judge of trial. In my judgment, however, the court is entitled to infer, as I do, that he did. Mr Ablyazov has given no explanation of the lateness of his application to the judge to recuse himself. Although there is of course no obligation on Mr Ablyazov to disclose privileged information, the court is entitled, and obliged, to form its own view on the question of knowledge. Otherwise no case of waiver of apparent bias could ever arise for recusal of a judge, or for setting aside judgment, on the ground of apparent bias, without an express concession of knowledge on the part of the Applicant of the right to object. An inference of knowledge may not be made where the ground of objection is obscure or uncertain (*Millar v Dickson*), or where the Applicant is without legal advice and under other disabilities (*McGowan v B*). However, Mr Ablyazov is an intelligent man, an experienced litigant, and has always had access to the best of legal advice; and it is Mr Ablyazov's own case that the unsuitability of the judge on the ground of apparent bias was known to him at latest at the time of the February judgments. In these circumstances, and in the absence of any explanation of the lateness of the application (other than Mr Matthews' submission to the judge that the September judgment on the July applications was a form of straw that broke the camel's back, an explanation that was not foreshadowed in the evidence or skeleton argument before the judge and was rightly rejected by him), I would infer that Mr Ablyazov knew at all relevant times of his right to object to a judge who on his own case had demonstrated the appearance of bias, and that the actual timing of the application to recuse was a tactical decision, designed to derail the trial.

[92] I would therefore hold that the failure of Mr Ablyazov to object, on the basis of his own grounds for alleging apparent bias, to the judge as the judge of trial, at all times from the delivery of the February judgments, and in any event at the pre-trial hearing of 2 October, was an unequivocal, informed and voluntary waiver of any right he had to do so. As such it is sanctioned by domestic, Strasbourg and international jurisprudence.

[93] There remains Mr Béar's submission that such a waiver should not be regarded as binding, or may be withdrawn, when account is taken of what in *Suovaniemi v Finland* (and elsewhere) is described as “sufficient guarantees commensurate to its importance”. I understand that as a reference to the importance of the right waived. However, it would be inconsistent with a view of waiver in this context as a form of election (see Lord Bingham in *Millar v Dickson*, above) to allow for a retraction of its effect. An election is binding from the moment it is made. Even if, however, out of consideration for the special context in which waiver of bias may occur, I assume that the court retains the need for some power of assessment over its effectiveness, or continued effectiveness, I cannot find in the facts of this case any good reason for permitting Mr Ablyazov the benefit of such a dispensation. The context of the reference in *Suovaniemi* to “sufficient guarantees” was to the availability to the Claimant in that case of legal representation (“considering that throughout the arbitration the Applicants were represented by counsel, the waiver was accompanied by sufficient guarantees commensurate to its importance”). I have already observed how well Mr Ablyazov has been served by legal support. In any event, the effect of dispensing with Mr Ablyazov's waiver in this case would be to override the interests of the other litigants, including other Defendants, in the actions currently being tried by the judge, as well as the interests of justice as reflected in the considerations which make up the overriding objective in CPR 1.1. It would do this in the face of the conclusion that I have drawn that the timing of the recusal application is connected with Mr Ablyazov's strategy of derailing the trial. I would

therefore reject the submission that any considerations of what might be meant by “sufficient guarantees” in Strasbourg jurisprudence require the court to overlook or allow the retraction of Mr Ablyazov's waiver.

CONCLUSION

[94] In sum, it was for these reasons that I joined in the decision of the court, announced at the hearing of Mr Ablyazov's adjourned application for permission to appeal, that it had failed. At that time, the court did not state whether the application was refused, or that an appeal was granted but dismissed. It is not unusual in this context, even after full argument, for a failure in this court to be dealt with as a failure to obtain permission to appeal (see *Locabail*). In the present case, having heard extensive argument, we have decided to grant an appeal, but to dismiss it. In doing so, however, we do not mean to suggest that we have had any doubt about the result.

TOULSON LJ:

[95] I agree.

MAURICE KAY LJ:

[96] I also agree.

Appeal dismissed.

End of Document

A House of Lords

Porter *v* Magill

Weeks *v* Magill

[2001] UKHL 67

B

1999 March 22, 23, 24, 25, 26; April 30

2001 Nov 5, 6, 7, 8, 12; Dec 13

Kennedy, Schiemann and Robert Walker LJJ

Lord Bingham of Cornhill, Lord Steyn, Lord Hope of Craighead, Lord Hobhouse of Woodborough and Lord Scott of Foscote

C *Local government — Audit — Loss due to "wilful misconduct" — Majority party's policy to sell council properties in marginal wards — Legal advice that policy unlawful — Revised policy adopted by housing committee and endorsed by council — Allegations of breach of statutory obligations and gerrymandering — Auditor certifying substantial loss due to wilful misconduct of responsible persons — Whether policy unlawful — Whether evidence establishing wilful misconduct — Auditor's refusal to discharge himself following objections to* D *conduct of investigation — Whether investigation conducted fairly — Whether real possibility of bias — Local Government Finance Act 1982 (c 32), s 20 — Human Rights Act 1998 (c 42), Sch 1, Pt I, art 6(1)*

In the local government elections in May 1986 the Conservative Party retained control of a city council with a much reduced majority. In the belief that home owners were more likely than council tenants to vote Conservative, P and W, the E leader and deputy leader of the council, formulated a policy to sell, pursuant to powers under section 32 of the Housing Act 1985, 250 council properties a year in eight marginal wards. Following legal advice that such targeted sales would be unlawful, the policy was revised to extend designated sales to 500 across the city while maintaining the target of 250 sales in the marginal wards. A report was prepared on three housing options with the revised policy, option 3, enjoying majority party support. The housing committee, of which neither P nor W was a F member, adopted option 3 in July 1987. The council approved the committee's decision later in July. Measures to implement the policy were introduced and the progress of the policy was monitored. Opposition councillors objected that the policy prevented the council from meeting its statutory obligations as a housing authority, and in July 1989 gave notice of objection to the auditor under section 17 of the Local Government Finance Act 1982. The objectors requested that the council's auditor certify a sum due to the council as a result of wilful misconduct under G section 20[1] of the 1982 Act on the ground that all expenditure arising from the policy was unlawful. Having completed his investigation into the statutory objections in January 1994, the auditor announced his provisional findings in a press statement which attracted considerable publicity. He also made such findings available to those he had interviewed, including P and W, and invited submissions. After an audit hearing and further evidence on quantum of damages, in May 1996 the auditor gave a final decision. In reaching his conclusion the auditor found, with regard to P and W, H that the council had adopted a policy with the predominant purpose of achieving electoral advantage for the majority party, that P and W were party to its adoption and implementation in the knowledge that it was unlawful and that the policy so promoted and implemented by them had caused financial loss to the council. In

[1] Local Government Finance Act 1982, s 20: see post, paras 69, 70.

respect of the accounts for 1987–88 to 1994–95 the auditor certified that those responsible for the policy, including P and W, had jointly and severally by their wilful misconduct caused the council to lose approximately £31m. The Divisional Court allowed appeals by the chairman of the housing committee, the director of housing and the managing director of the council but, accepting the auditor's findings in relation to P and W, dismissed their appeals, although the amount of the loss was reduced to £26,462,621. On their further appeal the Court of Appeal, by a majority, held that since they had acted on what they believed to be legal advice they were not guilty of wilful misconduct, that the Divisional Court had acted inconsistently in dismissing their appeals while allowing those of the other appellants and that, since other members of the housing committee had not voted for option 3 for improper reasons, any improper motive or purpose attributable to P and W did not render the committee's decision unlawful and was not causative of the council's loss. The Court of Appeal accordingly allowed their appeals and quashed the auditor's certificates.

On appeal by the auditor and on the questions whether the conduct of his investigation had been fair and P's and W's rights under article 6(1), as scheduled to the Human Rights Act 1998[2], had been infringed—

Held, (1) that a public power given to a local authority might only be exercised for the public purpose for which it had been conferred and those who exercised such a power otherwise misconducted themselves; that where they so acted knowingly or recklessly they were guilty of wilful misconduct and were liable under section 20 of the 1982 Act to make good to the local authority any consequent loss; that, although councillors did not act improperly or unlawfully if, exercising a power on behalf of a council for its proper purpose, they hoped to obtain the electorate's support and strengthen their electoral position and although they might lawfully support party policy so long as they did not abdicate responsibility to exercise personal judgment, powers conferred on a local authority might not lawfully be exercised to promote the electoral advantage of a political party; and that, accordingly, while the council might lawfully dispose of its property in exercise of its powers under section 32 of the 1985 Act it could not do so lawfully to promote the electoral advantage of any party represented on the council (post, paras 19, 21–22, 59–60, 144, 164).

(2) Allowing the appeal, that there were no grounds to doubt the correctness of the findings on which, as primary fact-finders, the auditor and the Divisional Court had based their decisions; that those findings precluded P's and W's claim to reliance on legal advice, in particular, since such advice had not been sought as to the lawfulness of a revised policy in the form of option 3 and since they plainly knew that such a policy was unlawful; that given the strength of the findings against them they suffered no injustice from the Divisional Court's dismissal of their appeals while those of the other appellants had been allowed; that, given P's and W's acceptance that once option 3 had been adopted by the majority party it would be approved by the housing committee, that committee's decision to adopt the policy gave effect to its unlawful purpose, whatever the voting reasons of individual members; further that, if account were taken of those reasons, the resolution was invalid for want of a majority, since the votes of chairman and vice-chairman were tainted by knowledge of the policy's unlawful purpose and other members were not in a position to exercise an independent and informed judgment; and that, accordingly, the chain of causation was unbroken between P's and W's wilful misconduct and the loss caused to the council (post, paras 25–26, 28–29, 31–32, 40, 45–48, 50–60, 131, 144, 148, 155, 163–164).

(3) That, assuming P and W might rely on Convention rights irrespective of the acts in question predating implementation of the 1998 Act, proceedings under section 20 of the 1982 Act were not punitive in character but compensatory and

[2] Human Rights Act 1998, Sch 1, Pt I, art 6(1): "In the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

A regulatory, the measure of compensation being the amount of loss suffered, and there was no provision for a fine or penalty by way of imprisonment; and that, therefore, the proceedings before the auditor were civil, and not in the nature of a criminal charge; that on its proper construction article 6(1) created separate, though closely related rights, which required separate consideration; that, although the auditor's role within the context of the 1982 Act required him to act as investigator, prosecutor and judge, the requirement of the tribunal's independence and impartiality was met B by the right of appeal from his decision provided by section 20(3) by way of a full rehearing by the appellate court; that, since the Divisional Court's conduct of the appeals satisfied the requirement of independence and impartiality, that element of P's and W's rights under article 6(1) were fully protected; that the appropriate test in determining an issue of apparent bias was whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased; that since the auditor had emphasised in his C public statement that his findings were provisional, since a progress statement would have been appropriate in view of the public interest in the matter and having regard to his subsequent conduct, no real possibility of bias was shown; that the right to a determination of a person's civil rights within a reasonable time was, on a proper interpretation of article 6(1), an independent right which was not to be regarded simply as part of an overriding right to a fair trial and did not require the complainant to show himself prejudiced by the delay; that, having regard to the complexity of the case and the volume of evidence before the Divisional Court, to the immense scope of D the auditor's investigations and to his constant activity in the pursuit of information, the proceedings did not exceed the reasonable time requirement in article 6(1); and that, accordingly, P's and W's Convention rights were not infringed and they suffered no unfairness at common law (post, paras 57, 59–60, 82, 85–87, 92–94, 102–103, 105, 106, 108, 109–114, 118, 131, 161).

König v Federal Republic of Germany (1978) 2 EHRR 170, *Findlay v United Kingdom* (1997) 24 EHRR 221 and *Darmalingum v The State* [2000] 1 WLR 2303, E PC applied.

R v Gough [1993] AC 646, HL(E) and *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, CA considered.

(4) That the underlying principle in providing for certification under section 20 of the 1982 Act was to compensate the body which had suffered the loss by such amount as would put it in the position it would have been in but for the relevant wilful misconduct; that since the council's loss was the difference between the full market F value of the properties sold and the discounted prices received no element of double counting in the auditor's calculation had been demonstrated; and that, accordingly, the sum certified by him, as reduced by the Divisional Court, would be restored (post, paras 54–56, 59, 126, 129–130, 131, 160, 163–164).

Decision of the Court of Appeal [2000] 2 WLR 1420 reversed.

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Attorney General v Belfast Corpn (1855) 4 Ir Ch R 119
Attorney General v Wilson (1840) Cr & Ph 1
Ausiello v Italy (1996) 24 EHRR 568
Bell v Director of Public Prosecutions [1985] AC 937; [1985] 3 WLR 73; [1985] 2 All ER 585, PC
Bradford v McLeod 1986 SLT 244
H *Brown v Stott* [2001] 2 WLR 817; [2001] 2 All ER 97, PC
Bryan v United Kingdom (1995) 21 EHRR 342
Crédit Suisse v Allerdale Borough Council [1997] QB 306; [1996] 3 WLR 894; [1996] 4 All ER 129, CA
Crummock (Scotland) Ltd v HM Advocate 2000 SLT 677
DC, HS and AD v United Kingdom [2000] BCC 710

Darmalingum v The State [2000] 1 WLR 2303, PC
De Cubber v Belgium (1984) 7 EHRR 236
Demicoli v Malta (1991) 14 EHRR 47
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Findlay v United Kingdom (1997) 24 EHRR 221
Flowers v The Queen [2000] 1 WLR 2396, PC
Graham v Teesdale (1981) 81 LGR 117
Hauschildt v Denmark (1989) 12 EHRR 266
Jones v Swansea City Council [1990] 1 WLR 54; [1989] 3 All ER 162, CA; [1990] 1 WLR 1453; [1990] 3 All ER 737, HL(E)
Kingsley v United Kingdom The Times, 9 January 2001; Application No 35605/97
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Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, CA and HL(E)
Phillips v United Kingdom (2001) 11 BHRC 280
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R v Board of Education [1910] 2 KB 165, CA
R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119; [1999] 2 WLR 272; [1999] 1 All ER 577, HL(E)
R v Bradford City Metropolitan Council, Ex p Wilson (Note) [1990] 2 QB 375; [1990] 2 WLR 255; [1989] 3 All ER 140, DC
R v Gough [1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724, HL(E)
R v Kansal (No 2) [2001] EWCA Crim 1260; [2002] 2 AC 69; [2001] 3 WLR 751, CA; [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)
R v Lambert [2001] UKHL 37; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)
R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council [2001] 1 All ER 462, CA
R v Port Talbot Borough Council, Ex p Jones [1988] 2 All ER 207
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Allenet de Ribemont v France (1995) 20 EHRR 557
Argentino, The (1888) 13 PD 191, CA
Asher v Lacey [1973] 1 WLR 1412; [1973] 3 All ER 1008, DC
Asher v Secretary of State for the Environment [1974] Ch 208; [1974] 2 WLR 466; [1974] 2 All ER 156, CA
B *Attorney General v Blake* [2001] 1 AC 268; [2000] 3 WLR 625; [2000] 4 All ER 385, HL(E)
Attorney Genenal v British Broadcasting Corpn [1981] AC 303; [1980] 3 WLR 109; [1980] 3 All ER 161, HL(E)
Attorney General v De Winton [1906] 2 Ch 106, CA
Attorney General's Reference (No 1 of 1990) [1992] QB 630; [1992] 3 WLR 9; [1992] 3 All ER 169, CA
C *Attorney General's Reference (No 2 of 2001)* [2001] EWCA Crim 1568; [2001] 1 WLR 1869, CA
B v Chief Constable of Avon and Somerset Constabulary [2001] 1 WLR 340; [2001] 1 All ER 562, DC
BOC New Zealand Ltd v Trans Tasman Properties Ltd [1997] NZAR 49
Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd [1997] AC 191; [1996] 3 WLR 87; [1996] 3 All ER 365, HL(E)
D *Barberà, Messegué and Jabardo v Spain* (1988) 11 EHRR 360
Barker v Wingo (1972) 407 US 514
Barrs v Bethell [1982] Ch 294; [1981] 3 WLR 874; [1982] 1 All ER 106
Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2) [1980] Ch 515; [1980] 2 WLR 430; [1980] 1 All ER 139; [1980] 2 All ER 92
Belgian Linguistic Case (No 2) (1968) 1 EHRR 252
Belilos v Switzerland (1988) 10 EHRR 466
E *Bendenoun v France* (1994) 18 EHRR 54
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Customs and Excise Comrs v City of London Magistrates' Court [2000] 1 WLR 2020; [2000] 4 All ER 763, DC
F *Delcourt v Belgium* (1970) 1 EHRR 355
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G [1965] 3 All ER 619, HL(E)
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Jago v District Court of New South Wales (1989) 168 CLR 23
Johnson v Johnson [2000] HCA 48; 201 CLR 488
Jones v Attorney General [1974] Ch 148; [1973] 3 WLR 608; [1973] 3 All ER 518, CA
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R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326; [1999] 3 WLR 175; [1999] 4 All ER 801, DC; [2000] 2 AC 326; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E)
R v Hertfordshire County Council, Ex p Cheung The Times, 4 April 1986; Court of Appeal (Civil Division) Transcript No 287 of 1986, CA
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R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd [1995] 1 WLR 386; [1995] 1 All ER 611, DC

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APPEAL from the Divisional Court of the Queen's Bench Division

By a notice of appeal amended in November 1998 the appellant, Dame B Shirley Porter, appealed from the decision of the Divisional Court on 19 December 1997 dismissing her appeal against the certificate of the respondent auditor, John Magill, made under section 20 of the Local Government Finance Act 1982 on 9 May 1996 and giving a certificate that the appellant by wilful misconduct caused a loss to Westminster City Council in the sum of £27,023,376 amended to £26,462,621 on 12 January C 1998.

The grounds of appeal were, inter alia, first in relation to unfairness, that the Divisional Court erred in law and fact or exercised its discretion on an erroneous basis in failing to find that the bias or appearance of a real danger of bias or manifest unfairness of the auditor rendered the procedure grossly defective and so prejudiced the appellant that it would have been appropriate to quash the auditor's decision, alternatively if the Divisional D Court was justified in embarking on a rehearing it erred in law or exercised its discretion on an erroneous basis in failing to provide a full rehearing, that the Divisional Court erred in law in applying the test of whether there was a real danger of bias, the correct test being whether there was an appearance of a real danger of bias, that the Divisional Court erred in its application of article 6 of the Convention for the Protection of Human Rights and E Fundamental Freedoms (1953) (Cmd 8969), in particular in finding that the proceedings were not criminal within article 6, in concluding that there had been no breach of the reasonable time guarantee in article 6 and in rejecting the contention that it was incompatible with article 6 for the auditor to exercise the functions of investigator, expert witness, judge and prosecutor.

In relation to liability, the grounds of appeal were, inter alia, that the Divisional Court erred in law in finding that the decision of the housing F committee of 8 July 1987 was unlawful, that in view of the burden and high standard of proof the Divisional Court erred in finding the appellant guilty of wilful misconduct, that the Divisional Court misunderstood the meaning, effect and purpose of the legal advice given to the appellant and misunderstood the role of political considerations in local government decisions and the appellant's understanding of it, that the Divisional Court G erred in law and fact in finding that the housing committee's resolution of 8 July 1987 was caused by the appellants, and in finding that the policy of building stable communities targeted marginal wards.

In relation to the loss and deficiency, the Divisional Court erred in law and in fact in finding that any loss was caused to the council.

By a notice of appeal the appellant, David Weeks, appealed in substantially the same terms.

H By respondent's notices dated 2 April 1998 in relation to Mr Weeks and 29 July 1998 in relation to Dame Shirley Porter, the auditor contended that the order of the Divisional Court should be affirmed or the certificates varied to £28,142,103 on the grounds, inter alia, (1) that the court erred in holding that it was for the appellants to show merely that the auditor had appeared

to go wrong in any respect and that, if they did, it was then for the auditor to prove misconduct causing loss. The court should have held (i) that it was for the appellants to establish that the auditor had in fact erred in some respect, whether in fact or in law, on grounds specified in the grounds of appeal, (ii) that if the appellants discharged that burden then it was for the auditor to show none the less that his decision to issue the certificate in respect of a particular amount should be upheld or that the certificate should be varied and (iii) that, in doing so, the auditor was entitled to rely on any findings in respect of which the appellants had not shown that the auditor had erred in some respect as specified in the appellants' grounds of appeal; (2) that the court erred in holding that prima facie the auditor went wrong in giving no consideration to the impact on the state of mind of the appellants of Mr England's report of 5 May 1987 of the advice given by Jeremy Sullivan QC; (3) that the court erred in treating the auditor as having prima facie gone wrong in relation to the impact on the appellants of Mr England's report of 5 May 1987 of Mr Sullivan's advice as the court's own specific findings on that impact in relation to the electoral advantage of the Conservative Party were consistent with and supported those of the auditor; (4) that the court erred in treating the impact of that advice on the appellants as sufficient to place on the auditor the onus of proving wilful misconduct causing loss in respect of all matters whether or not the auditor's findings in relation thereto were the subject of any, or any successful, grounds of appeal; (5) that the court erred in law in holding that a person reaching or promoting a decision would only be guilty of wilful misconduct if he knew, or was recklessly indifferent to whether, the decision was unlawful, whereas it was sufficient for him to be guilty of wilful misconduct if he deliberately did, or omitted to do, something knowing such conduct to be wrong or with reckless indifference to whether or not it was wrong; (6) that the court should have found that the decision of the housing committee was unlawful for the reasons given by the auditor; and (7) that the court erred in disallowing an apportioned part of central management and other costs on the ground that they would have been incurred in any event and that only increased marginal costs involved an authority in a loss.

The facts are stated in the judgments of Kennedy and Robert Walker LJJ.

Lord Lester of Herne Hill QC, Jeremy McMullen QC, Stuart Cakebread and *Clare Roberts* for Dame Shirley Porter.

Stuart Cakebread and *Clare Roberts* for David Weeks.

John Howell QC and *Karen McHugh* for the auditor.

Cur adv vult

30 April. The following judgments were handed down.

KENNEDY LJ This judgment is in three sections. The first section is an introduction which comes conveniently at the beginning of this judgment, but which is in fact an introduction provided by the court. A more detailed summary of events covering the years 1986 to 1989 can be found at the start of the judgment of Robert Walker LJ. The second section of this judgment looks at the decision of the Divisional Court (1997) 96 LGR 157 in relation to the issue of liability, and the third section deals with my approach to that issue. My conclusions in relation to that issue make it unnecessary for me to

A deal with the other two issues, namely fairness and quantum, but fairness is dealt with in the judgment of Schiemann LJ, with which I agree, and I also agree with that part of the judgment of Robert Walker LJ which deals with quantum.

I. Introduction

B This is an appeal by Dame Shirley Porter and Mr David Weeks from an order of the Divisional Court (Rose LJ, Latham and Keene JJ) made on 19 December 1997. The Divisional Court had heard appeals under section 20(3) of the Local Government Finance Act 1982 by five individuals (three former members and two former officers of the Westminster City Council) against whom the appointed auditor, Mr John Magill, had issued certificates of loss under section 20(1) of the 1982 Act.

C The Divisional Court allowed the appeals of three of the appellants (Mr Peter Hartley, Mr Graham England and Mr Bill Phillips). It reduced the amount of the loss certified against Dame Shirley and Mr Weeks but dismissed their appeals on liability. They appeal to this court on issues of procedural unfairness, liability and quantum. The auditor by a respondent's notice seeks to reverse the reduction in quantum.

D Elected members and senior officers of local authorities are in the position of trustees for their ratepayers and since the 19th century there have been statutory procedures of audit and surcharge as a sanction against losses to ratepayers caused by unlawful expenditure or wilful misconduct on the part of members or senior officers of local authorities. The provisions in force at the material time (since re-enacted in the Audit Commission Act 1998) were in Part III of the 1982 Act.

E Section 11 of the 1982 Act provided for the establishment of the Audit Commission for Local Authorities in England and Wales. Sections 12 to 16 provided for the Audit Commission to appoint auditors and for the appointed auditors to audit local authorities' accounts in accordance with a code of audit practice prescribed by the Audit Commission, with statutory powers of obtaining documents and information. Section 15(3) was in the

F following terms:

> "The auditor shall consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the body concerned or brought to the attention of the public, and shall consider whether the public interest requires any such matter to be made the subject of an immediate

G report rather than of a report to be made at the conclusion of the audit."

Section 17 provided for accounts to be open for public inspection, and by section 17(3) any local government elector might (on notice under section 17(4)) make an objection as to any matter in respect of which the auditor could take action under section 19 or section 20, or could make a report under section 15(3).

H Section 19(1) (2) and (3) were in the following terms:

> "(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act that any item of account is contrary to law he may apply to the court for a declaration that the item is contrary to law except where it is sanctioned by the Secretary of State.

"(2) On an application under this section the court may make or refuse to make the declaration asked for, and where the court makes that declaration, then, subject to subsection (3) below, it may also—(a) order that any person responsible for incurring or authorising any expenditure declared unlawful shall repay it in whole or in part to the body in question and, where two or more persons are found to be responsible, that they shall be jointly and severally liable to repay it as aforesaid; (b) if any such expenditure exceeds £2,000 and the person responsible for incurring or authorising it is, or was at the time of his conduct in question, a member of a local authority, order him to be disqualified for being a member of a local authority for a specified period; and (c) order rectification of the accounts.

"(3) The court shall not make an order under subsection (2)(a) or (b) above if the court is satisfied that the person responsible for incurring or authorising any such expenditure acted reasonably or in the belief that the expenditure was authorised by law, and in any other case shall have regard to all the circumstances, including that person's means and ability to repay that expenditure or any part of it."

The following subsections contained ancillary provisions, including rights of appeal for objectors under section 17(3). Section 20(1) (2) (3) and (4) were in the following terms:

"(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount.

"(2) Any person who—(a) has made an objection under section 17(3)(a) above and is aggrieved by a decision of an auditor not to certify under this section that a sum or amount is due from another person; or (b) is aggrieved by a decision of an auditor to certify under this section that a sum or amount is due from him, may not later than six weeks after he has been notified of the decision require the auditor to state in writing the reasons for his decision.

"(3) Any such person who is aggrieved by such a decision may appeal against the decision to the court and—(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above.

"(4) If a certificate under this section relates to a loss or deficiency caused by the wilful misconduct of a person who is, or was at the time of

such misconduct, a member of a local authority and the amount certified to be due from him exceeds £2,000, that person shall be disqualified for being a member of a local authority for the period of five years beginning on the ordinary date on which the period allowed for bringing an appeal against a decision to give the certificate expires or, if such an appeal is brought, the date on which the appeal is finally disposed of or abandoned or fails for non-prosecution."

The following subsections contained ancillary provisions. It will be apparent that section 20 is concerned with the most serious breaches of duty (failure to account or wilful misconduct causing loss) and that neither the auditor nor the court has any discretion as to the amount to be certified.

The principal events relevant to this appeal were concerned with housing policies in the City of Westminster between 1986 and 1989. Those events were examined in great detail in a history of events which formed part of the auditor's report and decisions. There is little or no challenge to the accuracy of that history, so far as primary facts are concerned, although the conclusions drawn are matters of acute controversy.

By way of introduction it is useful to isolate a few landmark dates and events. On 8 May 1986 there were local elections at which the Conservative group on the Westminster City Council was returned to power, but with a greatly reduced majority. Dame Shirley Porter was leader of the council and Mr Weeks was deputy leader. Mr Hartley became chairman of the housing committee in June 1987 (succeeding Mrs Patricia Kirwan). Mr England was director of housing. Mr Phillips was head of the policy unit until February 1987 and then became managing director (the second most senior officer serving the council).

In the latter part of 1986 and the early part of 1987 a policy of "building stable communities" ("BSC") was discussed and adopted among the majority party. An important element of that policy was a proposed increase in designated sales, that is sales of council dwellings, when vacant, otherwise than under existing "right to buy" ("RTB") arrangements. On 5 May 1987 Mr Jeremy Sullivan QC gave advice in consultation as to the lawfulness of the proposed extension of designated sales. Legal advice had already been obtained from the city solicitor and further advice was obtained from counsel later.

On 8 July 1987 the housing committee voted by seven votes to five to adopt a policy (called "option 3" in a written joint report prepared by officers) which is of central importance to this case. The lawfulness of that decision and the legal advice obtained in relation to it have been the subject of close examination and discussion before the auditor, in the Divisional Court and in this court. The policy greatly expanded the council's programme of designated sales, with an associated programme of capital grants for the purchase of dwellings.

The policy came under fierce and sustained attack from the Labour opposition party on the council. On 18 and 19 July 1989 the attack culminated with a notice of objection given to the auditor (under section 17 of the 1982 Act) by Councillor Neale Coleman, an opposition member of the housing committee, and 12 other electors, and with the transmission on the BBC Panorama programme of an edition entitled "Lady Porter—the pursuit of power". The auditor undertook a long investigation (the character and

fairness of which have been issues before this court). He conducted a large number of interviews, including interviews with Dame Shirley Porter and Mr Weeks. On 13 January 1994 the auditor issued notices to 10 individuals, together with a note of his provisional findings and views and a large number of supporting documents. The 10 individuals included Dame Shirley Porter, Mr Weeks, Mr Hartley, Mr England and Mr Phillips. The auditor held a press conference on 13 January 1994 which attracted a great deal of publicity at the time, and which has attracted a great deal of criticism subsequently. Indeed the auditor was asked to disqualify himself but in a written decision dated 18 October 1994 he declined to do so (the Audit Commission having already decided not to exercise its power to remove him as auditor).

The auditor was asked to hold an audit hearing (in relation to the council's accounts for 1987–88 to 1994–95) and he did so over 32 days between 19 October 1994 and 7 February 1995. Dame Shirley was legally represented (as were many other interested parties) but she did not give evidence. Expert evidence was given on her behalf on the issue of quantum. Mr Weeks appeared in person and made submissions but did not give evidence. On 9 May 1996 the auditor gave his final written decision in the form of a report under section 15(3) of the 1982 Act (designated as volume 1); decisions and reasons on the section 19 objection, excluding questions of personal liability (volume 2); decisions and reasons on the section 19 and section 20 objections in relation to individual members of the council (volume 3A) and individual officers (volume 3B); and appendices containing the auditor's history of events (volume 4, appendix 1), associated documents (volume 4, appendices 2 to 12), and the auditor's findings on quantum (volume 5, appendix 13 with its 23 annexes).

The auditor issued certificates in the sum of £31·677m each against Dame Shirley Porter, Mr Weeks, Mr Hartley, Mr England, Mr Phillips and Mr Paul Hayler (a housing officer). Their appeals to the Divisional Court (except that of Mr Hayler, which was stayed for health reasons) were heard between 2 October and 4 November 1997, with further oral evidence from numerous witnesses, including Dame Shirley and Mr Weeks. The Divisional Court allowed the appeals of Mr Hartley, Mr England and Mr Phillips but dismissed those of Dame Shirley and Mr Weeks, apart from a reduction in the certificated amount to £26·463m (rounded to the nearest £1,000).

II. Divisional Court re Liability

(A) The case for and against

The Divisional Court summarised the way in which that court saw the central issue in the case in relation to all five appellants before it—namely Dame Shirley Porter, Mr Weeks, Mr Hartley, Mr England and Mr Phillips, 96 LGR 157, 166:

> "The essence of the case against all the appellants is that each, in differing ways, played a role in 1986–1987 in devising and/or implementing a policy targeting designated sales of council properties in marginal wards with a view to increasing the Conservative vote there in the 1990 elections. It is the case for each appellant that whatever role, if any, he or she played in the targeting, which admittedly existed as a political aspiration, no such targeting became council policy, as distinct

A from political aspiration and, or alternatively, there was no wilful misconduct: members relied on legal and other advice from officials; officials did no more than proffer advice."

The Divisional Court set out the case against Dame Shirley whose role and that of Mr Weeks the court regarded as "inextricably intertwined", at p 181:

B "The essence of the case against [Dame Shirley] . . . was that as leader of the majority party she was instrumental in pursuing the political policy of targeting designated sales in the marginal wards, despite the absence of support from council officials or independent consultants and, in the absence of any legitimate local government reasons, for the improper purpose of electoral advantage by seeking to introduce more electors who C might vote Conservative. The essence of her case is that political considerations inevitably play a part in local government, but there is a divide well understood by councillors between party proposals and council policy and there was nothing improper in the council or housing committee implementing a policy founded on party political considerations provided these were not dominant and there were other legitimate reasons for the policy; further, she was entitled to rely on the D advice of leading counsel, based on information provided to him by officials which she believed would include all relevant matters, as a complete answer to an allegation of wilful misconduct."

(B) The auditors' error

The Divisional Court noted, at p 174G, that the auditors' decision lacked E "a sufficient analysis of the possible impact on the state of mind of the appellants, which is crucial in relation to wilful misconduct, of the legal advice received, or reported to have been received, on 5 May 1987". That was a shortcoming which, the Divisional Court found to be "in itself sufficient reason for concluding that prima facie the auditor went wrong".

F *(C) Matters common to all appellants*

The Divisional Court identified three matters which were common to all five appellants before that court.

(1) All were observed to *distance themselves* from responsibility for the designated sales policy targeted in marginal wards which was prima facie improper (see p 175), but the court recognised, at p 177, that such a G distancing did not necessarily indicate any lack of frankness. The crucial events occurred a decade ago, and certainly since the auditor held his press conference in 1994 they had attracted much criticism. In addition, they were of course the very reason why the appellants found themselves surcharged and having to appeal to the Divisional Court. The Divisional Court said, at p 177:

H "In such circumstances it would be unsurprising if any of the appellants, however innocent of wrongdoing, had claimed any close relationship with the genesis and propagation of a policy which it is now common ground was both unlawful unless rescued by proper non-political reasons and might give rise to wilful misconduct unless sanitised by legal advice."

I have reservations about the way in which the Divisional Court expressed itself in relation to the common ground, but the recognition of the huge pressures on all appellants was clearly apposite.

(2) Secondly the Divisional Court noted the legal advice which was available to one or more of the appellants during the period from March to July 1987. It came from Mr Lewis (the deputy city solicitor), Mr Ives (the city solicitor) and counsel instructed by Westminster City Council (Mr Jeremy Sullivan QC and Mr Alan Wilkie). The first relevant piece of advice was that of Mr Lewis on 20 March 1987, when he advised Mrs Kirwan (then chairman of the housing committee) of the possible adverse effect on the homeless of a change in disposal policy, and of the need legally to justify a major change in policy: p 177. In fact the purpose of Mr Lewis's note was to explain the circumstances in which a policy change might be quashed by the court on judicial review, and it emphasised the need for the officer's report leading to a controversial decision to be "comprehensive, giving the pros and cons of possible actions." The effect on the homeless was given as an example of a relevant consideration. As Mr Lewis put it in his note, "there must be sufficient justification for the policy decision in the report, even if some of the factors point to a different decision".

On 24 March 1987 Mr England and Mr Ives responded separately to a series of questions posed by Mr Greenman (Dame Shirley's assistant). In answer to question 4(A) Mr Ives said:

> "The way to avoid successful challenge [by judicial review] is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision-takers have acted irrationally or relied on an irrelevant consideration."

In answer to question 7 he said:

> "It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property."

On 5 May 1987, at short notice, Mr Sullivan was consulted about the policy which at that time was to designate properties in such a way as to yield at least 250 sales in marginal wards in the belief that such changes of tenure would increase the Conservative vote. There is, as the Divisional Court noted, no contemporaneous record or minute of Mr Sullivan's advice, but after the consultation, Mr England prepared a note for Dame Shirley to use in connection with a discussion paper prepared by Mr Hayler (divisional director of housing, private sector) at the chairmen's group meeting to be held that evening. Mr England's note makes some important references to Mr Sullivan's advice as to designated estates, capital grants, and what should go into a joint report to go to the housing committee. For the moment I leave aside capital grants, but as to other matters Mr England's note reads:

A "Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council . . . The target set by housing committee is 'at least 250.' Counsel advises that this cannot be targeted solely in key wards, therefore, the group will need to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to B affordable housing contained in the PA Cambridge study should be included in the report. This report has now been released to the opposition . . ."

It also contains this passage:

"If the group wish to go for a larger global target in order to achieve C 250 in the marginal wards, this will require a decision by the committee. Counsel confirms that the report should be considered at the same meeting."

As the Divisional Court observed, at p 178F, Mr England's note "does not suggest that Mr Sullivan had advised that sales could be targeted in marginal wards for electoral advantage". No doubt, but the clear thrust of his advice, D as recorded, was that if the housing committee was provided with a balanced report, and then decided to adopt a designated sales policy which was city-wide, that decision could not be impugned provided that it was a decision which a reasonable committee could take in the light of the report—even if, when operated even-handedly across the city, it yielded 250 or more designated properties in marginal wards, a yield which for electoral reasons the majority party wanted to achieve.

E On 12 June 1987 Mr Sullivan approved the fourth draft of the joint report which was to go before the housing committee, and on 26 June 1987 Mr England sent Mr Hartley, the new chairman of the housing committee, an analysis of the estates by ward, and "a suggested list of estates which would give approximately the target sales and where sales can be justified in terms of the four indicators included in the committee report". There were F 269 properties in key or marginal wards, and 220 in other areas, a total of 489. Mr Lewis, in his note to Mr Hartley of the same date, said:

"The report on designated sales to the next housing committee invites the committee to select estates for designation. In drawing up its list it is vital that the committee chooses estates on the basis of housing and planning issues. We must be able to defend any challenge to the list by G showing that there is a rationale behind it and that it was neither arbitrary nor drawn up with regard to improper factors. To help the chairman, four criteria are set out in the report. Other factors can be taken on board, including members' own knowledge of the area. You are not limited by the criteria set out. But the list must be capable of surviving challenge in the courts and to do so it must be defensible in housing and H planning terms."

On 3 July 1987 instructions were sent to Mr Sullivan and Mr Wilkie to advise on the homeless persons legislation in the context of the final version of the joint report, and the forthcoming meeting of the housing committee on 8 July. Advice was given at a lunchtime consultation on 6 July.

After the housing committee had met, but just before the meeting of the full council on 29 July, Dame Shirley circulated to all members of the majority party a note prepared by Mr Lewis on 23 July which recorded his recollection of the advice given by Mr Sullivan on 5 May. She commented, "As you can see from the attached note our legal advice is that our policy is 'completely judge proof'."

(3) The third matter effecting all appellants considered by the Divisional Court was the housing committee decision of 8 July. The Divisional Court held, at p 181, that it was "substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful". The policy was proposed by Mr Hartley, and it gave effect to what the Divisional Court described as "this purpose" (i e the wish identified above) "whatever may have been the reasons for the votes of individual members". If the votes of individual members are not critical it must follow that it is necessary to look for the influential wish elsewhere. As the Divisional Court pointed out, a corrupt principal can act through an innocent agent, and the Divisional Court explained its conclusion, at p 181, by saying that option 3, the option for which the housing committee voted, was placed before the committee "in part at least, in order to achieve the improper purpose" of altering the composition of the electorate in marginal wards. In the circumstances that is a conclusion which is directly relevant to the state of mind of each of the appellants with whom we are concerned, and to whom I now turn.

(D) Dame Shirley and Mr Weeks

The Divisional Court said of these two appellants, at p 181, that "Although the evidence given by and about them differed in some respects, their roles in these events were . . . closely and inextricably intertwined." Dame Shirley as the majority party leader was clearly a driving force, and Mr Weeks was her details man, ensuring that the majority party objectives "particularly in targeting designated sales in marginal wards" were fulfilled. As the Divisional Court pointed out, at p 182, there was ample documentary evidence to show that from July 1986 onwards targeting marginal wards "ensuring that the right people live in the right areas" was central to Dame Shirley's political objectives. In January 1987, in the paper produced by Mr Segal at Dame Shirley's request, he spoke of the short-term objective being to target the marginal wards and "redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes". The Divisional Court concluded that the paper was generally endorsed. Between that date and 5 May 1987 document after document shows that Dame Shirley and Mr Weeks were pushing that policy forward, hoping initially that the PA Cambridge Economic Consultants ("PACEC") report would provide a non-partisan explanation for the policy which could then be put to the housing committee. However, that hope was not fulfilled, and it was against that background that Mr Sullivan was consulted on 5 May and gave the advice to which I have already referred.

As to the effect of that advice on Dame Shirley and Mr Weeks the Divisional Court said, at p 179E, that it was "impossible for [her] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible". The Divisional Court also found that on

A the evening of 5 May the chairmen's group meeting, attended by Dame Shirley and Councillor Weeks, agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The drive towards implementation then continued. As I have already mentioned, Mr Sullivan was asked to approve the joint report for the housing committee which was to meet on 8 July and, using the criteria set out in that report, a selection of 489 properties was made city-wide, 269 of them being in marginal wards.

B

The Divisional Court, at p 184B, rejected as "plainly untrue" the claim of Dame Shirley and Mr Weeks that following counsel's advice on 5 May designation of sales in marginal wards for electoral purposes was abandoned. Throughout June and July steps identified by the Divisional Court were being taking to monitor the effect of the city-wide policy now

C proposed in relation to marginal wards, and, even after the full council meeting on 29 July, this went on. Later in 1988, as the Divisional Court found, there was "a cover-up" which, the court held, was inconsistent with the belief that what had been done in 1987 was proper.

The Divisional Court found that from March 1987, when she saw the answers given by Mr Ives, Dame Shirley knew that the advantages of selling council properties had to be considered "not from any ulterior motive but

D from the standpoint of what is right in view of the council's role as a housing authority". She did not understand counsel's advice on 5 May to be any different, and so, the Divisional Court concluded, at p 185A, she cannot have thought that the suggestion of increasing the numbers city-wide came from Mr Sullivan because it "would have left untouched the continuing ulterior motive in relation to marginal wards which Mr Ives had advised against".

E By way of summary, the Divisional Court concluded, at p 185, that because Dame Shirley and Mr Weeks knew the targeting policy was unlawful they were content to adopt the suggestion in Mr England's note that it be "dressed up in city-wide clothes". Their purpose throughout was to achieve unlawful electoral advantage. Because they knew that the purpose, which they sought to conceal, was unlawful they were guilty of wilful misconduct.

F

(E) Mr Hartley

Although the Divisional Court allowed the appeals of Mr Hartley and the two officers, Mr England and Mr Phillips, it is necessary to look at the court's reasons for doing so because it is said on behalf of both appellants before us that at least to a large extent the same reasons applied in their cases

G and should have led to the same conclusion.

Mr Hartley knew of the designated sales policy long before he took over the chairmanship of the housing committee in June 1987. He knew of Dame Shirley and Mr Weeks's objective to sell properties in marginal wards to boost Conservative votes, but, he claimed, his intention was to sell as many houses as possible. He regarded the policy which he guided through the

H housing committee on 8 July 1987 as a lawful policy to sell at least 500 homes per annum city-wide, which was not in any way skewed to obtain electoral advantage for the Conservatives. It met his political objective of selling as many council properties as possible, and Dame Shirley's aspirations in the marginal wards. Neither Mr England nor Mr Lewis (as legal adviser to the housing committee) suggested it was unlawful.

Subsequent monitoring he regarded as a legitimate tool to gauge the effect of the policy in wards in which his party had a particular interest. A

The Divisional Court was satisfied that Mr Hartley knew that the policy which he had to carry forward would produce 250 sales per annum in marginal wards, which was intended to improve the Conservative vote. But the list of properties presented to Mr Hartley was one which apparently met the legal requirement identified by Mr Lewis. Mr England had not apparently approved or disapproved of the figure of 500 so, the Divisional Court concluded, at p 198: B

> ". . . [Councillor Hartley] had no reason to believe that he would be acting contrary to either professional housing or legal advice were he to present, as he did, option 3 as the majority party's preferred option at the housing committee meeting. He was entitled, in our view, to take further comfort from the fact that the joint report had, so far as he was concerned, been approved by counsel." C

Both Mr McMullen, for Dame Shirley, and Mr Cakebread, for Mr Weeks, contend that their respective clients were in the same position. The Divisional Court was critical of Mr Hartley, saying, at p 198:

> "He knew that the genesis and development of the policy to extend designated sales lay in the lead members' desire to add to the number of Conservative voters in marginal wards. We have no doubt that he knew that this was an improper purpose. He knew that in supporting the policy he would enable that improper purpose to be achieved. In doing so he was guilty of misconduct in that he was promoting a policy which was infected by that improper purpose." D

E

The court then went on to say, at p 199, that the crucial question in his case was whether he knew or was reckless as to whether the policy was unlawful, given that his own purpose was lawful. The Divisional Court's conclusion was that because he had a proper motive (i e to sell as many houses as possible) he did not appreciate the unlawfulness of his conduct, and genuinely believed that his own proper purpose rendered his actions lawful, so his misconduct was not wilful. F

(F) Mr England

The Divisional Court found that from January 1987 onwards, and probably before, the designated sales policy was clearly targeted at marginal wards, and yet Mr England as director of housing assisted the council members to pursue their policy. The PACEC report provided no justification G for such a policy, and yet Mr England did not give to council members unequivocal and clear advice that the choice of marginal wards for electoral advantage was improper. He was anxious about the council's ability to discharge its statutory obligations to the homeless, but, the Divisional Court accepted, at p 191H, after seeing Mr Sullivan's advice on 5 May 1987 Mr England "believed that designating city-wide would not be unlawful *merely* because it met [Dame Shirley's] objective of 250 in marginal wards". H Before us Mr McMullen and Mr Cakebread asked why their clients could not be credited with the same belief.

After Mr Hartley was appointed chairman of the housing committee, Mr England was told that the chairman's group had decided to go for 500

A sales per annum. The case against Mr England was that thereafter he went along with that proposal, and drew up a list of designated properties distorted in such a way as to provide 250 sales in marginal wards. There was also an allegation as to the way in which the PACEC report was reflected in the joint report to the housing committee which he helped to prepare, but for present purposes that is not so significant. What is significant is that the Divisional Court, at p 193, accepted Mr England's evidence that in his view B the figure of 500 was "just the right side of the line", and the Divisional Court also accepted that in the joint report he "fairly, properly and in clear language set out the consequences of each of the options". The report as a whole was described by the Divisional Court as "a fair and adequately comprehensive representation of the relevant issues" which, in a version "not materially different from that seen by the committee" had been C approved by leading and junior counsel.

Mr England helped to prepare the list which was ultimately chosen by the committee. In essence it was the list which he passed to Mr Hartley on 26 June, and despite its apparent bias the Divisional Court was not satisfied that the lists were manipulated by council officers. There was no evidence before the Divisional Court casting doubt on the propriety of the criteria used to compile the list.

D Having accepted that, after seeing Mr Sullivan on 5 May 1987, Mr England believed that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards, the Divisional Court found it impossible to conclude that anything Mr England did up to and including the date of the housing committee meeting on 8 July amounted to wilful misconduct. He was, the court found, entitled to take E comfort from the fact that Mr Sullivan had, according to Mr Lewis, approved the joint report.

Thereafter there was monitoring, assisting the majority party to ascertain whether the council's policy was yielding the results which the majority party, and the present appellants in particular, hoped that it would yield in the marginal wards. The Divisional Court found, at p 195B, that F Mr England knew that it was inappropriate for him to be involved in that partisan activity, but it also found "no substantial evidence that the monitoring was coupled with a deliberate attempt to increase the level of designated sales actually achieved in the marginal wards", and that, like the findings in relation to the compilation of the list, seems to me to be a significant finding so far as the present appellants are concerned. As the Divisional Court concluded, at p 195D, in relation to Mr England, "if he may G have believed that the majority party's aspirations could be lawfully achieved, the fact that he was involved in monitoring to see whether they had in fact been achieved adds nothing to the case against him".

In the light of those findings in relation to Mr England the argument presented to us by Mr McMullen and Mr Cakebread on behalf of their respective clients is clear and obvious. It can be encapsulated thus: if Mr England, with his extensive knowledge of local government and his full H knowledge of all the relevant facts, was entitled to conclude on 5 May 1987, after seeing Mr Sullivan, that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards, why were two amateur politicians to whom he reported not entitled to reach the same conclusion? And if that was their conclusion, where is the evidence

of wilful misconduct which justified the court in distinguishing between Dame Shirley and Mr Weeks on the one hand and Mr England on the other? A

(G) Mr Phillips

The argument to which I have just referred is clearest when it is advanced by reference to the decision of the Divisional Court in relation to Mr England, but it is also advanced by reference to the decision in relation to Mr Hartley and the decision in relation to Mr Phillips, who joined Westminster City Council in July 1986 as head of the policy unit, and who in February 1997 was appointed managing director. He too was an experienced civil servant. He knew of the targeting of the eight key wards both before and after 8 July 1987, but he did not claim to have been influenced by the legal advice obtained on 5 May. The Divisional Court, at p 201E, regarded it as an important piece of evidence in his favour that after meeting Mr England and Mr Hayler he prepared the "critical path" which required that the draft report to the housing committee be sent to counsel. The Divisional Court regarded that as strongly indicating that at that date Mr Phillips believed that there was a lawful policy which could be taken forward to committee with the approval of counsel. Here again, we are asked to consider wherein lies the difference? If Mr Phillips was able to reach that state of mind on the basis of the information he received from Mr England, why should it be said that the state of mind of Dame Shirley and Mr Weeks, who had the same informant, could not have been identical? Indeed in the case of Mr Phillips, although he did not rely upon Mr Sullivan's advice, the Divisional Court regarded the advice given on 5 May as having affected his mind "and his appreciation of whether what was thereafter proposed was unlawful": p 202. The Divisional Court's conclusion was that his state of mind might have been affected by the fact that Mr England and Mr Lewis, the deputy solicitor, were both prepared to carry forward the policy determined by the chairman's group on 5 May. Somewhat surprisingly, the Divisional Court went on to say of Mr Phillips, at p 202:

B C D E F

> "he knew that what was proposed would give effect to an improper purpose, and he was therefore guilty of misconduct. But he was not advised that it was unlawful and accordingly we are not prepared to conclude that he must have known that what was proposed was unlawful as well as improper."

The critical path which he set out was regarded as a sufficient answer to an allegation of recklessness, and his position after 8 July was regarded as broadly similar to that of Mr England. G

(H) Causation

The Divisional Court accepted that most members of the housing committee were not guilty of misconduct and did not themselves vote for option 3 for improper reasons, but the court found that option 3 was placed before the committee because Dame Shirley and Mr Weeks hoped to increase the Conservative vote in marginal wards by selling each year 250 council properties in those wards. Furthermore, as adoption of option 3 was Conservative policy promulgated by Mr Hartley as chairman of the committee, Dame Shirley and Mr Weeks knew that it would become council H

A policy because in reality the housing committee always did adopt the majority party's policy. So the Divisional Court concluded that the housing committee's decision on 8 July was caused by Dame Shirley and Mr Weeks and thus there was no break in the chain of causation. At the end of July the full council refused to overturn the housing committee's decision, and on that occasion Councillor Weeks voted with the majority, motivated, so the B Divisional Court held, at p 204A, by "a continuing desire to target marginal wards".

Before us Mr McMullen and Mr Cakebread have submitted that once it was clear that Mr Hartley and the members of the housing committee had before them a full and properly balanced report which pointed out the advantages and disadvantages of each option (including option 1, which was the maintenance of the status quo), and once it was held that "most" C members of the housing committee were not guilty of misconduct and did not vote for option 3 for improper reasons, it followed that even if Dame Shirley and Mr Weeks were guilty of misconduct their misconduct was not causative of the committee's decision and any resultant loss. Indeed it can only be linked to the decision by reason of the fact that the two appellants were responsible for the matter going before the committee with majority D party support for option 3, and that, it is contended, is an insufficient link, given the duty of individual councillors on the housing committee to decide matters for themselves on proper grounds, a duty which, according to the Divisional Court, they fulfilled.

III. Liability

1 *Auditor's approach to liability contrasted with that of Divisional Court*

E Unlike the Divisional Court, the auditor treated the legal advice given by counsel as almost an irrelevance. His conclusion in substance was that the key members of the majority party and the key local government officers at all material times knew that they could not sell council property in marginal wards to secure, or to attempt to secure, an electoral advantage. Any canvassing of that idea amounted to wilful misconduct, and, although legal F advice was obtained on 5 May 1987 and on various occasions thereafter, the reality was that the members and officers continued as before, pursuing an objective which they knew to be illegal, but masking their activities by purporting to act city-wide and restricting the flow of information wherever possible. The monitoring of sales in marginal wards and the lack of frankness when challenged were regarded by the auditor as indications of G wilful misconduct, so he concluded that all who were involved should be held liable—not only the present appellants, but also Mr Hartley, Mr England and Mr Phillips. In my judgment, that was a tenable position to adopt, but it was not the position adopted by the Divisional Court.

The Divisional Court found that the legal advice, especially that given by counsel, was critical for some of the appellants before that court, and the court made other findings of fact which seem to me to be of considerable H importance. I list some of them.

1. After receiving the advice of counsel on 5 May 1987, Mr England "*believed* that designating city-wide *would not be unlawful* merely because it met [Dame Shirley's] objective of 250 in marginal wards": p 191H (emphasis supplied). He was an experienced director of housing, and it was

through him that on that evening Dame Shirley and the chairmen's group learnt what counsel had advised.

2. The decision was then made to designate *500* properties city-wide. That number of properties was regarded by Mr England as "*just the right side of the line*", having regard to the council's other obligations: p 193B

3. A joint report was then prepared by council officers, including Mr England, which "fairly, properly and in clear language set out the consequences of each of the options" which members of the housing committee were to be invited to consider: p 193B One of the options was option 3, which the court clearly regarded as a genuine option, thus rejecting Mr Howell's submission that it was an option which no rational authority could accept.

4. The Divisional Court found that, considered as a whole, the joint report was "a fair and adequately comprehensive representation of the relevant issues", which was approved by leading and junior counsel in a version "not materially different from that seen by the committee": p 193D

5. Dame Shirley and Mr Weeks were aware that counsel had approved the report, and Mr Phillips had, in his "critical path", specified that *counsel approval* be sought—something which the Divisional Court regarded as clearly indicative of his belief that there was a lawful policy which could be taken forward to committee with the approval of counsel: p 201. So two important council officers, who knew of the majority party's aspirations in relation to the marginal wards, nevertheless at the material time believed that the policy being pursued was lawful, and neither counsel nor any officer appears thereafter to have suggested otherwise.

6. As the Divisional Court noted when dealing with Mr Hartley, neither Mr England nor Mr Lewis (as legal adviser to the housing committee) suggested that the policy was unlawful, and Mr Hartley had "no reason to believe that he would be acting contrary to either professional housing or legal advice were he to present, as he did, option 3 as the majority party's preferred option at the housing committee meeting": p 198A. He too was regarded by the Divisional Court as entitled to take comfort from the fact that the joint report had been approved by counsel.

7. The joint report set out criteria for the selection of properties. The criteria were appropriate, and although the application of those criteria resulted in a surprisingly large number of properties being designated in the eight marginal wards, the Divisional Court, having heard evidence from Mr England, held that the auditor was unable to establish to the requisite standard of proof that the criteria or the lists were manipulated by officers for the purpose of securing party political advantage for the majority party.

8. After 8 July 1987 there was monitoring of sales in marginal wards, but, as the Divisional Court recognised in relation to Mr England, monitoring was equivocal: "if he may have believed that the majority party's aspirations could be lawfully achieved, the fact that he was involved in monitoring to see whether they had in fact been achieved adds nothing to the case against him": p 195D.

9. There was, as the Divisional Court found, "no substantial evidence that the monitoring was coupled with a deliberate attempt to increase the level of designated sales actually achieved in the marginal wards": p 195B.

A *2 Approach of Court of Appeal*

Mr Howell, for the auditor, whilst for his own purposes reminding us of the weight which this court always gives to findings of fact reached by a court which has seen and heard the relevant witnesses, has nevertheless invited us to reconsider virtually all of the factual conclusions listed above. For obvious reasons he would like to restore the auditor's conclusions, but B there is no appeal against the conclusions of the Divisional Court in relation to Mr Hartley, Mr England and Mr Phillips, and it would be strange indeed if we were to reopen the evaluation of the case against each of them without them even having an opportunity to be heard. In my judgment this case must now proceed upon the basis that the Divisional Court was entitled to make each of the findings which are set out above.

As part of his attempt to put back the clock, Mr Howell also invited us to C reverse the Divisional Court's decision that the auditor failed to make any sufficient analysis of and the possible impact on the state of mind of the appellants of the legal advice received and reported on 5 May 1987 which, as the Divisional Court said, "is crucial in relation to wilful misconduct": p 174G. However, that is no longer a matter of any real significance, because the fact is that the Divisional Court decided to conduct a full hearing. The D hearing involved fresh evidence, as well as looking again at evidence which already existed, and it is against the decisions of the Divisional Court as to the liability of the appellants that this appeal lies. As I understand the position, the auditor does not go so far as to contend that the Divisional Court was not entitled to reach its own conclusions as to liability, so I need say no more about his analysis of the impact of legal advice on the appellants' separate states of mind.

E

3 What is "wilful misconduct?"

Wilful misconduct was defined by Webster J in *Graham v Teesdale* (1981) 81 LGR 117, 123 as "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not". In this case that definition has enjoyed universal support, but there is an issue F as to the extent to which the conduct in question must impact upon the activities of a local authority before it becomes misconduct for the purposes of section 20 of the 1982 Act. Mr Howell submits that a state of mind alone will suffice, so he says:

> "It is misconduct for a member of a local authority to seek to promote a proposal for an authority to do something for a reason which the G authority may not take into account, such as the electoral advantage of his own political party. Such misconduct is wilful if that member knows that the reason is one which the authority may not take into account or is recklessly indifferent to whether or not it may do so."

Mr McMullen adopts a narrower formulation, saying:

> H "For a member to be guilty of wilful misconduct because she has caused or taken part in a decision of the council, it is necessary for that decision to be unlawful, because, for example, it is an abuse of the council's relevant public powers, and has caused a loss or deficiency. The fact that the decision is ultra vires and unlawful is a necessary but not sufficient condition for the section 20 offence to be committed."

I agree with Mr Howell that the wording of section 20 is wide, and has to be related to the facts of an individual case. It may, as he points out, be used where there has been a theft of council property, but the section only bites where a loss has been incurred or a deficiency has been caused (the past tense is, in my judgment, important). So, for example, discussions at a meeting of party members which do not result in any action impacting upon the local authority cannot be misconduct for the purposes of section 20. That is important because politicians must be free to discuss and explore ideas freely prior to implementation. So, in the present case, the impact upon the local authority occurred when the housing committee made its decision on 8 July 1987 to increase designated sales to 500 per annum and to institute a scheme of capital grants. If there was misconduct by the appellants or by either of them, it must be found in effective action which they took to obtain and/or implement that decision. In the context of this case, that seems to resolve itself into two issues: (1) did the appellants know when they caused or permitted option 3 to go before the housing committee with majority party support that they were acting illegally? (2) If so, was their conduct causative of the housing committee's decision?

Unlike Mr McMullen I do not begin by analysing the legality of the housing committee's decision, but unlike Mr Howell I do not regard the legality of that decision as a matter of no significance.

4 Real politics

Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. That seems to me to be unreal. In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it. In most cases they cannot seriously be expected to disregard it, but they know that if the action which they take is to withstand scrutiny (to be "judge-proof") there must be sound local government reasons, not just excuses, on which they can rely. As Neill LJ said in *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, 333:

> "The statutory powers conferred on local authorities to be exercised for public purposes can only be validly used if they are used in the way which Parliament, when conferring the powers, is presumed to have intended. This is a general principle of public law . . ."

Although the sale of local authority housing is a matter in relation to which many people have strong views it is common ground that local authorities are entitled to sell housing, so the adoption of option 3 did not, on the face of it, contravene the law. Furthermore, in a case which has achieved so much notoriety, it is important to recognise that no one has ever contended that either appellant became involved in the sale of council properties for private gain.

5 Burden and standard of proof

Allegations of wilful misconduct contrary to section 20(1)(b) of the 1982 Act are very serious and, as this case shows, if they are established the

A outcome for the individual may well be catastrophic. As Lord Nicholls of Birkenhead said in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586:

> "the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."

B Mr Howell contends that the Divisional Court adopted the wrong approach in relation to the issues raised by all five appellants in that court. He submits that the Divisional Court cast the burden of proof upon the auditor and then made the standard too high. In my judgment there is no substance in that submission. The Divisional Court was right to require the auditor to prove his case, and, although the Divisional Court used different C formulations at different times when expressing its conclusions, I see no reason to conclude that it was ever unaware of the standard which had to be attained.

6 Effect of legal advice

I remind myself that the Divisional Court had the advantage of seeing the D two appellants, as well as others, when they gave evidence, and clearly that court was not particularly impressed by these two appellants, but what I cannot follow is how the court was able to find these appellants guilty of wilful misconduct having regard to its conclusions in relation to those important factual issues which I set out at the beginning of this section of this judgment, conclusions which led the court to conclude that three out of five appeals must be allowed. I recognise that long before 5 May 1987 Dame E Shirley, but not Mr Weeks, had received legal advice from Mr Ives, but on 5 May 1987 the possibility of targeting sales in marginal wards for political gain was put to leading counsel of considerable standing. Mr England, who received and reported upon counsel's advice, was led to believe that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards. The judgment of the Divisional F Court simply does not explain why the advice of leading counsel did not affect Dame Shirley and Mr Weeks as it affected Mr England, and for that matter Mr Hartley and Mr Phillips, and I cannot make good the omission because there seems to have been no reason to make any distinction. The Divisional Court said that the purpose of the appellants throughout was "to achieve unlawful electoral advantage". The use of the word "unlawful" begs the question. Their submission is that having taken legal advice they, like the G others, believed that electoral advantage could lawfully be pursued by the route envisaged in Mr England's report of his consultation with Mr Sullivan, and thereafter the route chosen was, they believed, entirely legitimate. The number of properties designated was not excessive. A joint report was prepared and approved by counsel. Proper criteria were used to select properties in marginal and other wards. No improper pressure was brought H to bear on the members of the housing committee or thereafter on the officers responsible for sales, and, although sales in marginal wards were monitored, that was, as the Divisional Court recognised, no clear indication of guilt.

Mr Howell is right to say that the inconsistencies on which the appellants rely are not internal. They are only observed when I look to see how the

Divisional Court dealt with others, but that is no answer when they relate as they do so closely to the case of each appellant. I recognise, of course, that in the Divisional Court the appellants contended that the great increase in the number of designated properties was not promoted in order to achieve 250 sales per annum in marginal wards, and that the Divisional Court held otherwise, but in all essential matters the records speak for themselves. On 5 May 1987 counsel and the officers who attended on him knew all there was to know about Dame Shirley's ambition as to sales in marginal wards. The Divisional Court was critical of both appellants for saying that, in the light of Mr Sullivan's advice, the policy was abandoned. The court said, 96 LGR 157, 185, that they "lied", but on any view option 3 was not the proposal which Mr Sullivan was asked to consider. It was only formulated as a result of his advice.

As Mr McMullen pointed out, those who wish to offend against the law do not usually consult lawyers of good reputation, give them access to all relevant information, and then act in accordance with their understanding of the lawyer's advice, arranging for further advice to be obtained as events progress. In most cases where a breach of section 20 has been found proved, the evidence shows an unwillingness to obtain or a defiance of legal advice. That is not this case.

Mr Howell, being fully alive to the difficulty of his position, sought to contend that, if the Divisional Court erred, it was when it allowed appeals, not when it dismissed them. In my judgment in this case, such severance is simply not a possibility, and the findings of fact made by the Divisional Court, primarily in relation to others, should have resulted in the appeals of these appellants also being allowed. In the light of those findings, it is simply not possible to find, as against these two appellants, even on a balance of probabilities, in relation to a serious matter such as this, that wilful misconduct has been proved. That is a conclusion I reach without resort to the Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969), which we were invited to consider, together with a whole host of authorities to which it is unnecessary to refer.

7 Legality of the housing committee decision

If there was no wilful misconduct by either appellant prior to the decision of the housing committee on 8 July 1987, then there would seem to be no ground for saying that the housing committee's decision was unlawful.

8 Causation

In any event, the link between the wilful misconduct alleged and the housing committee decision can only be found in the decision of the appellants to put before the housing committee a joint report which contained option 3, and to advise the members of the committee that option 3 had majority party support. As Mr McMullen points out, the reasons for laying a proposal before a committee may not be the same as the reasons for adopting it, if it is adopted, and here that point is clearly illustrated by the decision of the Divisional Court. Mr Hartley, as chairman of the housing committee, was a firm believer in selling as many properties as possible, and no doubt voted for option 3 for that reason. As to the rest, the Divisional Court found, at p 203F, that "most members of the committee were not

A guilty of misconduct and did not themselves vote for option 3 for improper reasons". They knew, of course, of Dame Shirley's desire to sell properties in marginal wards, and could reasonably infer that it was that desire which generated party support for option 3, so it would seem to follow from the Divisional Court's finding, that in the end party support for that option was not critical. The support of Mr Hartley may have been.

B

9 Grants

If, as I would hold, the findings of wilful misconduct cannot be sustained in relation to the primary decision to designate properties city-wide, the same must follow in relation to capital grants. They were an ancillary part of the designation package, incorporated into the joint report as approved C by counsel. As it turns out there was, it seems, no power to make such grants, but it is not contended that either appellant knew that.

10 Preparation of papers

Similarly, as it seems to me, the cost of preparing papers and other costs related to the widespread designation cannot be laid at the door of the D appellants if they did not transgress. I would therefore discharge the certificates in their entirety and allow the appeal of both appellants.

SCHIEMANN LJ Having nothing to add as to the facts which are compendiously set out in Kennedy and Robert Walker LJJ's judgments I can go straight to the first issue in this appeal, namely whether or no the evidence before the Divisional Court showed that a loss had been incurred by the E wilful misconduct of the two appellants.

I agree with Kennedy LJ's conclusion and reasoning to the effect that the auditor has not shown that any loss has been incurred or deficiency caused by wilful misconduct on the part of either appellant and that therefore this appeal must be allowed and the certificate quashed. Since that is the view of the majority of this court it is not necessary for me express a view on the F submissions as to unfairness or as to quantum. As to the latter I prefer to express no opinion. The submissions as to unfairness, however, raise some issues of general importance, upon which I take this opportunity to comment later in this judgment. Before doing so I would like to express in my own words the reasoning process which has led me to the conclusion that the appeals ought to be allowed.

G As Robert Walker LJ points out in his judgment, post, p 432A–B, there was throughout the hearing a certain lack of focus as to precisely what misconduct is alleged against the appellants and the relationship between that alleged misconduct and the decision of the housing committee on 8 July 1987. I agree with him that the Divisional Court approached the issue as being "whether the appellants had promoted, pursued or implemented a policy which was unlawful because of its improper purpose": post, p 433A–B. H However, unlike him, I do not consider that the Divisional Court was right so to do. That very formulation has led to the lack of focus to which he draws attention. The phrase "*its* improper purpose" leads one to forget to be clear as to *whose* purpose is under examination. I differ from him in the formulation of the issue. He formulates it in this way, post, p 428A–B:

"The crucial issue is whether the appellants devoted a great deal of their considerable energy and enthusiasm, and a great deal of the council's financial resources, to the genuine pursuit of a lawful (though highly controversial) policy . . . or whether they merely pretended to do so and their real purpose remained the improper purpose of targeting marginal wards in order to win the 1990 elections, but with an extension of the policy to other wards tacked on as camouflage."

As it seems to me the following questions lie at the root of this case. Was the decision of the committee on 8 July unlawful? Did either appellant wish the committee to take an unlawful decision?

What caused any loss to the council was the decision of the housing committee on 8 July. Unless it can be shown that this decision was unlawful the appeals should, in my judgment, succeed. Even if it can be shown that the decision taken by the committee was unlawful, nevertheless the appeals should in my judgment succeed unless it can be shown that the relevant appellant wished the committee to take an unlawful decision.

Whether or not the decision of the housing committee was unlawful depends, in the circumstances of this case, on the motivation of the committee at the time of the vote. If its motive was purely to secure electoral advantage for the Conservative Party then the decision was unlawful. If purely Housing Act considerations were its motivation then its decision would be lawful. I shall term these two motives electoral and housing respectively. There is a complication. Frequently individual persons act from mixed motives. Further, group decisions may have multiple motivations—in part because there are many votes cast and in part because each voter may himself have several motivations. For the purposes of the present case I can ignore this complication and proceed on the assumption that the committee decision was either motivated by electoral considerations or by Housing Act considerations.

The following in my judgment are not sufficiently analysed in the judgment of the Divisional Court: (1) the motivation of the committee and those who composed it; (2) two possible desires in the breast of Dame Shirley: (i) a desire, having a party political aim, that designated sales should take place in marginal wards, and (ii) a desire that those who voted in favour of designated sales in marginal wards should do so being themselves motivated by party political considerations.

The Divisional Court found on ample material that: (1) Dame Shirley was motivated by a desire, having an electoral aim, that 250 designated sales should take place in marginal wards; (2) Dame Shirley expected the Conservative majority on the committee to share her desire; (3) Dame Shirley knew and every other councillor knew that for the committee to take the decision motivated at that time purely by electoral considerations would be unlawful; (4) had it not been for Dame Shirley the proposal for designated sales in the marginal wards would not have been placed before the committee.

The appellants knew that if a decision to designate city-wide was taken the chances were that it would be challenged in the law courts by their political opponents. They were expressly warned by their officers of this risk. It is clear that they were concerned, at the least, to obtain something "judge-proof"—that is to say something whose illegality could not be

A demonstrated in court. In those circumstances a court can legitimately demonstrate such worldly wisdom as it has and expose any reality which is hidden behind a form of words. However, a court embarking on such an exercise must do so with immense care, identifying precisely what are the questions which need to be asked and what is the evidence in relation to each question. It is a particularly difficult task when the court is faced with a B group decision. The Divisional Court might perhaps have concluded on the evidence before it that the resolution passed by the housing committee was voted for by the Conservative councillors solely because *they* wished for electoral advantage. However, the Divisional Court refrained from so concluding. Instead the reasoning was that because the passing of the resolution would achieve Dame Shirley's political purpose she was guilty of wilful misconduct in urging the committee to pass it. That I regard, with C respect, as too simplistic a solution to the difficulties of this case.

It is important initially to keep separately in mind the position and motivation of each of three sets of persons—the committee, individual councillors who vote, and the councillor, such as each of the appellants, who does not vote but who seeks to persuade others to vote. The judgment under appeal does not do so.

D It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality. The leading case on this branch of the law is *R v Waltham Forest* E *London Borough Council, Ex p Baxter* [1988] QB 419. That was a decision of this court (Sir John Donaldson MR, Stocker and Russell LJJ) upholding a decision of the Divisional Court consisting of Glidewell LJ and myself. The essence of the case, as was pointed out by Watkins LJ in *R v Derbyshire County Council, Ex p Times Supplements Ltd* (1991) 155 LGRev 123, 126, is contained in the following quotation from the judgment of Russell LJ F [1988] QB 419, 428:

> "Party loyalty, party unanimity, party policy, were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other considerations which are required for a balanced judgment. If, by blindly toeing the party line, the G councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote [is] potentially flawed."

The Court of Appeal's decision in the *Waltham Forest* case was expressly referred to in the judgment of Slade LJ in *Jones v Swansea City Council* [1990] 1 WLR 54, 83 where he said:

H

> "Even if the evidence had established that all the Labour members who voted for the resolution both knew of the resolution and on 28 June would have regarded it as subjecting themselves to an informal party whip, they would still have been entitled and bound to have regard to their personal responsibility and to vote in accordance with their beliefs

and consciences. The decision of this court in *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419 shows that this would have been their duty as councillors, even if there had been a party whip. It also illustrates that the mere fact that all the members of one party vote the same way does not establish that they were not exercising an independent judgment."

This passage in the judgment of Slade LJ was approved by Lord Lowry and at least three of the other members of the appellate committee of the House of Lords when the decision in that case was reversed [1990] 1 WLR 1453, 1469E.

Although a *councillor* can be motivated by a desire that his party should win the next election, a desire that one party should win the next elections is not one which is permitted to motivate the *council's* actions: it is an impermissible motivation for the committee. If the committee's resolution had set out the motivation of the committee and that motivation had been expressed to be to change the composition of the electorate in order to advantage the Conservative Party this would have been an impermissible motivation for the council.

One of the problems highlighted by the present case is that it is difficult to separate the motivation of individual councillors from the motivation of the committee. But this is a commonplace of decision-making by a body having a legally separate existence but constituted of individuals. Examining the motivation of individuals is fraught with problems. One problem is that the motivation of councillors may change during the course of debate—to suppose otherwise would render all debate futile. Further, a resolution for which a councillor's vote is sought may have a number of concurrent different attractions for him. Another problem is that different councillors may vote for the same resolution but for different reasons.

The law of the European Community, following French traditions, requires that regulations, directions and decisions of the Council and the Commission shall state the reasons on which they are based: EC Treaty, article 190. Absent deceit, this has the great advantage that the court knows the motivation and can test its legality. That however is not our tradition. The decision under attack does not set out the reasoning of the councillors who passed it. It is common ground that the decision is not illegal on its face. I accept that it is open to a court, after hearing evidence, to come to the conclusion that the council's motivation was an impermissible one.

The Divisional Court held in relation to the decision of 8 July, 96 LGR 157, 181:

"In our view this decision was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful. The policy proposed at the meeting by [Mr Hartley] and adopted by the committee was one which gave effect to this purpose, *whatever may have been the reasons for the votes of individual members.* It is perfectly possible, in law and common sense, for a corrupt principal to cause a result through an innocent agent or (in the context discussed by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385C) a dishonest third party to be liable for a breach of trust perpetrated by a trustee acting innocently. In the present case,

A *whatever the reasons of individual members for voting as they did*, the option for which they voted was placed before the committee, in part at least, in order to achieve the improper purpose to which we have referred." (My emphasis.)

The meaning of the first sentence is obscure. It has not been proved that the committee was itself motivated by legally impermissible motives. The B repeated reference in the passage which I have just cited to "whatever the reasons of individual members" indicates that the Divisional Court did not regard the motives of the voting members as crucial to its decision. It would have been open to the Divisional Court to conclude that the committee was motivated at the time of the vote by an impermissible motive but the Divisional Court refrains from making such a finding. In those C circumstances, I do not think that we ought to make a finding that the committee's motivation was impermissible. Thus the decision must be regarded as a lawful decision by the committee unless it is prevented from being lawful by the motivation of the councillors who voted for it or by the motivation of those who procured the presence of the motion on the committee agenda.

D *The motivation of individual voting councillors*

Questions

In theory there are two separate question which arise: (1) what is permissible motivation for voting councillors; (2) did the voting councillors in the present case overstep the limits of what is permissible?

The Divisional Court did not decide that the voting councillors E themselves overstepped the limits of what was permissible. In those circumstances the logically first question does not need to be answered.

As I indicated above it is legitimate for councillors to desire that their party should win the next election. For a council to decide to lower council house rents with a view to pleasing council house tenants or to decide to lower rates with a view to pleasing ratepayers is not illegal provided that F these decisions involve no other element of illegality, such as not providing for a balanced budget. These voter-pleasing decisions are lawful in my judgment even if one of the motivating factors in the minds of the councillors who vote for them is the desire to be re-elected and a consciousness that their wards contain a significant number of electors of the category which the relevant decision is designed to benefit.

Undoubtedly, however, there are some means of securing the re-election G of one's party that are unlawful. The declaration of what is lawful and which are unlawful in this context is, in part at any rate, made expressly by Parliament. Thus imposing a rate at a higher figure than is permitted under statute is illegal. Deliberately setting a rate so low that the council's total income and reserves will not enable the council to fulfil its statutory obligations is again unlawful. Giving money bribes to electors is unlawful. In part the courts have felt free to supplement these parliamentary H constraints by imposing behavioural rules on a council acting as a council—broadly equating the council's position with that of a trustee.

Designating properties city-wide does not become unlawful merely because it achieved Dame Shirley's objective of 250 in marginal wards. It is similar in some ways to a decision to lower council house rents not being

illegal merely because it may well have been motivated by a desire not to lose council house tenants' votes at the next election.

Parliament has, by sections 94 to 98 of the Local Government Act 1972, placed certain limits on what councillors may vote for when they have a personal interest. They do not impinge on the present case save that the very fact that Parliament saw fit to regulate some matters and not others may be a pointer and save that it could be said that this legislation was in part not necessary if the theory that a councillor is a trustee be correct.

The law recognises that the fact that an individual may have voted for a decision without having given careful thought to all relevant factors, or for personal grounds which are strictly irrelevant to the merits of that decision, does not make the decision illegal. A vast number of decisions come before local authorities at each meeting and it is simply not practicable for each councillor to have examined the merits of each decision. In practice the immediate motivation of the councillors voting for it will often be that the proposal has the support of members of their party some of whom will have carefully considered the merits of the proposal in the light of general values which a particular councillor member of that party will broadly share. Thus councillor A will frequently vote for the sewage scheme proposed by his party or by councillor B because councillor A wishes to persuade his party and councillor B to vote for councillor A's education proposal.

As it seems to me there is nothing illegal in a councillor saying to a council officer, "This is the aim we are trying to achieve. Is that an aim which is permitted to us by law and are the means we are minded to employ open to us?" Nor is there anything illegal in council officers spending money in an attempt to find the answer to them. I agree with the Divisional Court when it says, 96 LGR 157, 174:

> "We can see nothing improper today in council officers attending political meetings of a group of council members if invited to do so. Their presence does not convey assent to party political views but gives the opportunity to hear the germination and development of ideas which, particularly if they are the ideas of the majority party, may develop into council policy. That knowledge will both alert them to issues which they may ultimately have to address professionally and, in some cases, afford an opportunity . . . 'to give a steer' as to the practicality and propriety of ideas before they become policy."

I do not think it would be right to draw a distinction between asking questions designed to avoid one possible illegality and questions designed to avoid another type of illegality.

The motivation of those who procured the presence of the relevant motion on the committee agenda but who did not vote

The Divisional Court suggest that, if a proposal comes before a committee by reason of what would be illegal motivation if that were the committee's motivation at the time of resolution, then, whatever the motivations of the voting councillors at the time of their vote, the passing of the motion is an illegal act. I disagree. Where a councillor proposes something for an unlawful reason and this illegality is pointed out to the committee and the committee then expressly rejects the unlawful ground and instead substitutes a lawful ground justifying the same action then the committee's resolution is

A lawful notwithstanding the unlawfulness attendant upon the policy's conception.

The judgment under appeal concentrates on two matters: (1) a historical examination as to how it came about that the motion was before the committee at all; (2) the fact that the policy was presented to the committee as being Conservative Party policy.

B So far as the first is concerned, it seems to me of no great significance that Dame Shirley was motivated throughout by a desire that her party's interest should triumph at the next election. There is nothing in local government law which prevents a councillor putting a proposal before a council in a matter in which he has a personal interest. There are inhibitions on voting but that is a separate matter. If Dame Shirley had applied for a discretionary grant for herself under some legislation she would not have been acting C improperly if she had put that matter before the council. Nor I think would she have been acting improperly if she had tried to lobby other councillors before the vote to vote in favour of giving her the grant. That is her right in a democracy. If that be correct, then I can not see anything wrong in her lobbying other councillors to cast their votes in favour of a proposal which favours, not her pocket, but her party.

D While I accept that a corrupt principal can cause a result through an innocent agent and a dishonest third party can be liable for breach of trust committed by a trustee acting innocently, I differ from the Divisional Court in that I do not regard these principles as dispositive in the present case. I do not see how Dame Shirley can be regarded as the council's principal or the council as her agent. Once one accepts that the committee has passed a lawful resolution the question of the liability of a dishonest third party does E not arise. Not that I accept that she was dishonest or indeed improperly motivated.

As the division of opinion in this court shows, there is no doubt that the borderline between what is permissible and what is not permissible in the context of what Dame Shirley was trying to achieve is not easily perceived by lawyers and even less easily perceived by laymen. It is clear to me that Dame F Shirley was seeking to avoid doing anything illegal and that this was the reason why she laid bare her hopes to her legal advisers and asked for legal advice.

If she, motivated by a desire to benefit her party, had sought to persuade the committee to vote with the same motivation as she herself had, then I accept she would have acted improperly, though given the complexities of analysis required I am not entirely persuaded that she would have acted G improperly wilfully. However, that is not the present case.

Rider

The judgment of the Divisional Court and the questioning by members of the court of Dame Shirley and their conclusion that she lied fail, as it seems to me, sufficiently to distinguish between: (1) the end result she desired in the H marginal wards, and (2) what her desires were in relation to the motivation of the committee voting for the resolution which would produce that end result.

As it seems to me, the position is that she, motivated by a desire to benefit her party, sought to persuade the council to vote with the same result but

motivated by a different desire. That does not seem to me illegal or improper, still less wilfully so. A

Of course I concede that a different view from mine as to the legality of the committee's decision may be taken. However, as it seems to me, if a judge takes the view that something is lawful, albeit that other judges differ, it is hard to describe the attitude of a layman who takes the same view as the first judge as wilful misconduct even if her conduct took place at a time when she did not know of the first judge's view. B

I turn now to my comments on the submissions on unfairness.

Unfairness

Lord Lester, in submissions which were broadly adopted by Mr Cakebread, submitted that this court should quash the certificate on the basis that the procedures adopted by the auditor and the Divisional Court were in their total effect so unfair that such a quashing was appropriate. For the purpose of exposition he isolated for the attention of the court four matters—apparent bias on the part of the auditor, unreasonable delay on the part of the auditor and the Divisional Court in confirming the auditor's decision in part, a failure on the part of the Divisional Court to hold a fair balance between the auditor and Dame Shirley Porter, and a breach by the Divisional Court of the presumption of innocence. C D

Lord Lester drew our attention to a number of features which he submitted cumulatively did result, or may have resulted, in the conclusions reached by the auditor and the court being unsafe. Mixed with these submissions were submissions of a different nature which one can call rights-based submissions. These had as their conceptual origin the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, Lord Lester submitted that there had been an infringement of a right to a trial within a reasonable time. He submitted that "the English courts should fashion an appropriate and effective remedy for a breach of Dame Shirley's right to a trial within a reasonable time and that the only effective remedy in the circumstances of this case was and is to quash the certificate". He submitted that this should be the result even if there was no danger that the infringement of the alleged right had produced wrong conclusions on the part of the tribunals below. E F

He inevitably accepted that at the relevant times the Convention had not been incorporated into our law. He accepted that no private rights could be derived from the provisions of unincorporated treaties. He submitted, however, that there were uncertainties and gaps in the statute and common law which this court should resolve and fill by seeking inspiration from the Convention and the jurisprudence decided under it. G

Apparent bias

Lord Lester put at the forefront of his submissions complaints as to the way the auditor had conducted himself at and after the press conference in January 1994. H

The Divisional Court, 96 LGR 157, deals with this aspect in the following passages in its judgment:

> "Having completed his investigation into the statutory objections, the auditor on 13 January 1994 wrote to all the appellants and others with a

A note of his provisional findings and views, together with 13 appendices, a bundle of material documents including notes and transcripts of interviews, a copy of the statement which he had that day made to the press and a notice that he had to consider whether to certify a sum slightly in excess of £21m or some other sum as due, on the ground that the loss of such a sum had been incurred by the wilful misconduct of the appellants and others. The notice also indicated that written representations could B be made by 29 July 1994 . . . The letter emphasised that the history of events set out in appendix 1 to the note and the auditor's findings and views were provisional and were being made available so that the appellants, the objectors and the council might make oral and/or written representations. On the same day, 13 January 1994, the auditor made a statement to the press which received substantial publicity on television C and in the newspapers. This court has seen video recordings of the relevant item on the 1 p m and 9 p m BBC news. In the light of this event and other matters to which we shall later come, [Dame Shirley Porter] . . . invited the Audit Commission to discharge the auditor, which they declined to do. That decision was not sought to be challenged by judicial review. All the appellants then invited the auditor to discharge himself and made representations to him. This he refused to do, in his written D decision dated 18 October 1994": pp 165–166.

"We are prepared to accept that, in the light of the great public interest in this matter and the lengthy period taken by the initial investigation culminating in the provisional findings, it was appropriate for the public to be given some explanation for the time spent and some indication of the auditor's provisional views. But, in our judgment, the press E conference which took place was ill-conceived and unfortunately executed. It would have been sufficient for a press statement to have been issued, preferably by the auditor's solicitor, saying that the complexity of the investigation accounted for its length and that, at that stage, the auditor was provisionally minded to make findings of wilful misconduct causing loss against the individuals named but that, before he reached any final decision, the individuals would have the opportunity to F give evidence and make submissions to him. Instead, a televised announcement was arranged at which the auditor himself appeared and, although he said that his views were provisional, he expressed them in florid language and supported them by reference to the thoroughness of the investigation which he claimed to have carried out. There was a further feature of the event which should have had no place in the middle G of a quasi-judicial inquiry. A stack of ring binders on the desk at which the auditor sat bearing the name of his firm for the benefit of the cameras was, ostensibly, under the protection of a security guard: unless it was being implied that the persons under investigation might wish to steal the documents, it is not clear what was the purpose of this posturing": p 173.

"We express the hope that, in any future statutory investigation of this kind, no auditor will stage any similar event, which may undermine the H perception, whatever may be the reality, of the auditor's open-mindedness. In the light of the material before us, including, in particular, the auditor's reasons for declining to recuse himself, we accept that, despite such inferences to the contrary as might have been drawn from the press conference, the auditor did have an open mind and was

justified in continuing with the subsequent hearings. We note that he did not confirm his preliminary findings in respect of those who gave evidence at those hearings. The error of judgment which we find he made, in holding the press conference as he did, did not, in our view, demonstrate bias on his part. He was at pains to stress the provisional nature of his findings and it is pertinent that in his final decision he made no finding of wilful misconduct against three people in relation to whom he had, provisionally, been minded so to find. In any event, as with the investigation, any possible unfairness to the appellants has been cured by the hearing before us": p 174.

I note that the Divisional Court referred to the auditor's reasons for declining to recuse himself. These reasons fall into two categories. The first category consists of contentions in the nature of submissions as to what was a sensible procedure for him to follow in the light of the audit procedure laid down by statute. The second category consists of protestations of lack of bias in fact. It was perfectly sensible of the auditor to include those protestations: had he not done so, some might have said that he had not even bothered to deny actual bias. However I would not regard such protestations as being of any great assistance to a court dealing with allegations of apparent bias. I doubt whether the Divisional Court in its reference to the auditor's reasons for declining to recuse himself had these protestations in mind. For my part I have given no weight to them.

So far as conduct at the press conference is concerned we too have seen the videos and agree with the criticisms of the Divisional Court. The citation from the judgment above accurately sets out the gist of some of Lord Lester's present submissions. To them, however, he adds complaints that the auditor did not do all he could to stem the publicity or correct inaccuracies in reporting.

Lord Lester accepts that he has not shown that the auditor was actually biased against the appellants but he submits that the auditor's conduct had as its predictable result that those against whom a prima facie case was found were "effectively found guilty by the media and the public at large." I agree that this seems probable. He submits that the release of all this material to the appellants' political opponents was almost bound to result in incomplete snippets adverse to his client appearing in the news media. I agree. He submits that the auditor could have done more than he did to discourage the media from such reporting. Perhaps, although there is no reason to suppose that this would have had any effect.

Lord Lester submits that there was "prejudicial publicity". In one sense of that word he is clearly right: the publicity would incline at least the superficial listener or reader to suppose that it was the auditor's view that Dame Shirley's conduct had been improper and that she had caused a huge loss. His difficulty, as he recognised, is that he has to establish a risk that the auditor and the Divisional Court, not the public, might be prejudiced. He sought to overcome this hurdle by submitting that, after such a public statement and after spending over £3m on the investigation the auditor would be under some psychological, perhaps unconscious, pressure to make his final conclusion tally in its essentials with his preliminary conclusion.

In this context it is important to separate out two types of damage which can be caused by this sort of publicity—first, damage to the integrity of the

judicial process in so far as it affects the appellants and, second, damage to the appellants' general reputation by giving publicity to provisional findings. While the latter is clearly regrettable it is not something with which this court is concerned in the present context.

Mr Howell before us disputed the accuracy of the description of what happened as a press conference and provided a number of reasons which, he submitted, justified the auditor in proceeding as he did. I see force in some of what Mr Howell submitted under this head but there is no need to lengthen this judgment by setting out findings in detail. This is because the resolution of the disputes as to the propriety of each of the auditor's actions or inactions under this head is not crucial to my conclusion.

The parties are at one in relation to the test which the court has to apply in cases where there is an allegation of apparent bias. That is the test pronounced by Lord Goff of Chieveley in *R v Gough* [1993] AC 646, 670. Although that test has not escaped criticism (see the comment by Lord Browne-Wilkinson in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 36A–B), each of the other members of the appellate committee approved it. All counsel agree that we are bound by it:

> ". . . I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him . . ."

The mere fact that the case of one party is regarded with disfavour is manifestly not enough to raise a danger of bias. It is necessary to concentrate on the assertion that there is a danger that this regarding with disfavour was the result of some unfairness. Lord Lester submits that the Divisional Court confused actual bias with danger of bias. The basis of that submission was the reference by the Divisional Court to the auditor's own exposition of his views when he refused to recuse himself. I do not accept that there was such a confusion in the Divisional Court which expressly referred to *R v Gough* [1993] AC 646. In any event, we are not thus confused.

I think there was room for a casual observer in January 1994 after the press conference to form the view that the auditor might be biased. However, that is not the relevant test. We must look at the matter now and consider whether there is a danger that the auditor in coming to his provisional and final conclusions unfairly regarded with disfavour the case of either of these appellants. Having looked at the material it seems to me that the auditor's conclusions at either stage in relation to that material are

not so odd that they lead one to suspect that the explanation for the oddness might be bias. To express that differently, the conclusions are ones which, while they can be the subject of rational attack, are ones to which there is an understandable path. Again, the fact that the auditor expressed a provisional view is one wholly understandable given the procedure sanctioned by Parliament. Having looked at the audit procedure laid down by Parliament and the code of practice, while one can take the view that the auditor was too enthusiastic and may have got lost by reason of having seen the mass of material which his researches dug up, there is nothing to lead one to suppose that he was unfairly biased against either of the appellants. Again, while one can take the view that he might have done more to discourage leaking of material after the press conference or to correct unfair press reports there is no reason to suppose that his failure to do so was attributable to bias.

I note that no one has been able to suggest any possible motive for bias on the part of the auditor against either of these appellants. Like the Divisional Court, and giving no weight to the auditor's inevitably self-serving protestations when he refused to recuse himself, I consider that there is here no real danger that the auditor might have unfairly regarded with disfavour the case of either of these appellants.

One can examine the issues in relation to bias in the light of the jurisprudence under the Convention and Lord Lester did so at length in his interesting submissions. However, as we think he accepts, the Convention case law does not suggest that the test in *R v Gough* is either wrong or inadequate. In those circumstances it is unnecessary to lengthen this judgment by consideration of that case law.

Delay causing an unsafe verdict

I turn now to examine the submission in relation to delay. For the purposes of exposition it is useful to consider separately two possible effects of delay—an unsafe verdict and other damage for the appellant.

I first consider the submission that the effect of the undoubted delay in disposing of this matter rendered the conclusions of the Divisional Court unsafe. The submission was primarily based on the fact that the appellants and others found themselves giving evidence some 10 years after the relevant events. A secondary basis was that, by reason of the delay, the appellants found themselves prejudiced when it came to adducing evidence in relation to the amount of the loss allegedly suffered by the city.

Lord Lester submitted that the delay was such that disadvantage to Dame Shirley in the presentation of her case is to be inferred. He pointed out that she had stated in her affidavits and at the trial before the Divisional Court that her memory of some of the meetings was imperfect.

The Divisional Court said in its judgment that the crucial question was whether the delay had given rise to such prejudice that no fair trial could be held. It considered that no such prejudice had on the balance of probabilities been shown and pointed out, 96 LGR 157, 169:

> "All the appellants were aware of the allegations from the time they were made in 1989 . . . [Dame Shirley] was advised by counsel from September 1989. [Mr Weeks] instructed solicitors in August 1991. In the public hearing which followed the provisional findings there was, as it

A seems to us, ample and fair opportunity given for the appellants to make their case to the auditor. Although each chose not to give evidence, each made representations, [Dame Shirley] . . . by counsel. Numerous contemporaneous documents chart the course of events. Accordingly, we are not persuaded that the auditor's final conclusions can be impeached on the grounds of unfairness. In any event, we are satisfied that the B hearing which has taken place before this court has cured any possible unfairness to the appellants which could have arisen from the conduct of the auditor. Each has had the opportunity, after mature consideration of the objectors' complaints, the relevant documents and the auditor's findings, to put his or her case fully in evidence and submission by experienced counsel."

C Mr Howell asked the court to note that: (1) the objection related to a major controversial policy for the appellants' party in the evolution and implementation of which both were closely involved; (2) the appellants were aware of the objection at the outset and they had every opportunity to prepare their case and refresh their memory by reference to documents produced at the time, the appellants were aware that the auditor would investigate the matter and that it was inevitable that they would be D interviewed and that indeed they were interviewed on a number of occasions by the auditor when they were shown relevant documents; (3) the Divisional Court reminded itself that it was necessary to bear in mind the lapse of time since the crucial events. That court was able to consider the extent to which the lapse of time materially interfered with the ability to hold a fair hearing, given the amount of contemporary documentation available, and having E seen the appellants and others give oral evidence. The court was able to conclude that a fair hearing could be held notwithstanding the lapse of time.

I have no doubt that the appellants' memory of events 10 years before, even given the contemporary documentation, would not be as full or accurate as their memory in 1989. However, in the context of what are the crucial issues in the present case, I consider that the Divisional Court was F justified in its conclusion that the lapse of time did not impede the fairness of the trial.

Submissions were made to the effect that the passage of time had adversely affected the appellants' ability to adduce evidence in relation to quantum. I desire to do no more than to say that I was not impressed by this part of the appellants' case.

G *Delay not causing an unsafe verdict*

I now turn to the first of the rights-based submissions. They are founded on article 6 of the Convention and on citations from a number of authorities from various common law jurisdictions, many of which are helpfully and extensively considered in a decision of the New Zealand Court of Appeal: *Martin v Tauranga District Court* [1995] 2 LRC 788.

H Article 6 provides:

"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law . . ."

The concept of reasonableness in this context is not limited by the effect of the delay on the reliability of any verdict produced after trial. Pursuant to the Convention there can be a remedy for the distress or other loss caused by delay even if there is an acquittal. We were addressed at length about the causes of the undoubted delay. For the purposes of this part of this judgment I am prepared to assume in the appellants' favour, without so finding, that the appellants did not have a hearing within a reasonable time.

Mr Howell did not accept that there was in English law any right to a trial within a reasonable time; still less did he accept that there was a right not to be tried after the lapse of a reasonable time. It is not in my judgment necessary for us to express any concluded view on either proposition in the abstract and I refrain from doing so. This is because I reject the submission that, on the assumption that such rights exist in certain circumstances, the natural consequence of the lapse of a reasonable time is that there must be a quashing of any order made after the lapse of this period—in the context of the present case a setting aside of the order of the Divisional Court and a quashing of the certificate. Lord Lester repeatedly referred to the "prejudice" resulting to Dame Shirley from the delay. However, his use of the word had a chameleonic quality—sometimes it referred to the distress and damage caused to the appellants by having these grave charges hanging over them and sometimes it referred to the possibility that their chances of success in relation to the surcharge and disqualification had been adversely affected by the delay.

The passage of time may have one or both of two results. First, it may cast doubt on the reliability of the conclusions reached by the tribunal. Second, it may cause or aggravate financial, physical or psychological harm to one or more of the parties to litigation. In so far as the court considers that the reliability of the conclusions reached by the tribunal has been impaired by the tribunal's failure to give appropriate weight to the effects of the passage of time, the court may treat this as a ground for quashing the judgment arrived at by the tribunal. This I have already considered.

However, in so far as the passage of time has resulted in *other* harm to the litigants, the requirement in article 13 of the Convention that everyone be given an effective remedy for a violation of his rights does not have as a logical or inevitable consequence that the decision of the tribunal be quashed. An award of damages may well be a more appropriate remedy for damage caused to a litigant by an unduly delayed trial. This is clearly so where the litigant has been acquitted or found not liable. While in the case of an unsuccessful litigant no doubt the quashing of the decision will be welcome it does not as such provide any relief which is commensurate with the loss which has been suffered. In the context of the present case, the quashing of the certificate in no way provides a remedy for any financial or other damage suffered by the appellants. No award of damages having been asked for in the present case, we are not required to address the question whether under our law as it currently stands the courts would be able to make such an award.

Questions as to the effect of delay may come before the court both before and after the decision of the tribunal. When they arise *before* the decision of the tribunal then it will often be appropriate to take into account both the danger of an unreliable verdict and the danger of other damage caused to the litigant by the delay. Both of these can be averted by a stay of proceedings

A and may be averted by an order for speedy trial. However, when questions as to the effect of delay arise *after* the decision it seems to me that quashing is likely to be the appropriate remedy for delay resulting in unreliable conclusions by the tribunal whereas an award of damages is likely to be the appropriate remedy for delay resulting in damage to the litigants.

We did not have our attention drawn to any case where the verdict
B obtained at trial was quashed because of the lapse of time although the verdict was held to be safe notwithstanding the lapse of time. I do not consider it appropriate to quash the certificate merely because there was an undue delay in proceedings.

Equality of arms and the presumption of innocence

I turn now to the remaining aspects of Lord Lester's submissions as to
C fairness which can usefully be considered under the same heading.

Using terminology more familiar on the continent than here, he referred to the principle of equality of arms, a principle which he summarised as meaning that everyone who is a party to proceedings must have a reasonable opportunity of presenting his case to the court under conditions which do not place him under a substantial disadvantage vis-à-vis his opponent.

D The disadvantages of which he complained related to delay, the auditor's alleged apparent bias in relation to the press conference and its aftermath, the fact that the auditor did not decide to proceed under section 19 of the Act and the fact that, in the Divisional Court, Dame Shirley Porter was required to give evidence and be cross-examined before the auditor had to put his case.

I have already set out my views as to delay and bias. I do not consider that the appellants' complaints in relation to either of these matters gain any
E extra strength from the invocation of the principle of equality of arms.

Lord Lester submits that by choosing to invoke section 20 rather than section 19 of the Act the auditor put Dame Shirley at a severe disadvantage. He makes a number of points: (1) by virtue of section 19(3) the court is precluded from making an adverse order if it is "satisfied that the person [affected] acted reasonably or in the belief that the expenditure was
F authorised by law"; there is no such phrase in section 20; (2) section 20 imposes a burden on the person surcharged to appeal whereas if the auditor proceeds under section 19 it is he who has to apply to the court for a certificate: he has to swear an affidavit supporting his application, he goes first and the nature of his case appears before the person criticised has to reveal his hand; (3) in proceedings under section 19(3) the court can take into account ability to pay.

G There are a number of answers to these submissions. As to the first, if a person acts reasonably and in the belief that the expenditure is authorised by law then he will not be guilty of wilful misconduct. So the point proceeds from a misconception: in this regard there is no significant distinction between the sections.

The second is more complicated. Lord Lester's original submission was
H that the auditor should have proceeded under section 19 rather than section 20. However, it was rightly pointed out that, once it appears to him that a loss has been caused by wilful misconduct, the auditor has no discretion whether to proceed under section 20. Lord Lester thereupon reformulated the point so as to submit that it was a misuse of the auditor's discretion not to proceed concurrently under section 19. Assuming, without

so finding, that, had the auditor chosen to proceed thus it would have removed the procedural disadvantage of which Dame Shirley complains, I consider that it was well within the auditor's discretion to choose to proceed under only one of these sections. This course had the advantage of avoiding a yet further layer of complexity in what was already a complex case.

As to the third point, whilst it is true that section 20 does not permit account to be taken of ability to pay, that is the regime prescribed by Parliament. Given the duty to proceed under section 20, the fact that ability to pay is irrelevant under that section whereas it is relevant under section 19 is of no significance.

I turn therefore to consider Lord Lester's criticisms of the procedure adopted by the Divisional Court. He submits that: (1) the Divisional Court required, as a condition for allowing the appellants to pursue their appeals, that they each file affidavits and submit themselves to cross-examination upon them; (2) the auditor's report was admitted in evidence without the exclusion, which was imposed on the appellants' evidence, of inadmissible material; (3) the auditor was afforded a specially privileged status in that his report was accepted as cogent evidence without any requirement for him to submit himself to cross-examination; had cross-examination been permitted it might have been fruitful in two areas—as showing actual bias on the auditor's part and in relation to the calculation of loss; (4) by contrast, his advocate was permitted to cross-examine the appellants and their experts; (5) whereas the auditor was under no time constraints in producing his report, Dame Shirley's experts were under time constraints imposed by the court the result of one of which was that some valuation evidence was not admitted; moreover, the experts called by him were not themselves subject to time constraints comparable to those imposed upon those called by Dame Shirley; (6) in section 20 proceedings persons in the position of the appellants were effectively required to show cause why the auditor's report should not stand.

Lord Lester submits that the cumulative effect of these matters is that the appellants were in effect required to prove themselves not guilty of wilful misconduct and were also in effect required to prove that the loss which the auditor asserted had been incurred as a result of that misconduct had not been incurred. Moreover, he submits, the appellants were required to prove themselves not guilty at a time when the auditor had not declared his position in relation to the crucial issue, namely, the impact on the minds of the appellants of the legal advice received.

So far as the first of these submissions is concerned I do not accept it. While there is indeed a requirement under RSC Ord 98, r 3(3) that

> "the appellant must file . . . an affidavit stating—(a) the reasons stated by the auditor for his decision; (b) the date on which he received the auditor's statement; [and] (c) the facts on which he intends to rely at the hearing of the appeal . . ."

it is perfectly possible to appeal against a certificate without asserting any facts. The reason why the appellants chose to file evidence of facts is because they no doubt recognised that the facts disclosed in the auditor's report called for an answer which could not be given by mere submission. This situation is no more a violation of any presumption of innocence than that which faces any person against whom a case has been made on the facts. In

A any event it results from the provisions of the Rules of the Supreme Court which as such have not been challenged in this appeal.

The auditor's approach was that any burden of proof was on the objectors and that he should only make a finding of wilful default if he was sure that he should do so. The Divisional Court, on 1 May 1997, directed that "the ultimate burden of proof on appeal will be on the respondent". I am satisfied that looking at the procedures overall in substance the B appellants were not required to prove their innocence of wilful misconduct but that the auditor and the Divisional Court were persuaded that the appellants had been guilty of wilful misconduct.

As to the suggestion that the auditor's report may have contained some evidentially inadmissible material and it was unfair not to exclude it in the Divisional Court, we have not heard detailed submissions. The fact is that C the Rules provide for the whole of the report to be in evidence. That is no doubt because it reveals what the auditor took into account and is admissible on that basis because it is relevant to the inquiry which the appellate court is undertaking. In any event no suggestion of significant prejudice to the appellants is made under this head.

So far as lack of the opportunity for cross-examination of the auditor is D concerned the complaint falls into two parts. The first concerns the inability to conduct a fishing cross-examination designed to elicit an admission that actual bias, of which the appellants had no evidence, in truth existed. I reject this complaint. Any tribunal's judgment is liable to be reversed on the grounds of actual bias by the tribunal but it is not a part of our procedures that the tribunal be required to submit itself to cross-examination just in order to see whether or no an admission of actual bias can be procured. E Lord Lester's submissions have more force in the context of his submission that the Divisional Court may have given weight to the auditor's assertions of lack of bias. Since I however, as I have indicated, give no weight to these assertions I do not need to address this point. The second cross-examination point relates to the calculation of loss. Submissions were made to the effect that the appellants were unfairly prevented from cross-examining in relation F to quantum. I desire to do no more than to say I was not impressed by this part of the appellants' case.

Even looking at all these matters cumulatively I am not persuaded that there has been unfairness justifying the allowing of the appeal.

ROBERT WALKER LJ

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Summary of events (1): up to April 1987

The local government area known as the City of Westminster covers a large part of central London and contains some sharply contrasting residential areas. These range from Mayfair, Belgravia and Regent's Park to some far less fashionable areas in the vicinity of Queen's Park and the H Harrow Road. For electoral purposes the city is divided into 23 wards which elect either two or three members, making up a total of 60 seats on the city council. The composition of the new council elected on 8 May 1986 was 32 Conservative members, 27 Labour members and one independent member.

A policy of designated sales of vacant council dwellings had been introduced by Westminster City Council in 1972 but until 1986 it was on a very small scale, producing only about 10 sales a year. An expansion to produce 65 to 70 sales a year was considered by the majority group in 1984. In mid-May 1986, soon after the local elections, Mrs Kirwan (then chairman of the housing committee) discussed expansion again with Mr England and other officers. Mr England wrote a briefing note for Mrs Kirwan in which he stated: "Were we able to go forward with a policy of wholesale disposal of stock as Wandsworth have done it will be virtually impossible for us to meet our statutory let alone our socially desirable rehousing commitments." (The elected members and officers principally concerned are identified in the overview at the beginning of the judgment of Kennedy LJ.)

On 3 June 1986 there was a discussion at the chairmen's group attended by (among others) Dame Shirley Porter, Mrs Kirwan, Mr Hartley and Mr Weeks. The chairmen's group was an influential group of Conservative members, including the leader and deputy leader, the chief whip (then Mr Barry Legg) and the chairmen of the principal committees of the council. It was described by some witnesses as Dame Shirley's cabinet. They met on a regular basis (sometimes with officers in attendance) under Dame Shirley's chairmanship. On 3 June they decided that major policy initiatives should come down from the chairmen's group and the policy and resources committee. The subjects discussed included "marginal wards". Marginal wards (or, as they were sometimes called, "target wards", "key wards" or even "key battlezone wards") are of central importance to the events of this period. As Dame Shirley explained in a paper entitled "Keeping Westminster Conservative" which she wrote in March 1988, 15 of the 23 wards within the City of Westminster were either safe Conservative (9 wards with 22 seats) or safe Labour (6 wards with 18 seats). Those wards would change hands only in a landslide. The other, marginal wards were as follows (the figure for majority indicating the gap between the least successful elected candidate and the most successful non-elected candidate at the 1986 election):

	Members	Majority
Bayswater	3 Labour	156
Cavendish	3 Conservative	70
Hamilton Terrace	2 Conservative	128
Little Venice	3 Labour	36
Millbank	3 Labour	241
St James's	2 Conservative	130
Victoria	2 Conservative	248
West End	1 Conservative, 1 Independent	142

Shortly after the meeting of the chairmen's group Mrs Kirwan produced a note for Dame Shirley. The note stated that "the dangers of mass voting one way or another (i e nurses about to be evicted from health service accommodation . . . and homeless/down and outs who are not our natural supporters) cannot be overemphasised". The note recognised an increase in designated sales as a possibility but commented that "all these options will lessen our already stretched ability to meet our statutory requirements". The council's statutory obligations included those imposed by Part III of the

A Housing Act 1985 (Housing the Homeless) which re-enacted the Housing (Homeless Persons) Act 1977.

On 24 June 1986 Dame Shirley and Mr Weeks attended a special meeting of the chief officers' board. The board was told that the focus of attention would be winning the next election, and there was a reference to "social engineering". On the same day the chairmen's group decided to withdraw a B paper on the homeless persons review from the housing committee. On 30 June Dame Shirley attended a working lunch with Jones Lang Wootton. Mr England, who was present, made a note referring to "economic justification for G[erry]mander on housing". That seems to have been the first, but it was not to be the last, reference in the case to Elbridge Gerry, who was Governor of Massachusetts at the beginning of the 19th century and gave his name to a form of manipulation for electoral advantage. The C Divisional Court found that from July 1986, if not before, concentration on key wards was the policy of the majority party. On 1 September 1986 the policy unit produced a paper entitled "Homelessness/Gentrification". It stated that homelessness was reaching crisis proportions, and that the law should be changed. It continued:

> "Within the present legislation we might (a) test the law to its limits . . . D (b) target additional homeless accommodation on specific and appropriate wards; (c) use property outside Westminster for both temporary and permanent accommodation. This could assist in relieving homelessness in Westminster; and in gentrification, to the extent that it frees suitable properties in the city. What is gentrification? In short, it is ensuring that the right people live in the right areas. The areas are relatively easy to define: target wards identified on the basis of electoral E trends and results. Defining 'people' is much more difficult and is not strictly council business."

On the same day Mr England submitted a draft paper on "Gentrification" to Mr Weeks. Its conclusion was as follows:

> "A number of initiatives are already in operation to improve home F ownership in the city in both public and private sectors. The current economic and planning study will hopefully identify further areas where these schemes can be pushed forward. The major constraint unfortunately, at the present time, is the impact of the Housing (Homeless Persons) Act and the council's other statutory and high priority rehousing requirements, eg: medical cases and the need in many instances for rehousing to be available to prime the pump in getting further home G ownership schemes off the ground. The rate of disposal of council stock must therefore be seen in this overall context."

The reference to the "current economic and planning study" was to a study already commissioned from PA Cambridge Economic Consultants ("PACEC"). On 2 September 1986 Dame Shirley sent a note to members of the chairmen's group entitled "Strategy to 1990". It stated, "Clearly our top H priority is to win the 1990 elections." It listed "homelessness/gentrification" as one of the key issues relevant to electoral success. This and other papers were presented to a seminar of Conservative members on 6 September.

On 15 September there was a meeting with PACEC attended by Dame Shirley Porter, Mr Weeks and others. The consultants were shown (but did

not retain) some policy papers. Notes made by Mr Mark Kleiman of PACEC included the following:

> "Getting the right people housed. Strategy—to push Labour voters out of marginal wards. Housing Dept can't say—privatise/gentrify council blocks in marginal wards—400 in b & b. But *we* could say—preserve economic base—need to boot out these blocks."

Ten days later Mr England wrote in a note to Mr Phillips:

> "Initial discussions being held with [PACEC]. Report targeted for four months' time. The current feeling is that the consultants have grasped the key issues very quickly and are likely to produce a productive report."

The development of the policy of designated sales in key wards can be seen in the minutes of successive meetings of the chairmen's group on 23 September, 1 October and 16 November 1986 and 13 January and 27 January 1987. It is not necessary to summarise these minutes because it is not in dispute that the policy was being actively developed at this time, or that its purpose was to achieve electoral advantage for the Conservative group on the city council. By way of illustration, the meeting on 27 January considered a paper by Mr Alex Segal, a Conservative member of the housing committee, which stated the problem as he saw it:

> "If it is accepted that owner-occupiers are more inclined to vote Conservative then we approach the city council elections in 1990 with an enormous handicap . . . The short-term objective must be to target the marginal wards and, as a matter of utmost urgency, redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes."

On 23 January 1987 Dame Shirley, Mr Weeks and others met the PACEC representatives to discuss their preliminary findings. On 14 and 15 February there was a conference at the University Arms Hotel, Cambridge, organised by PACEC and attended by (among others) Dame Shirley, Mr Weeks and Mr Phillips (who was at about that time appointed as managing director). After the conference Dame Shirley sent a note to all Conservative members stating:

> "We agreed at the seminar that we've got to target our efforts in key areas. The [PACEC] study shows that we've got to put a tremendous effort into providing affordable housing, community improvement and effective expansion room for our growing office sector. All this is going to require a tremendous amount of thought. David [Weeks], Barry [Legg] and I will continue to act as a strategy group, but we'll need to draw on other colleagues to help ensure that our corporate plan brings success."

By then the eight key wards had been identified. Two other wards (Churchill and Maida Vale) were also mentioned in some papers prepared at this time, but were not, as matters developed, regarded as key wards.

On 14 March 1987 the chairmen's group met and considered how the BSC policy (of which designated sales formed part) should be presented and implemented. A paper entitled "Handling" favoured a "broad-brush" approach and stated, under "Members' corporate role", "Chairmen will also have a key role in getting officers—especially chief officers—to 'think BSC' Chairmen can impart to officers a political awareness which will be essential

A to the success of the strategy." Under "Officers' corporate role" it stated, "The managing director will lead and direct the officer input to BSC." On 17 March Mr England submitted an analysis "based on the designation of all council-owned properties in the key wards". The conclusion of this paper merits quotation in full since it contains the first, or almost the first, reference to obtaining legal advice:

B "As previously reported to the housing sub-group, it is not possible in professional terms to justify the designation of all properties in the eight wards. The key ward analysis will have to flow from the PA Cambridge study. Neither is it possible to justify in an officer report, a greater degree of designation within those wards than is indicated in the first column of appendix 1. Any further designation in columns 2 and 3 would require a C report by the chairman and would need justification by members as to the impact on the council's existing allocation policies. Members would be advised to consult the city solicitor as to the 'reasonableness' of proceeding on this course of action and whether, in view of the reports which they have received on the council's annual housing priorities and homelessness statistics, the city council could find itself subject to judicial review in proceeding along this course."

D The total in the first column (officer proposal) was 172. The total in the second column (members' sub-group, referring to a proposal made on 27 February 1987) was 249. The total in the third column (total designation) was 490, with the largest sub-totals in Millbank (225), Bayswater (124) and Little Venice (61).

On 20 March 1987 Mr Robert Lewis, the deputy city solicitor, wrote a E note to Mrs Kirwan under the heading "Disposal Policy". He gave some general advice and concluded, "I'm sorry that the above is all rather general. I hope it at least reinforces the notes of caution that have already been expressed. If there is to be a major change of policy it is important to involve lawyers early on to minimise the risk of successful challenges."

On the following day a seminar for Conservative members was held at the F London Business School. It was attended by Dame Shirley Porter, Mr Weeks, Mrs Kirwan and Mr Hartley, among others. Mrs Kirwan spoke against the designated sales policy. However there was general support at the seminar for BSC A later note (prepared for Dame Shirley and presented by her) referred back to BSC having been agreed at the seminar and set out the key elements of the policy:

G "*Targeting key areas*

"Certain marginal wards require special attention. In these wards, targets for increasing our support are:

Bayswater	350
Cavendish	250
Hamilton Terrace	250
H Little Venice	250
Millbank	450
St James's	250
Victoria	150
West End	250

"*Protecting the electoral base*

"In addition to our goals in the targeted wards, we need to protect the electoral base in the wards that we have.

"*Affordable housing*

"A key element in BSC must be to attract home owners in Westminster. This means finding innovative ways of ensuring that the right sort of housing is available to the right sort of buyer or tenant. And it must be available by October 1989."

October 1989 was the time at which the official lists would be prepared of those qualified to vote in the local elections in 1990.

On 24 March 1987 (possibly prompted, although there is no finding about this, by Mrs Kirwan having referred at the seminar to the advice of Mr Lewis) Dame Shirley Porter got an assistant, Mr Stuart Greenman, to fax a series of handwritten questions to Mr England and to Mr Ives, the city solicitor. The first three (of 15) questions to the director of housing were (with the original emphasis):

"1. How does he propose to achieve the target voter figures in the *eight relevant wards by 1990?* 2. Does he agree there are good decant possibilities in all eight wards? 3. Will he please give figures on numbers of units in each ward which will become available for sale?"

Mr England's replies to the first two were:

"1. The [PACEC] report was meant to set the targets for the eight relevant wards. There is very little support that officers can give to the eight target wards as opposed to the policies in other wards without the [PACEC] report. 2. No There are decant possibilities in the Millbank ward and possibly in the Bayswater ward but these will need to be considered in conjunction with the housing committee's other strategies and obligations."

In answer to the third question he repeated the figures in his paper of 17 March: "option 1 (officer suggestion 172); option 2 (members' sub-group suggestion 249); option 3 (party group suggestion total designation 490)" Mr England's replies reflect the expectation (also apparent in other papers prepared at this time) that the final PACEC report might provide a satisfactory objective basis for targeting designated sales in the key wards. The final draft of the report had by then been received but it is not clear when it was seen by officers other than Mr Phillips. The expectation was at least partially disappointed.

The seven questions put to the city solicitor and his replies (faxed on the same day) need to be set out in full. The questions were:

"1. Will the council's new policy on 100% designation for sale in the eight target wards conflict with its statutory obligations? 2. Given proposed annual figure of sales within the target wards, will this conflict with council's ability to house category A medical cases etc? 3. If there is any possibility of conflict, then what level of annual sales (and void creation) *would* enable council to continue to house category A medical cases etc. 4. Is there any possibility that this policy will lay the council open to (a) judicial review of its policy or (b) surcharging for illegality etc.

A 5. What happens if Westminster is unable to fulfil all obligations, e g if it is overwhelmed by numbers of homeless families etc? 6. Is committee approval needed for any further designation? 7. Is there anything in the answers to the previous 15 questions put to director of housing which may put us ultra vires or in breach of our duty as a local authority under the law?"

B Mr Ives's replies were:

"1. This is a question of fact not of law. If the policy is to be introduced then as a matter of law the reasons for its introduction have got to be carefully argued. The needs of the homeless and the impact of a decision to sell accommodation which might otherwise be available for them is a highly relevant consideration which will have to be balanced against the C advantages of selling. It is fundamental that the arguments in favour of selling be soundly based and properly argued. Anything which smacks of political machinations will be viewed with great suspicion by the courts. 2. The same considerations apply as in the answer to 1 above. The needs of the medical cases like other housing requirements will have to be put in the balance against each other. The courts will interfere if all issues are not put fairly to the committee or if the committee have considered all the D relevant issues but arrive at a decision which no reasonable man could have arrived at. 3. A specific number cannot be given at this stage. Later it may be possible to give a broad indication of the parameters within which the council should work once the arguments in favour of sale have been developed and weighed against the disadvantages. The courts recognise that two reasonable people can legitimately hold differing views E and will only interfere if a decision is perverse or unreasonable. 4. (A) Yes. The way to avoid successful challenge is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision-takers have acted irrationally or relied on an irrelevant consideration. (B) For the district auditor to take action financial loss must have resulted either F because expenditure has been incurred contrary to law (an abuse of power) or because loss has flowed from wilful misconduct of decision-takers. The possibility of surcharge exists but it will be necessary for those challenging to demonstrate that the loss flowed from the act of wilful misconduct. This re-emphasises the need for a good argument to be constructed in favour of sale. 5. The duty to provide accommodation G is not limited by the ability of the council to find accommodation. The council must find accommodation. A consequence of increased sales would of course be an increase in the numbers housed in temporary accommodation. 6. Yes. 7. It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the stand point of what is right in view of the council's role as a housing authority. A general H policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property. It might be sensible to go forward in stages rather than offer a broad target. Lawyers should be involved in consideration of any reports at the earliest possible stage. Since a general policy will inevitably draw fire the advice of counsel

should be sought at an early stage so that if judicial review is commenced the prospects of successful challenge can be minimalised."

The auditor (who conducted interviews with Mr Ives, though Mr Ives did not give evidence either at the audit hearing or to the Divisional Court) said that parts of these replies might demonstrate an unfortunate choice of language. But he did not find that Mr Ives was encouraging or colluding in any sort of cover-up of an unlawful policy.

On the same day, 24 March 1987, the chairmen's group rejected a draft report prepared for the housing committee because it contained too many options. The group wanted to get on with designated sales. Two days later Mr England wrote a note to Mr Phillips about the problem which the group's decision posed for him, and suggested (as he had already discussed with Mrs Kirwan and Mr Weeks) a planted question about the level of designated sales. The planted question was asked by Mr Segal at the housing committee meeting on 1 April and the committee resolved that the director of housing should "report back to the committee on means by which designated sales can be increased without delay to an annual level of at least 250". By then two lists had been prepared, one by Mr England and one by the members' sub-group, as shown in the appendix to Mr England's paper of 17 March. On 3 April Mr Garry Peltzer Dunn, an officer in the housing department, produced a third list adding another 98 properties in Millbank, Bayswater and Little Venice, so as to bring the proposed total to 270. He produced a fourth list with a further 117 properties, almost all outside the key wards, on 9 April. The final PACEC report was eventually received on 10 April. On 14 April a fifth, consolidated list was prepared. It showed numbers of potential sales where vacancies were created otherwise than by transfers. 199 were in the eight key wards and 120 in the other wards.

Towards the end of April a discussion paper headed "Designated Sales" was prepared by Mr Hayler (the divisional director of housing) for Dame Shirley and the chairmen's group. It assumed a designated sales target of 250 dwellings a year. It contained a list which consisted of the fifth list, rearranged, together with 83 units on the Churchill Gardens estate in Churchill ward. The paper recorded the city solicitor's strong advice

"that because the matter is inevitably going to prove contentious and because it raises a whole range of legal issues, it is imperative that counsel's advice be sought and obtained on the final shape of the committee report. The legal issues are not only the legality of the specific proposals . . ."

The paper also noted that an increase in designated sales from 10–20 a year to 250 a year would have significant staffing and financial implications.

II

Summary of events (2): May to September 1987

That was where matters stood on 5 May 1987. There were three important meetings on that day and its events have been examined in great detail by the auditor, in the Divisional Court and in this court. At 9.45 a m Dame Shirley Porter called Mr Hayler and Mr Lewis to a meeting at which Mr Segal, Mr Phillips and Mr Albert Newman (a consultant) were also present. Dame Shirley told Mr Hayler that his discussion paper was not

what was needed: "The policy was clear—the note needed to spell out how, not give options." Mr Lewis was told that leading counsel's advice must be obtained in the course of the day. A revised note was required for a meeting of the chairmen's group at 6 p m that day.

Mr Lewis was able to arrange a consultation with Mr Sullivan. It was held at 3 p m and attended by Mr Lewis, Mr England and Mr Hayler. It lasted for about one hour. Mr Sullivan received no written instructions or documents before the consultation. Mr Lewis made notes of the consultation (which were typed on the following day, omitting a reference to the decision being made "completely judge-proof") and Mr England prepared a note for the chairmen's group meeting on the evening of 5 May. Mr England thought that he read the note to Mr Lewis.

The auditor interviewed and heard oral evidence from Mr Lewis; he interviewed, but did not hear oral evidence at the audit hearing from, Mr England and Mr Hayler. The auditor found (volume 4, paragraph 237) that Mr Sullivan was told by Mr Lewis that he (Mr Lewis) believed that leading Conservative members on the council wished to secure electoral advantage by a policy of designated sales in marginal wards, and that Mr Sullivan confirmed Mr Lewis's view that it would be unlawful to concentrate sales in marginal wards or to select properties for sale by reference to electoral considerations. However the auditor found (volume 3B, paragraph 2810) that Mr Lewis did not take a full note of the consultation, and took a conscious decision not to record Mr Sullivan's advice as to what would be unlawful.

Mr England's note for the chairmen's group did not purport to be a full note of counsel's advice. Its structure was to suggest action to be followed in respect of the options set out in the discussion paper (which Dame Shirley had already dismissed as not what was wanted). It stated in relation to paragraph 2(i) (setting the designated sales target):

> "Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council. The group will therefore need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300–350 properties will need to be sold across the city. This will clearly exacerbate the problems of dealing with housing demand."

In relation to paragraph 5(iv) (which referred to the PACEC report as not justifying increased sales) it stated:

> "The target set by housing committee is 'at least 250'. Counsel advises that this cannot be targeted solely in key wards, therefore the group will need to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the [PACEC] study should be included in the report. This [PACEC] report has now been released to the opposition."

No minutes, formal or informal, are extant for the meeting of the chairmen's group held that evening. Dame Shirley Porter and Mr Weeks were among those present. A sixth version of the list of properties to be designated was included in the papers before the group. The group decided,

as the auditor recorded in his history of events (volume 4, paragraph 253), to adopt Mr England's suggestion for a higher target throughout the city in order to achieve 250 sales a year in the eight marginal wards.

The true significance of that decision, and of the way in which it was carried into effect, lies at the heart of this case. Mr Weeks's evidence to the Divisional Court, which the Divisional Court rejected as plainly untrue, was that the chairmen's group's policy of designated sales in marginal wards was abandoned "with relief". The Divisional Court's view, 96 LGR 157, 185, was that what happened was that Dame Shirley and Mr Weeks, as leading members of the group,

> "were content, without further inquiry of Sullivan, [England], Lewis or anyone else, to adopt the suggestion in [England's] note that [the targeting policy] be dressed up in the city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage."

On 13 May Mr Phillips produced a document headed "Designated Sales: Critical Path" laying down a detailed timetable for production of an officers' report to go before the housing committee on 8 July. It provided for the draft report to be submitted to counsel three times during May and June. Mr Ives questioned whether such frequent advice on drafts was necessary but Mr Phillips maintained his view (however, the programme for advice was not in the event followed). On 14 May there was a meeting of officers to discuss homelessness. The minutes record the view that 600–700 permanent dwellings were needed to house homeless persons. They also referred to "political objectives regarding the maintenance of stable residential communities within Westminster".

On 13 May Dame Shirley Porter was re-elected as leader of the Conservative group on the council, defeating Mrs Kirwan who stood against her. Shortly afterwards Mr Hartley replaced Mrs Kirwan as chairman of the housing committee.

On 20 May Mr Hayler sent a draft of the officers' report to Mr Ives. His covering note stated that one of the principal matters still to be included was a clear setting out of the three main options:

> "option one—maintain the current balance of provision between sale and renting; option two—designate 250 casual vacancies for sale in relevant areas; option three—designate 400 approximately vacant units on estate for sale/rent via trusts."

On 29 May Mr Phillips, Mr Ives and Mr Hayler met Mr Richard Loftus (a property developer described in the file note as an adviser to Dame Shirley) to discuss proposals for the Westminster Housing Trust. The file note prepared by Mr Ives records Mr Loftus as having accepted "that the role of the housing trust was not strictly necessary and that its intervention was purely to sanitise what might otherwise appear to be politically motivated decisions". On the same day a revised draft of the officers' report was sent by Mr Hayler to Mr Phillips, Mr Ives and others. The options appeared in paragraph 82 as (1) maintain the present balance of policies and provision; (2) designate 250 voids per annum for sale; (3) designate 400 voids per annum for sale/higher rent. Against (2) and (3) are the manuscript comments "No—we would need to designate far more to achieve 250 sales"

A and "ditto". The draft was accompanied by a seventh draft list identical to the sixth.

A third draft of the report was prepared in early June, following by a fourth draft on or about 8 June. The copy of the fourth draft which is in evidence shows the changes later made to it. In paragraph 7.6 the number of units of council accommodation required for the homeless has been altered in ink from 635 to 570 (with the marginal query "does counsel agree or can this be toned down?"). Option 2 is "increase designated sales by 250 per annum" (correcting the previous inapposite reference to voids but keeping the same number). Option 3 was "increase designated sales further and expand higher rented accommodation" altered in ink to "increase designated sales by 500 per annum".

Throughout this period there were numerous further meetings and memoranda passing between officers as to the ever-increasing problem of homelessness and its impact on designated sales. The officers involved included Mr Phillips, Mr Ken Hackney (a divisional director of housing) and Mr Nick Reiter (the head of the policy unit).

On 12 June (which was a Friday) Mr Lewis instructed Mr Sullivan by letter to review the latest draft of the officers' report. This draft was the fourth draft in its original state (that is, without the manuscript alterations mentioned above). There is no record of the content of Mr Sullivan's advice (for which he charged a fee of £75 indicating chargeable time of about half an hour) but it seems likely that he approved the report with minor changes, and gave his advice by telephone.

On 11 June Dame Shirley's new appointments of chairmen and vice-chairmen of committees took effect. On 13 and 14 June she held a weekend strategy meeting outside London. Those in attendance included Mr Weeks, Mr Hartley, Mr Phillips and Mr Reiter. The papers circulated and discussed included papers entitled "Setting the scene" written by Dame Shirley; and (all written by Mr Reiter) "Building stable communities", "Targeting areas", "Protecting the electoral base" and "Affordable housing". The first paper began:

> "We face a tremendous challenge. The electoral register for the 1990 elections will be compiled in just over *two* years' time. Some very ambitious policies must be implemented by then: providing a great deal of affordable housing in key areas; protecting the electoral base in other areas (for example, by controlling the impact of homelessness); and implementing the Conservative philosophy throughout Westminster . . ."

A large part of the second paper has already been quoted with reference to an earlier seminar. On the copy of this paper in evidence there is written in ink in what is accepted to be Dame Shirley's handwriting: "These papers are written assuming that ALL know ALL."

On 17 June Mr Hartley and two Conservative members of the housing committee had a meeting with Mr England and other housing officers. Mr England's file note records that the members' main policy objective was to achieve a substantial increase in RTB sales and to achieve a minimum of 500 sales under the designated sales policy. At about the same time the fourth draft of the officers' report was further revised, including the alterations already mentioned. At the chief officers' board on 25 June the

chief officers "were reminded of the paramount importance of the [BSC] strategy in the development of all council policy."

On 26 June Mr England sent a note to Mr Hartley enclosing:

> "1. Final copy of the committee report; 2. an analysis of the estate by ward; 3. a suggested list of estates which would give approximately the target sales and where sale can be justified in terms of the four indicators included in the committee report. The city solicitor is concerned at the possibility of legal challenge if members individually designate estates which do not have a key indicator in the appendix. I have ignored the scattered properties although we can discuss these when we meet on Monday morning."

Several points on this note call for explanation. The auditor recorded (volume 4, paragraph 331) that the second enclosure could not be identified, but may have been a document prepared by Mr Peltzer Dunn during the previous February. The third enclosure was a list of possible sales by ward, with a total of 4,285 properties (expected to produce 269 sales a year) in six of the key wards (Victoria and West End had very few council properties) and a total of 3,826 properties (expected to produce 220 sales a year) in ten other wards (Bryanston, Hyde Park, Knightsbridge, Lancaster Gate and St George's also had few council properties). The auditor identified this as the eighth list.

The report itself is summarised below but it is convenient to note at once that the "four indicators" referred to in Mr England's note are identified in paragraph 10.5 of the report (where they are referred to as options) and at the end of appendix 5 (where they are referred to as categories and are stated as (1) popular for home ownership, (2) above average level of turnover, (3) area identified by [PACEC] study and (4) unmodernised property).

The four indicators were also referred to in a note which Mr Lewis sent on the same day, 26 June, to Mr Hartley, stressing the importance of the list being drawn up by the housing committee on the basis of housing and planning issues. The documentary evidence suggests that officers were at this time anxious that responsibility for the selection of the final list should be that of the members on the committee (although ultimately it was essentially an officers' list which was approved, as the Divisional Court noted).

On 29 June the chairmen's group considered a draft paper on homelessness by Dr Michael Dutt (a joint vice-chairman of the housing committee who took his life after the release of the auditor's provisional views). The first two recommendations in the paper were:

> "1. We should not accept that increasing designated sales should in any way be prevented by our statutory obligations for the homeless. The figures do not show that our statutory obligations are put in peril merely through an increase in designated sales."—Mr England annotated his copy: "? seems likely they do"—"2. We should take a definite decision to look outside Westminster for accommodation for the homeless, and be imaginative: prefabricated homes, mobile homes, houseboats, disused holiday camps are all possibilities."—Mr England annotated: "in public at committee?"

A The list of properties was further revised (twice) by officers between 30 June and the housing committee meeting on 8 July. On 3 July (a Friday) written instructions were sent to Mr Sullivan by the city solicitor. The instructions were concerned with the council's policy towards the homeless. The instructions referred to the BSC policy as a key theme in the council's policies. A copy of the officers' report (in its final form) was included but counsel's attention was not drawn to the respects in which it differed from B the draft sent to him on 12 June. Nor was he asked in terms to approve the report.

On the morning of Monday, 6 July Mr Sullivan was appearing in the Court of Appeal on behalf of Westminster City Council, instructed by Mr Lewis. It was a judicial review application which had no direct connection with this case. Mr Sullivan also had a consultation with other C clients fixed for 2.30 pm Mr Sullivan stated in written statement to the auditor:

> "It seems most probable that we managed to have a fairly hurried consultation at some time over the lunch period between the end of the Court of Appeal hearing and the beginning of the 2.30 consultation. In the circumstances it would have been the best we could do. The fact that D any consultation had to be 'squeezed in' might explain why I did not endorse my backsheet, or send in a fee note. It might also explain why there appears to be no written record of the advice given. The fact that [Mr Lewis] persuaded me to have a consultation over the lunch period is, I feel, eloquent testimony of his determination to obtain counsel's advice. Since I had no recollection of the consultation I am unable to say whether I did or did not approve the final version of the report. [Mr Lewis] is clear E in his own mind that I did, and I would not question the genuineness of his belief. The instructions did not seek my approval and given the pressure of work described above, I suspect that I would have looked at the report in advance of the consultation only in so far as I thought it necessary to enable me to answer the specific questions in my instructions."

F Mr Lewis told Mr England that Mr Sullivan had approved the report. But even if paragraph 7.6 had been drawn to his attention it is hard to see how counsel, whose task was to advise on matters of legal principle, could have said whether it was right for the director of housing to change his professional opinion as to the homelessness requirement from 635 units to 570 units.

G On the same day, 6 July, there was a meeting with Mr Victor Hausner of PACEC. It was attended by Dame Shirley, Mr Weeks, Mr Hartley, Mr Phillips and others. One purpose of the meeting was to consider what further role PACEC had to play in the BSC policy. The minutes record that Dame Shirley "reaffirmed the agreed BSC programme of action as agreed by chairmen as an all-embracing strategic council policy with determined priorities for BSC initiatives". The minutes record that in discussion: H "[Dame Shirley] and Peter Hartley felt that the city council had an agreed plan of action which could be clearly understood and implemented by officers, and that there was little need for an external catalyst . . ." This meeting took place, it may be noted, two days *before* the officers' report was, after its long and difficult gestation, to be placed before the housing

committee, which had delegated power to make a decision on behalf of the Westminster City Council. Dame Shirley Porter said in her affidavit sworn on 20 December 1996 (paragraph 239): "It was confidently expected by the majority party that its proposals would be approved by the housing committee bearing in mind the majority our party held on the council."

In preparation for the meeting of the housing committee on 8 July officers prepared briefing notes for Mr Hartley and Dr Dutt. Officers (Mr England and Mr Hayler) also attended a caucus meeting, at 6 p m on 8 July, of the Conservative members of the committee. The Divisional Court saw nothing improper in that provided that officers did not imperil their independence by political partiality. At this meeting the latest (tenth) version of the list of properties was disclosed to those backbench Conservative members of the committee who attended.

It is not clear whether all the Conservative members attended the caucus meeting but there were seven Conservative members at the housing committee meeting which began at 7 p m: Mr Hartley (chairman), Dr Dutt and Mrs Judith Warner (vice-chairmen), and Councillors Jenny Bianco, Karen Buxton, Richard Evans and Angela Hooper. Councillor Hooper was filling a casual vacancy for that meeting only. The opposition members at the meeting were Councillors Coleman, Gavin Millar, J B Provost, Jackie Rosenberg and Peter Wright.

The officers' report placed before the housing committee was headed "Review of Home Ownership". It was supported by various background papers including the PACEC report. Paragraph 2 ("Recommendations") contained some relatively uncontroversial matters. Paragraph 3 was headed "If the committee wish to increase the number of designated sales the following additional recommendations would be appropriate" and paragraph 3.1 was in these terms:

> "That the following blocks be designated for sale [with a blank] (The committee is invited to select from appendix 5 those blocks comprising a total of 5,500 dwellings (which may be expected to produce approximately 250 voids per annum) or 11,000 dwellings (which may be expected to produce approximately 500 voids per annum)."

Paragraph 3.3 and appendix 4 referred to the selection of purchasers. Paragraph 3.4 proposed a measure of flexibility between RTB and designated sales. Paragraph 3.5 proposed a scheme of capital grants. Paragraph 3.6 recommended (if option 3 was adopted) the acquisition of new premises for a complete home ownership advice service.

Paragraphs 4 ("Background"), 5 ("The need to promote home ownership"), 6 ("The need for some control of home ownership"), 7 ("The need for social housing") and 8 ("The conflict between the demand for social housing and the need to promote home ownership in Westminster") set out the arguments on both sides in a way which the Divisional Court considered, 96 LGR 157, 193, to be "a fair and adequately comprehensive representation of the relevant issues." Paragraph 7.6 estimated the homelessness requirement at 570 units in accordance with the amendment already mentioned.

Paragraph 9 then introduced and set out the three options. Option 3 was stated as "Increase designated sales by 500 per annum (appendix 2, column 3)." That appendix set out the expected effects on different

A categories of those seeking housing by the council. The narrative in paragraph 9.5 spelt out the effects:

> "Ability to meet homeless needs substantially reduced and significant increase in use of temporary accommodation; decanting requirements to be maintained; ability to house category A medical applicants drastically reduced. Tenant transfers reduced. Most other priority housing
B categories closed; allow existing secure tenants who have the right to buy to purchase designated flats . . . introduce capital grants to existing secure tenants to buy privately owned accommodation inside or outside Westminster; home ownership increased by 500; introduce model clauses in leasehold disposals to ensure occupation by people as their main or principal home; investigate restrictions on resales of low-cost home ownership dwellings."

C

Paragraph 10 dealt with implementation, including (in paragraph 10.5, appendix 6) the four options or categories already noted. Paragraph 11 dealt with financial implications.

The proceedings at the meeting and the decisions which it reached were closely examined by the auditor and appear at various places in his findings (notably the conclusions in volume 2, paragraphs 871–890 and volume 4,
D paragraphs 367–390). On the review of home ownership (which was the seventh item on the agenda) the housing committee agreed to receive a deputation from the Bayswater co-ordinating group and to hear its representative. There was a vigorous debate in the committee. The committee then passed a resolution (by seven votes to five) of which paragraph (v) designated a list of 9,360 properties for sale, and paragraph
E (ix) was for the introduction of a scheme of capital grants.

The auditor found that Mr Hartley and Dr Dutt had taken into account electoral advantage to the Conservative Party and had sought to promote it by their votes. He found that Councillors Warner, Bianco, Buxton, Evans and Hooper may have been aware of the electoral objective but he was not satisfied that they sought to promote it by their votes. He found that
F Councillors Warner, Bianco and Hooper sought to exercise an independent judgment in relation to option 3, but that they relied on the officers' report and on Mr Hartley. He found that Councillors Evans and Buxton did not seek to, and did not, exercise any independent judgment in relation to option 3, but relied on the report and on Mr Hartley. The auditor found that none of these five members could exercise any independent judgment in relation to the list of properties. He concluded (volume 2, paragraph 884):

G

> "that both the decision to increase the number of designated sales and the selection of the properties designated for sale were influenced by the electoral advantage of the majority party . . . [That] is an irrelevant consideration which ought not to have been taken into account. I have concluded that both decisions were ultra vires and unlawful for this reason."

H

Under the council's standing orders the housing committee's decision had to be referred to the next meeting of the council, which was to be on 29 July. The legality of the decision had already been questioned by Councillor Coleman and others, both in debate and in communications with officers. On 20 July Mr Lewis wrote to Mr Alan Wilkie (who had often acted for the

council as junior counsel to Mr Sullivan) explaining that the detailed financial arrangements consequent on the housing committee's decision were to be considered by an appointed members' panel ("AMP"). Mr Lewis wrote:

> "We have learnt that the minority party is considering judicial review, mainly on the basis that no reasonable authority could decide the way we did in the light of the financial consequences (which are significant). In view of this, I am anxious for the AMP report to be scrutinised by yourself to make sure it, too, is 'judge-proof'."

On 23 July Mrs Kirwan wrote to Mr Rodney Brooke, the council's chief executive, expressing concern. She referred to the advice given to her by Mr Lewis on 20 March and asked to see counsel's opinions or notes of advice in consultation. Mr Lewis prepared a revised note of the consultation on 5 May and Mr Ives sent this to Mr Coleman. On 28 July there was an informal meeting of chairmen attended by Dame Shirley. The minutes recorded under "Monitoring" that figures were being prepared by Mr Reiter "to show which initiatives are most likely to achieve the electoral targets".

29 July 1987, the date of the full council meeting, was an eventful day. Mr England sent Mr Reiter a list of likely designated and RTB sales arranged by ward, with six of the eight key wards (that is, except Victoria and West End) listed first. Mr Brooke sent Mrs Kirwan a copy of the revised note of the consultation on 5 May, and stated that counsel had approved the officers' report and the AMP report. He told Mrs Kirwan that they were matters of report only so far as the council meeting was concerned. Dame Shirley sent a letter to all Conservative members of the council referring to the controversy and stating:

> "At the last party meeting, I said that I would reassure you on this point. We took advice from a QC before preparing the report to housing committee. As you can see from the attached note, our legal advice is that our policy is 'completely judge-proof'. We all know how important the designated sales policy is to the success of our overall objectives. We are completely sure that it carries no risk of legal challenge."

On the same day Mr Millar wrote to Mr Ives expressing concern about the legality of the officers' report. Mr Ives telephoned Mr Wilkie and obtained advice from him. At the meeting Mr Ives addressed the council and stated that the report had been seen and approved by leading counsel before it went to the housing committee. Mr Ives also reported on his very recent advice from Mr Wilkie. The report was debated and adopted. On 3 August 1987 there was a working lunch of leading Conservative members and some officers. The agenda began: "The attached target schedules show the target for new electors in each of the eight key wards. They then show target figures for the various initiatives designed to achieve the increase in the electorate." A later paragraph stated: "The overwhelming message from these figures is that the council will have to rely very heavily on the housing trust/private sector and planning gain routes in order to achieve the electoral objectives in the key wards." "New electors" was, as the Divisional Court observed, a euphemism for "Conservative voters". There was a table for each of the eight marginal wards (including Victoria and West End) and for the eight wards overall in the following format:

	BSC Targets Totals for all eight wards Target to 1989
New electors	2,200
RTB sales	260
Designated sales	260
Housing trust/private sector	1,195
Planning gain	650
HOUSING TOTAL	2,365
Enforce against hotels with homeless	11
Deal with other unlicensed hotels	19
Potential planning permissions (units)	994

Quality of life amount [illegible, but apparently about £1·1m].

At about the end of August 1987 Mr Reiter circulated to officers a draft paper entitled "BSC Campaign: Plan for Action". In relation to RTB and designated sales it stated the policy as being to maximise the number of sales "particularly in the key wards." Comment on the proposed housing trust was also directed towards the eight key wards. Annexed were detailed profiles of all eight key wards, with targets for "new residents" (another euphemism, as the Divisional Court noted, for Conservative voters).

On 2 September 1987 the AMP (consisting of members of the housing committee and the policy and resources committee) met but the meeting was disrupted. It was reconvened on 4 September, when it approved the recommendations before it.

On 5 and 6 September Dame Shirley held a strategy weekend attended by (among others) Mr Weeks, Mr Hartley, and Mr Phillips. The papers sent with the agenda included a paper prepared by Mr Reiter, "the BSC Campaign Plan for Action". It was very similar to the draft already mentioned. On 29 September the chairmen's group (attended by Dame Shirley, Mr Weeks and Mr Hartley) received "BSC Monitoring Report No 1" written by or at the direction of Mr Phillips. Under "RTB" it stated:

> "The target across the eight areas is 256 sales in 1987/8. So far, we have achieved 79 (30% of the total). The immediate task is to pull out of the log jam those applications which arise in the key areas; give those applications priority; and sift the rest of the log jam. In the past, there has been no accurate measurement by ward of how many applications are stuck at each stage of the procedures. I have seconded a member of the VFM team to the housing department to research this information; and to devise a suitable data base for recording it in future."

Under "Designated sales" it stated:

> "We have already identified 118 designated voids in the key areas, against a target of 137 for 1987/8. Most of these are in Bayswater (34 sales needed, 34 voids identified) and Millbank (70 sales needed, 68 voids identified). No sales had yet been completed: the first are expected towards the end of November. The figures to the end of August are . . ."

and it set them out in detail (with none in Victoria or West End).

III

Summary of events (3): after September 1987

It would be an unnecessary protraction of what is already a long summary to recount in detail the events which occurred from the end of September 1987 until the formal objection made to the auditor (on 18 July 1989), the Panorama programme (19 July 1989) and the applications for leave to move for judicial review made to Hutchinson J (12 February 1990) and the Court of Appeal (14 June 1990); these applications were refused on the ground that an alternative procedure for a remedy was available, and had indeed already been invoked. But five main themes can be traced in the auditor's history of events and the documentary evidence: monitoring; steering groups; concentration of the BSC policy on key wards; opposition challenges; and the increasing financial and political problems associated with the council's statutory duties to homeless persons.

At a meeting on 11 October 1987 Mr Weeks, Mr Legg and Mr Phillips agreed to set up a BSC support group as had been proposed by Mr Reiter. It was to include various officers whose functions would include "monitoring of progress on BSC initiatives (e g RTB, designated sales)" for "clients" consisting of the chairmen's group, Mr Phillips and individual chairmen. The policy and resources committee was invited to give budgetary priority to BSC and support for BSC The second monitoring report was made to an informal meeting of chairmen (including Mr Weeks and Mr Hartley) on 3 November 1987. The third monitoring report was made at a chairmen's strategy day (also attended by Mr Weeks and Mr Hartley) on 5 December 1987. At a meeting on 12 January 1988 (attended by Mr Weeks, Mr Phillips and Mr Hausner among others) it was agreed that the monitoring system to drive BSC should be steered at member level by Mr Weeks and Mr Hartley and at officer level by Mr Phillips, Mr England and Mr Syd Sporle (a divisional director of planning and transportation).

Accordingly, in January 1988 the officers' and members' steering groups were established and from then on they met on a regular basis. The officers' steering group sometimes met as often as once a week during 1988, but its meetings became less frequent and in May 1989 it discontinued regular meetings because the BSC campaign was regarded as "self-running".

Monitoring continued until well into 1989. The documentary evidence shows that it was deliberately concentrated on the key wards, almost to the entire exclusion of the other wards, although at a council meeting on 27 April 1988 Dr Dutt, in reply to a question about monitoring key wards, stated that officers monitored all designated sales. Yet on the next day, 28 April 1988, the BSC members' steering group (attended by Mr Weeks, Dr Dutt, Mr Phillips and Mr England) received the monitoring report for April which referred to the need:

> "to provide more precise and quantitative information on the targets for BSC actions and progress to date upon their achievements, particularly in those wards which have been identified as being key to the BSC initiative."

The report contained various statistics including a summary table for the eight key wards giving target voter figures. The group also received a paper on the rationale for key wards which said of designated sales, "there was a

A tremendous demand. The problem was to generate vacancies in key wards. There was a limit of £12m. So assisted purchases should perhaps be targeted."

At a chairmen's strategy weekend on 7 and 8 May 1988 held by Dame Shirley the meeting received a paper summarising progress on BSC, with tables referring to figures for "target voters" and a presentation by B Mr England on home ownership. Mr England made a note in the following terms: "Should we be selling to cats. 1, 2—are they 'the right stuff'. Grass roots work? . . . Why key wards—Victor [Hausner] to do paper on bringing eight key wards in." At a BSC members steering group meeting on 31 May statistics on five key wards (Little Venice, Victoria, Cavendish, St James's and West End) were presented by Mr England. "Target voter" figures were C again produced and considered. It was agreed that Cavendish, St James's and West End were to be the priority areas. Bar charts were regularly produced illustrating progress in the various key wards.

All this was taking place against a background of sustained questioning from opposition members on the council. Councillor Paul Dimoldenburg, the leader of the opposition, repeatedly pressed Mr Phillips for information on the selection of wards and the political neutrality of officers. D Mr England's candid manuscript notes on his papers appear to show a mixture of bravado and apprehension: for instance at a meeting with Dr Dutt on 25 July 1988 he wrote: "Lab[our] bashing—fit facts to strategy plan" but also "Public audit . . . explanation of eight wards . . . can we justify why eight chosen and look at pattern of designated? Why did we pick them?—members will ask us . . ." On 12 August 1988 Mr England wrote an internal E memorandum as to Councillor Dimoldenburg's complaints. On 24 August Mr Ives suggested that Mr England should respond to three questions: "1. Why were these eight wards chosen? 2. By whom were these eight wards chosen? 3. Why and by whom are these eight wards regarded as 'key'?" Mr England appears never to have done so; when pressed he said on 27 October 1988 that he could not add to his memorandum of 12 August.

F A defensive attitude to opposition questioning appears not to have been confined to officers. After a chairmen's strategy weekend on 17 and 18 September 1988 all the papers were shredded in order to avoid any leak. At about the same time it was decided that in future BSC reports should be given orally.

During 1988 there was mounting concern (apparent, for instance, in the G minutes of informal meetings of chairmen on 18 October and 20 December 1988) as to the cost to Westminster of housing homeless persons. The need to achieve a saving of £1m was perceived. One aspect of the problem was that many homeless families needed the largest units of accommodation, and much accommodation of that type had been designated and had become vacant but remained unsold. This problem was referred to in a memorandum on four-bedroom units written on 26 November 1987. H Action was eventually taken more than a year later, on 6 February 1989, when five large family flats which had been vacant for a long time were "de-designated" to achieve a saving of £150,000 a year.

On 9 May 1989 an informal chairmen's meeting received a report on homelessness which stated:

"We have no strategy for dealing with the long-term permanent rehousing obligation. The issue now is that we are taking many more cases a year than we are able to house. Unless the government repeals the legislation, or we can supply more accommodation, this will have a major financial impact on the city's community charge position in 1990–91 and beyond, despite the policies to contain temporary accommodation costs."

Savings of almost £2m were required in order to avoid a supplementary estimate. The possibility was mentioned of returning to counsel to seek confirmation of the legality of existing policies. Mr Phillips wrote on his copy of the report: "Don't go to counsel—he'll want everything in the report."

The possibility of "de-designation" "in non-marginal wards only" was considered again at an informal meeting of chairmen on 18 July 1989 but the proposal was rejected. That was the same day as a formal notice of objection to the auditor was made by Councillor Coleman and 12 other Westminster electors. The Panorama programme followed the next day. The policy of designated sales effectively came to an end at a meeting of the housing committee on 30 October 1989, although "pipeline" sales continued into 1990.

The Panorama programme gave rise to intense activity. At a meeting of the full council on 26 July Dame Shirley stated that no one had taken the decision that quality of life schemes should be targeted as far as possible into the key wards. She denied that there were any clear conclusions reached in the briefing note presented to her by Mr England in March 1987. She stated that no one was responsible for the decision that homeless families should be moved out of Westminster starting with the key wards, and said that no such decision had been taken. When she was asked about the BSC Campaign Plan for Action she stated that Panorama had refused to let the council have copies of the papers referred to. When she was asked which officers had prepared papers for the meeting on 14 March 1987 she said that officers would have provided data for members. When she was asked about officers collecting information on the eight key wards, she replied that, "at various times different wards have been key issues for study". Mr Weeks also spoke and gave an explanation of how policies had evolved.

On 28 July Mr Hayler gave an instruction that in future monitoring wards should be listed in alphabetical order (previously the eight key wards had always come first). On the same day Mr Phillips sent a memorandum to Mr Reiter referring to the folder "Chairmen's Weekend June 1987" obtained from Dame Shirley's papers. He wrote:

"Some of these documents, which came as news to me as to you, are plainly highly political . . . It is absolutely vital that we establish, from our own sources and by asking the members directly concerned: (a) which papers were produced by officers, (b) which were produced by members, and (c) whether any of those in (b) involved the use of council resources. You agreed to let Mr Ives and myself have a complete set of the papers on the folder."

These papers were provided to Mr Phillips but not to Mr Ives. They were not disclosed to Mr Sullivan when he next gave advice.

A On 22 August 1989 there was a meeting between Mr Phillips, Mr Ives, Mr Colin Wilson (who had succeeded Mr Lewis as deputy city solicitor) and Mr England. Mr England's notes under the heading "legality" state: "unlawful motive—selection of estates by members—discussed with MD and city solicitor who consider current policy to be legally dead". Reference was also made to Dame Shirley having requested a glossary of "difficult" terms.

B The glossary was produced by Mr Reiter on 1 September 1989 on what was his last working day at Westminster. His glossary included the following:

> "*Key wards.* The term is loosely used. Relates to wards where the level of stress, in terms of the [PACEC] study, is particularly high, and therefore
C where the implementation of [BSC] policies would be particularly important.
>
> "*How were the key wards identified?* When the [PACEC] study was first commissioned members pointed at five wards where they felt, based on their observations, the problems of loss of middle income permanent residency was particularly acute. The [PACEC] study concluded that the problem was based rather in a swathe cutting across the centre of the city.
D The eight wards in question appear to have been identified as a result of discussion between members and Victor Hausner, based on the stress factors which the study had identified. It should be noted that, when the term key wards is used, it may not necessarily refer to the eight wards, but to wards which are key in terms of a particular policy or objective . . .
>
> "*Numerical targets of electors.* These appear to be guesstimates of
E what might be achieved in the given ward in terms of getting additional electoral registrations, if BSC was fully and effectively implemented. Electoral registration was perceived as the easiest and most straight forward way of measuring the impact of BSC policies."

Mr Sullivan was again instructed and gave oral and written advice which need not be set out. Nor is it necessary to go further into the unsuccessful
F applications for leave to move for judicial review.

IV

Unfairness

I agree with all that Schiemann LJ has said on the issue of unfairness. I add some remarks of my own.

G I agree with Schiemann LJ that there are serious criticisms to be made of the procedural course which this case has taken, from the original objection on 18 July 1989 to the hearing before the Divisional Court more than eight years later; but that they do not lead to the conclusion that the auditor's certificate should be quashed, and the appeal allowed, on the ground of unfairness. Some of the matters of criticism are inherent in the statutory scheme of audit, objection and surcharge laid down by the 1982 Act (and
H now re-enacted in the Audit Commission Act 1998). Those inherent difficulties are accentuated when the statutory scheme has to be applied to allegations as grave and as complex as those which the auditor had to investigate in this case. The enormous scale and protracted nature of the auditor's investigations must be deplored, but it was the auditor's duty to be

careful and thorough, and he did (as his report records) encounter delays and difficulties in obtaining copies of relevant agenda, minutes, memoranda and other documents.

Other procedural problems arose from the decisions of Dame Shirley Porter and Mr Weeks not to give evidence at the audit hearing held by the auditor between October 1994 and February 1995. They were fully entitled not to give evidence to the auditor if they chose not to, but when they later decided to put in very lengthy affidavits before the Divisional Court (136 pages from Dame Shirley and 160 pages from Mr Weeks) it led to a position which was (to say the least) unusual and unsatisfactory. The Divisional Court (following the general guidance given by this court in *Jones v Attorney General* [1974] Ch 148) decided at a preliminary hearing on 1 May 1997 to admit affidavit evidence from and on behalf of the appellants in that court with cross-examination of deponents on their affidavits, subject to a proviso about possible abuse of process (which seems not to have arisen at the full hearing). The result was that the Divisional Court became the main tribunal of fact in relation to the appellants, but with the auditor's lengthy report, findings and history of events standing as the foundation on which the Divisional Court built.

The hearing of two rounds of oral evidence by two successive tribunals of fact has led to various submissions as to the burden and standard of proof before the Divisional Court. Each side criticised the Divisional Court for having imposed too high a burden on it. At the preliminary hearing the Divisional Court described its approach as following the House of Lords in *Lloyd v McMahon* [1987] AC 625 (and in particular what Lord Templeman said, at p 716). The Divisional Court regarded the ultimate burden of proof on the appeal as being on the auditor, and the standard of proof as being the high civil standard described by Lord Nicholls of Birkenhead in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586–587. In my judgment the Divisional Court did not, in adopting that approach, err in favour of the auditor in relation to the liability of Dame Shirley Porter and Mr Weeks. It would be inappropriate, on this appeal by Dame Shirley and Mr Weeks, to express any definite view as to whether the Divisional Court erred in favour of the other persons (appellants before the Divisional Court) whom it acquitted of wilful misconduct.

V

Liability (1): reality and pretence

The essential task facing the auditor and the Divisional Court, as the twin tribunals of fact, was to distinguish between reality and pretence. There has been no real dispute about the principles of law to be applied, and I can at this stage restrict myself to two citations. In *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386, 398 (the Pergau Dam case) Rose LJ said:

> "The principle is correctly summarised by Professor Wade in *Administrative Law*, 7th ed (1994), p 413: 'statutory powers, however permissive, must be used with scrupulous attention to their true purposes and for reasons which are relevant and proper.' A political purpose can taint a decision with impropriety: see per Glidewell J in *R v Inner London Education Authority, Ex p Westminster City Council* [1986]

A 1 WLR 28 and *R v Governor of Brixton Prison, Ex p Soblen* [1963] 2 QB 243, 302, where Lord Denning MR said, in relation to the decision to deport: 'If it was done for an authorised purpose, it was lawful. If it was done professedly for an authorised purpose, but in fact for a different purpose with an ulterior object, it was unlawful.' "

In *R v Derbyshire County Council, Ex p Times Supplements Ltd*, 155 B LGRev 123 (where the county council had decided to stop advertising teaching posts in "The Times Educational Supplement" because of a vendetta) Watkins LJ described the local authority's decision-making process in these terms, at p 127:

"It cannot possibly be gainsaid, I think, that the Labour group on the county council decided to sever all links with Mr Murdoch's publications, C gave instructions through [the leader of the council] to that end, secured an immediate order from [the chief executive] imposing the ban and then set about trying to discover whether there was available the reality or semblance of a lawful excuse for that conduct. Obviously, the Labour group took its decision being unaware of any lawful reason for it. The officials of the county council had then to look about, with the help of D learned counsel, in order to see whether, somewhere or other, a lawful consideration could be put before the forthcoming meeting of the education committee. In those circumstances the officials of the county council were presented, in my view, with an unenviable task which they performed by the production of a report which purported to show that the effective publication for the advertisement of teaching posts by the TES had suddenly become not so effective after all. Another outstanding E fact is, in my judgment, that the subject of advertising in the TES would not have been on the agenda of the education committee were it not that the decision of the Labour group forced its inclusion. All of that, it was submitted, is really of no account. It is, it is maintained, only the conduct of the education committee and later of the county council itself with which we are concerned. It has to be shown that if bad faith there was, it F was manifested at the respective meetings of those two bodies. That, in the last analysis, is, of course, true. But in examining what happened at those meetings, it is of the utmost importance, in my view, to keep well to the forefront of one's mind how the subject of advertising in the TES came to be placed on the agenda and how the report came to be prepared. It would be totally unrealistic to neglect to think of such a consideration when endeavouring to discover what was in the minds of the Labour G councillors when they successfully voted for the move from the TES to The Guardian."

In this case attention is focused (although not exclusively, a point I shall come back to) on the decision taken by Westminster City Council's housing committee on 8 July 1987. Even though the target of 500 sales a year under option 3 was (in Mr England's own words) on the edge of perversity H (because of the ever-worsening problem of homelessness in Westminster, and the city council's statutory duties under Part III of the Housing Act 1985) it might have been lawful and proper for the housing committee to have adopted a policy of 500 sales a year, spread through the 23 wards on a sound basis (which does not necessarily mean either an equal or a

proportionate basis, since the wards differed so much in size and character). It is common ground that it would have been unlawful and improper to have adopted a policy of 250 sales a year concentrated in the eight marginal wards (or in six of those eight wards) in the hope of electoral advantage. The crucial issue is whether the appellants devoted a great deal of their considerable energy and enthusiasm, and a great deal of the council's financial resources, to the genuine pursuit of a lawful (though highly controversial) policy of the sort described at the beginning of this paragraph, or whether they merely pretended to do so and their real purpose remained the improper purpose of targeting marginal wards in order to win the 1990 elections, but with an extension of the policy to other wards tacked on as camouflage. If it was no more than camouflage, it could not serve to turn an illegal purpose into a legal one: on the contrary, because of the more severe effect of the policy on homeless persons, it would exacerbate the seriousness of the illegality (this point is vividly made, in a totally different context, in G K Chesterton's short story "The Broken Sword").

The Divisional Court, which saw and heard evidence from the appellants, was in no doubt that there had been widespread and persistent pretence, and that Dame Shirley and Mr Weeks had lied to the court. It rejected, 96 LGR 157, 184, the evidence of Mr Weeks (that the policy of concentrating designated sales in marginal wards in the hope of electoral advantage was abandoned after counsel's advice on 5 May 1987) as "plainly untrue". I can see no reason why this court, which has not heard the witnesses, could or should depart from the Divisional Court's findings. There is ample documentary evidence to confirm, and virtually none to put against, those findings. Some of the most striking items of documentary evidence are mentioned in the first three sections of this judgment, and it is not necessary to repeat them. The overall impression throughout, from mid-1986 to mid-1989, is that the most influential members of the Conservative group on the city council, led by Dame Shirley and Mr Weeks, had electoral advantage as the overriding objective in formulating their housing policy, securing its adoption by the council, and implementing it with high priority given to the marginal wards. The city solicitor was correct when he wrote on the agenda for the working lunch on 3 August 1987, "This paper shows officers working for a Tory victory." The same comment could have been made about dozens of other similar papers produced at the expense of council tax payers in the city of Westminster. What occurred cannot realistically be described simply as officers providing factual information to elected members, nor simply as elected members allowing the occasional thought of possible electoral advantage to cross their minds.

The phraseology of the Divisional Court's judgment shows that it found that the conduct and utterances of the most influential members of the majority party (and especially Dame Shirley and Mr Weeks) were steeped in pretence. Pretence is symptomatic of a guilty conscience. "New residents" and "new electors" were euphemisms for potential Conservative voters. There was a "cover up" in relation to monitoring. Mr Weeks was content that officers should in their reports "mask" action which chairmen wished to take. The point is spelt out most clearly in the Divisional Court's conclusion as to the appellants, at p 185:

A "Because [Dame Shirley Porter and Mr Weeks] knew the targeting policy was unlawful they were content, without further inquiry of Sullivan, [England], Lewis or anyone else, to adopt the suggestion in [England's] note that it be dressed up in city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage. Knowledge of the unlawfulness and such
B deliberate dressing-up both inevitably point to, and we find, wilful misconduct on behalf of each of them."

That being the conclusion of the Divisional Court which saw and heard the appellants, it would in my view be a very strong thing for this court to reach a different conclusion, unless some error of law on the part of the Divisional Court is clearly demonstrated. There are, I think, three topics
C which have by their combined or cumulative effect led Kennedy and Schiemann LJJ to the conclusion that the appeal should be allowed. The first concerns the legal advice sought and obtained on behalf of the city council, in view of which (it is said) any misconduct on the part of the appellants cannot be characterised as wilful. The second is an amalgam of overlapping points including what Dame Shirley Porter referred to as "the great divide"
D (between party political inclinations and local authority decision-making), the relationship between the misconduct alleged and the particular decision taken by the housing committee on 8 July 1997, and associated issues of causation. The third is the apparent inconsistency in the conclusions of the Divisional Court that the appeals of Dame Shirley and Mr Weeks should be dismissed (except as to quantum) but that those of Mr Hartley, Mr England and Mr Phillips should be allowed.

E

VI

Liability (2): legal advice

Counsel for the appellants submitted that the Divisional Court had criticised the auditor for dealing inadequately with the effect on the
F appellants' states of mind of the legal advice which they received, but then fell into the same error so far as Dame Shirley and Mr Weeks were concerned. It is therefore necessary to examine closely the section of the Divisional Court's judgment, at p 177 (headed "Legal advice"), which deals with this aspect. It begins with a summary of the legal advice given by the city solicitor and his deputy before 5 May, and then goes on to Mr Sullivan's advice on that day, concentrating on what it refers to as Mr England's note
G of conference. In fact the only document properly called a note of conference was prepared by Mr Lewis; Mr England's "Note to Leader" was a series of comments on an earlier discussion paper with two brief references to counsel's advice. Both are set out verbatim in the judgment, which continues, at p 178:

"In our judgment, the actual terms of Mr Sullivan's advice, save in
H relation to [Mr England], are immaterial for present purposes: it is material what if anything, by reason of [Mr England's] note or otherwise, each of the other appellants believed Mr Sullivan had advised. The note does not suggest that Mr Sullivan had advised that sales could be targeted in marginal wards for electoral advantage."

In fact Mr Sullivan had, as the auditor found, given unambiguous advice on this point (volume 4, paragraph 237):

> "Mr Sullivan confirmed the view of Mr Lewis that it would be unlawful to concentrate sales in marginal wards or to select properties for sale by reference to party political or electoral considerations. The advice from Mr Sullivan on what Mr Lewis has described to me as the 'hidden agenda' included advice that the electoral marginality of wards was not a proper factor for council members and officers to take into account in selecting properties for inclusion in an extended programme of designated sales."

The judgment of the Divisional Court then briefly summarised later legal advice and reached conclusions, at p 179, as to Dame Shirley and Mr Weeks which are so important that they need to be set out in full:

> "The position of [Dame Shirley Porter] in relation to legal advice was initially, as reflected in the opening skeleton argument on her behalf, that she never sought or received advice which could have led her to believe that it was open to the council to exercise its powers to secure an electoral advantage for the majority party. In her affidavit she said her duty as a councillor was 'to decide matters in council only upon considerations relevant to local government factors identified by officers'. In cross-examination she said she could see nothing wrong in targeting quality of life programmes in marginal wards but she gave no clear answer when asked whether a local authority's resources could be used to promote the advantage of a political party. In answer to the court she said she felt there must have been some proper local government considerations for targeting marginal wards but did not know whether these were in mind at the time. She also said that Mr Ives's advice that there must not be any ulterior motive came as no surprise in the light of her experience and she did not understand leading counsel's advice on 5 May to have differed from that of Mr Ives. In the light of this evidence, although we accept that [Dame Shirley] was always anxious to obtain and follow legal advice, it is, in our judgment, impossible for [her] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible. [Mr Weeks's] evidence in cross-examination was that, as a result of counsel's advice on 5 May it was clear 'that you could not just designate for 250 in the marginal wards' and that he greeted that advice 'with some relief' because a major aspect of contentiousness could be removed. He said that, following counsel's advice, he and other members 'immediately abandoned' talk of designating blocks in marginal wards and the lists produced 'after 5 May were constructed on other grounds'. Whether that evidence is credible we shall consider later. But it provides no basis whatever for suggesting that, if [Mr Weeks] continued to be party to a scheme for targeting designated sales in marginal wards for electoral advantage, he did so in reliance on legal advice."

Counsel for Dame Shirley suggested that the Divisional Court had misunderstood or misstated her evidence given in cross-examination and in answer to questions from all three members of the Divisional Court, but the transcript does not appear to me to support that suggestion. She could not say what proper local government reasons there might have been for

A concentrating sales in the marginal wards. To the last question from Latham J she said: "I feel that there must have been some, but whether or not it was in mind, I do not know." She said in cross-examination that the policy did change, and she answered a question from Keene J by referring to a "whole change in emphasis", meaning (as I understand it) that by the time of the housing committee meeting on 8 July 1987 the policy of concentrating B sales in marginal wards had been abandoned or at least substantially diluted. But in fact (as Mr Reiter's draft "BSC Campaign: Plan for Action" made plain within a matter of weeks) the policy of targeting marginal wards was continuing with renewed vigour.

The way in which Dame Shirley's case has been presented has varied from time to time. Only in this court, I think, has much emphasis been placed on C her reliance on legal advice. In her oral evidence she said that she was well aware that local authority resources must not be used for party political ends, and that the legal advice which she received came as no surprise to her. She also said that it never occurred to her to ask to see Mr Sullivan's advice in writing. She did not contend, either in her oral evidence or through her counsel (apart from drawing attention to Mr Ives's unfortunate references to devising or constructing arguments), that she was relying on any legal advice D to the effect that an unlawful policy could be made lawful by camouflage. On the basis of Mr England's "Note to Leader" it seems likely that Mr Sullivan's unambiguous advice was distorted in the course of transmission to Dame Shirley, although in the absence of any minutes of the meeting of the chairmen's group on the evening of 5 May 1987 (at which Mr England was present) it is impossible to gauge the degree of distortion. E But as the Divisional Court found, she cannot at any stage have believed (either in reliance on legal advice or otherwise) that targeting marginal wards for electoral advantage was a lawful use of council resources.

In relation to Mr Weeks the position is similar, but if anything even clearer. Mr Weeks was present at the evening meeting on 5 May 1987 at which Mr England reported to the chairmen's group. He said in the course F of his examination-in-chief:

> "There was talk of designating blocks in marginal wards, which persisted until 5 May. Mr Sullivan advised through Mr England and Mr Lewis that that was not a wise thing to do and it might be controversial, so members immediately abandoned that. I abandoned it with some relief."

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Dame Shirley said the same (without any reference to relief) in paragraph 72 of her affidavit and in cross-examination. The Divisional Court found, on ample grounds, that that evidence was false. Legal advice as to the propriety of a genuinely city-wide policy cannot be relied on as approval of the deceptive continuation of a policy (of targeting marginal wards for H electoral advantage) which Mr Sullivan had in fact unambiguously disapproved.

I am not therefore persuaded that the Divisional Court dealt inadequately with the issue of legal advice. I find the Divisional Court's conclusions on this topic clear and convincing.

VII

Liability (3): "the great divide" and associated topics

The expression "wilful misconduct" in section 20 of the 1982 Act is capable of covering a variety of acts and omissions, including both formal and informal acts and a continuing course of conduct. That is to state the obvious but on this occasion it may be useful to do so, since there has throughout the hearing of this important and difficult appeal been a certain lack of focus, in my view at least, as to precisely what misconduct was alleged against the appellants, and the relationship between that alleged misconduct and the decision taken by the housing committee on 8 July 1987.

Sometimes misconduct may consist of a single decision made on behalf of a local authority by an individual acting under delegated powers, the decision being formally correct but invalid because made for improper and legally irrelevant reasons. One example is *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207, in which the borough housing officer, under pressure from the chairman of the housing committee, gave priority to rehousing another councillor for improper reasons. It may consist in the negligent performance or non-performance of routine duties, where no question of formal decision-making arises, as in *Pooley v District Auditor No 8 Audit District* (1964) 63 LGR 60, the case of the head caretaker who failed to take care of the supplies of solid fuel for his group of schools.

Where formal decision-making is involved and the decision-maker is not an individual but a committee, difficult inquiries may be necessary as to whether the decision of the committee as a whole (embodied in the voting majority) was tainted by some improper purpose not apparent on the face of the resolution, or the papers before the meeting. That is illustrated by a case alleging misfeasance in public office against a local authority itself, *Jones v Swansea City Council* [1990] 1 WLR 1453, reversing the decision of this court [1990] 1 WLR 54. Normally the purposes for which a local authority committee reaches a decision to exercise its powers will be inferred from the tabled papers (which will normally have been prepared by officers under a duty to act impartially). But if ulterior purposes are alleged, a closer inquiry becomes necessary. What Maugham LJ said in *In re Magrath* [1934] 2 KB 415, 434 ("in my view evidence is not admissible to show that some of the persons present and voting took a particular view of the resolution which they concurred in passing") was directed to the meaning of a resolution, not to any issue of ulterior purpose.

In this case the original objections, made under section 17 of the 1982 Act on the day before the Panorama programme, identified the decisions of the housing committee on designated sales and capital grants, and detailed objections under two heads: (i) the unlawfulness of the original decisions; and (ii) unlawfulness in implementation (see volume 4, appendix 6 of the auditor's report). In line with that the auditor made a very detailed investigation, not only of events leading up to the decisions on 8 July 1987, but also of the events of the next two years and beyond. Investigation of the consequences of the decision was of course necessary in order to quantify the loss caused by any wilful misconduct which the auditor found to be established. But it was also necessary in order to answer a question which is central to the issue of liability, that is whether or not the policy of concentrating sales in marginal wards for electoral advantage was, as

A Dame Shirley Porter and Mr Weeks claimed, abandoned immediately after receipt of Mr Sullivan's advice.

The issue of misconduct cannot therefore, as I see it, be equated simply with the question of whether the appellants were (so to speak) vicariously responsible for the decision taken by the votes of Mr Hartley and his six Conservative colleagues. Both the auditor and the Divisional Court approached the issue more broadly, as whether the appellants had B promoted, pursued or implemented a policy which was unlawful because of its improper purpose. In my view they were right to approach the issue in that way. But the decision of the housing committee is plainly of crucial importance because it was (if assumed to be valid) the means by which the policy of the majority group became the official policy of the city council, with increasingly serious financial implications over the next two years as C indicated in the third section of this judgment.

The decision of the housing committee was in fact the occasion on which, in Dame Shirley Porter's phrase, the policy passed "the great divide" between political aspiration and the exercise by a local authority of its statutory powers. Dame Shirley said in her affidavit (paragraph 14) that the auditor had failed to appreciate the difference between political discussion and the considerations which a councillor has to take into account in decision- D making at meetings of the council or its committees. However she also said (paragraph 29):

> "The dividing line between purely political matters and legitimate council matters is a narrow one and can become blurred. If it is considered that on any occasion an officer has inadvertently crossed the line then I would wish to make it plain that this would have been at the E express or implicit instance of myself or other members and not at the instigation of the officer."

When that passage was put to Dame Shirley in the course of her cross-examination (in which she used the expression "the great divide" in her first substantive answer) she said:

F > "I believe that throughout my affidavit I have made it abundantly clear that there is a great divide and I know where the divide is. The divide is the moment that it gets into the council machinery. When we cease just to be thinking politically, and when we are working on a policy."

(The context shows that by "working on" the witness must have meant "carrying out at the expense of local government funds".)

G Dame Shirley also made some spirited and realistic comments about the place of party politics in local government. Near the end of her cross-examination in the Divisional Court she said: "If you are saying to me that there should not be any politics in local government, then I have to come back and say then there is no point in having political parties and that, to me, is the whole essence of it." There Dame Shirley was acknowledging the fact that (for better or worse) local government, as well as national government, H is now suffused with party politics. That inescapable fact has been clearly acknowledged in the Report of the Committee of Inquiry into the Conduct of Local Authority Business (the Widdicombe Report) (1986) (Cmnd 9797), para 4.17), which pointed out that the statutory scheme of local government barely acknowledges party politics, and "As a result insufficient distinction

has been made between the fact of the existence of politics, which is a reality which any system of government must recognise and accommodate, and particular manifestations of politics that should not be sanctioned." (One of the rare statutory references to politics is in section 175(3) of the Local Government Act 1972, where the reference to political objects must be to party politics.)

However the courts have gone some way to recognise the reality of rival party political loyalties and organisations within the members of a local authority council who are meant, in theory, to make decisions as to the exercise of their powers in a collegiate and corporate manner. Realistic and helpful guidance was given in the three separate judgments given in this court in *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419. See Sir John Donaldson MR, at pp 423–425, Stocker LJ, at p 427, and Russell LJ, at p 428, who said:

> "Party loyalty, party unanimity, party policy, were all relevant considerations for the individual councillor. The vote becomes unlawful only when the councillor allows these considerations or any other outside influences so to dominate as to exclude other considerations which are required for a balanced judgment. If, by blindly toeing the party line, the councillor deprives himself of any real choice or the exercise of any real discretion, then his vote can be impugned and any resolution supported by his vote potentially flawed."

It is important to note that in the *Waltham Forest* case the only issue (at any rate in this court) was as to whether a council decision setting a rate was invalidated because four of those who voted with the majority had expressed different views at a party caucus meeting held just before. The issue of invalidity turned on a supposed abdication of individual judgment, not on ulterior purpose (except so far as blindly maintaining party solidarity might be described as being in itself an ulterior purpose).

Sometimes it may be difficult or even impossible to discern the precise point at which party political and electoral considerations come to play too large a part in a local authority's decision-making. That appears from several cases to which this court was referred, including *R v Inner London Education Authority, Ex p Westminster City Council* [1986] 1 WLR 28; *R v Lewisham London Borough Council, Ex p Shell UK Ltd* [1988] 1 All ER 938 and the *Waltham Forest* case [1988] QB 419. But, whatever difficulties may arise in borderline cases, it is common ground in this case that it would not have been lawful for the ruling Conservative group to adopt a new housing policy, and to incur heavy direct and indirect costs in pursuing it, with the purpose of improving its prospects of success at the local elections in 1990. The appellants' case was that the ruling group did not, after 5 May 1987, have such a policy. The Divisional Court rejected that case as based on false evidence.

I must try to pull these threads together by reference to the main submissions made on behalf of Dame Shirley by Mr McMullen (and adopted on behalf of Mr Weeks by Mr Cakebread). The Divisional Court found, 96 LGR 157, 181, that the decision of the housing committee on 8 July 1987 "was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore unlawful". Mr McMullen made a

A two-pronged attack on this conclusion. In the first place, he argued, the decision was not unlawful, since (as the Divisional Court found) most members of the housing committee were not guilty of misconduct and did not themselves vote for option 3 for improper reasons. Mr McMullen also argued that the decision of the housing committee broke the chain of causation between any earlier misconduct on the part of the appellants (in B devising and promoting the BSC policy, targeted at marginal wards, during the second half of 1986 and the first half of 1987) and the financial losses suffered in the next two years (and beyond) in consequence of the housing committee's decision.

Mr McMullen developed these twin submissions by reference to four matters: the joint report prepared by officers for the housing committee; the list of properties for designation in marginal and non-marginal wards; the C motivation of Mr Hartley, the chairman of the housing committee, in voting for option 3 and the other resolutions; and the motivation of the other Conservative members of the committee (Councillors Dutt, Warner, Bianco, Buxton, Evans and Hooper).

Mr McMullen submitted that the Divisional Court had been right to conclude that the report was "in general fair and adequately D comprehensive", and that the auditor's respondent's notice challenging that conclusion should be rejected. To my mind the Divisional Court's conclusion about the report cannot be faulted, if the report in its final form is considered simply as a text, without reference to its painful evolution as Mr England and other officers struggled with their professional consciences (it must be remembered what Mr England had written in his memorandum of 17 March 1987, and in his replies to Mr Greenman's faxed questions of E 24 March). However it would be going too far to say, as was submitted, that the joint report did not hide anything. It did fail to disclose one absolutely crucial fact, that is what Mr England called the "hidden agenda" of the most influential members of the Conservative group to concentrate their efforts and resources on the eight marginal wards. In the circumstances the approval given by leading counsel (at a hastily arranged lunchtime F consultation, still without any proper written instructions) seems to me to add little if anything to the status or significance of the joint report.

I take much the same view of the list of properties approved by the housing committee. The Divisional Court discussed the evolution of the list and concluded, at p 194, that the auditor

> "is unable to establish to the requisite standard of proof that the G criteria or the lists were manipulated by officers for the purposes of securing party political advantage for the majority party. There is no evidence before us which casts doubt on the propriety of the criteria. Having listened with care to [Mr England's] explanations for the reduced proportion of designations in the non-key wards, we are unable to say that those explanations are specious."

H That conclusion also is challenged in the auditor's respondent's notice. For my part I see more force in that challenge, but I am not prepared to differ from the findings of the Divisional Court which saw and heard Mr England being cross-examined on this point. Mr England's basic case on this point was set out in paragraph 227(1) of his affidavit: "My case on this has always been that once you seek to achieve 500 designated sales per annum across

the city (as opposed to 250) you have little choice as to which properties to select." That basic case, as elaborated and tested in cross-examination, seems to have been accepted (or at any rate not rejected) by the Divisional Court. The sheer scale of designation required for 500 sales a year made it almost inevitable that the 9,360 properties designated city-wide should include all those already provisionally identified in the six marginal wards which had a significant number of council properties. But assuming in the appellants' favour that the final list was (or may have been) objectively justifiable as a basis for a genuine city-wide policy of sales at the rate of 500 properties a year, I consider that the list does not by itself demonstrate that that ever was a genuine policy; and the facts as to the painful evolution of the list, through nine intermediate drafts, reflect Mr England's continuing doubts and anxieties about the matter.

In relation to what happened at the housing committee meeting, Mr Howell for the auditor has not challenged the Divisional Court's finding that most members of the committee were not guilty of misconduct and did not vote for option 3 for improper reasons. He did, however, contend that there was sufficient evidence that Mr Hartley and Dr Dutt were aware of the appellants' ulterior purposes, even though Mr Hartley was acquitted of wilful misconduct and no findings of individual misconduct were made against Dr Dutt after he had taken his own life. Since the resolutions were passed by seven votes to five that would arguably be sufficient to lead to the conclusion that the resolutions were improperly passed.

However, the decision of this court in *R v Derbyshire County Council, Ex p Times Supplements Ltd*, 155 LGRev 123 shows that it is permissible, and indeed necessary, to take a broader view of the realities of the decision-making process. The resolutions and the officers' report came to be before the housing committee as the result of a carefully planned strategy (involving a "planted" question) devised or approved by the appellants and other influential members of the Conservative group. Dame Shirley Porter realistically accepted that, once the resolutions were on the agenda, their approval (with option 3) was something which the majority party "confidently expected". Those committee members who were in the majority party, but outside the influential centre, followed the party line innocently (so far as any hidden agenda was concerned) but in some cases without exercising any independent judgment. (Councillor Hooper knew nothing about the details of housing problems and was asked to fill a casual vacancy about two hours before the committee meeting; Councillors Evans and Buxton were regular committee members but exercised no real judgment about the option 3.)

Since councillors are (at least in a non-technical sense) in the position of trustees of the public funds which they control (see *Attorney General ex rel Rea v Belfast Corpn* (1855) 4 Ir Ch R 119, 143, 156) I would if necessary apply by analogy the principle which the Divisional Court derived from the decision of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385, that a dishonest third party may be liable (as a constructive trustee) for a breach of trust perpetrated by a trustee acting innocently. But as all councillors were under the same statutory obligations of a fiduciary character, whether or not they were members of the housing committee, and as the appellants no longer rely on the material parts of paragraph 17 of Dame Shirley's notice of appeal, I do not find it necessary to go further into

A that point. In my judgment the appellants' attack on this part of the Divisional Court's judgment fails on both fronts.

VIII

Liability (4): inconsistency

The appellants' counsel made some powerful submissions, developed in
B great detail, to the effect that the Divisional Court had acted inconsistently in allowing the appeals of Mr England, Mr Phillips and Mr Hartley, but dismissing the appeals (on liability) of Dame Shirley Porter and Mr Weeks. The appellants are, counsel submitted, entitled to equal treatment before the law. It is not open to this court to reverse the conclusions which the Divisional Court reached in relation to Mr Hartley (against whom the
C auditor sought leave to appeal, but failed to get it) or in relation to Mr England and Mr Phillips (against whom the auditor did not seek leave to appeal).

I have to say that I have found this the most difficult aspect of the whole of this difficult case. Mr Hartley, as chairman of the housing committee from 11 June 1987, was a member of the chairmen's group which acted as Dame Shirley's political cabinet, and Mr England and Mr Phillips were closely
D involved at all stages in the policy of targeting wards, including attendance at meetings of the chairmen's group and subsequently at the officers' steering group. Mr England's candid manuscript notes on his papers are eloquent testimony of his doubts and apprehensions at various stages. Mr England was the individual who, having attended the consultation with Mr Sullivan on 5 May 1987, was responsible for conveying counsel's advice to Dame
E Shirley Porter and the other members of the chairmen's group that evening. Mr England was primarily responsible for the evolution of both the officers' report and the list of properties, however much he sought to distance himself from the list and to foster what Mr Howell has called "the myth of the members' list". Counsel submitted that his acquittal, and that of Mr Hartley and Mr Phillips, make the adverse findings against Dame Shirley and
F Mr Weeks unsafe and that their appeals should be allowed on that ground.

This part of the case has caused me some anxiety. I accept Mr McMullen's submission that the auditor, not being in a position to seek to reverse the conclusions which the Divisional Court reached about Mr Hartley and the two officers, cannot be heard to say (as part of his case against Dame Shirley and Mr Weeks) that the Divisional Court was wrong about the others. I cannot completely avoid the feeling that there may have
G been some element of mercy in the Divisional Court's conclusions about Mr Hartley and the two officers, especially Mr England, who seems to have been most vulnerable to pressure from elected members. The Divisional Court found, 96 LGR 157, 186: "There is no evidence that any officer was exposed to overt intimidation or threats during the relevant period; but Lewis told the auditor about 'an atmosphere of fear'." The judgment then
H quotes some observations made by Mr Weeks and continues, at p 186:

> "As [Mr Weeks] was deputy leader this gives a flavour of the attitude of the majority party to [the Westminster City Council] officers, for whom it could not have been pleasant working at this time. We take into account that such pressures may well have had an insidious effect on the officers,

making them consciously or unconsciously reluctant to speak out robustly." A

The structure of the first sentence may have gone awry, but its meaning is plain. It is to be observed that in a passage of her affidavit already quoted Dame Shirley Porter did, to her credit, seek to protect the council's officers, saying that they acted at the instance of herself or that of other elected members. B

Section 20 of the 1982 Act does not leave any room for mercy, if wilful misconduct causing loss has been established, however grave the financial consequences. But, whether or not there was some element of mercy in the Divisional Court's conclusions, it could uphold the surcharge on Mr Hartley and the two officers only if satisfied that each was, on the totality of the evidence, guilty of wilful misconduct, and that his misconduct was causative of loss. The Divisional Court saw and heard oral evidence from each of the five appellants before it and had to reach conclusions in respect of each of them individually, not collectively. C

In the case of Mr England its findings in relation to the officers' report and the list of properties (which the auditor has unsuccessfully challenged in this court), and its finding that Mr England made an honest attempt to pass on Mr Sullivan's advice, led it to the conclusion that Mr England was not guilty of wilful misconduct down to 8 July 1987, whatever his doubts and equivocations. As to the subsequent course of monitoring by the steering group, the Divisional Court found, at p 195: D

"that he knew that it was inappropriate at the time, and that that is the explanation for his assistance to [Mr Phillips] in providing Councillor Dimoldenburg of the minority party with wholly misleading answers to what appear to us to be understandable and wholly proper questions. This does not, however, mean that he was guilty of wilful misconduct in relation to the policy of designated sales." E

In relation to Mr Phillips the Divisional Court found that he must have realised that the policy of concentrating sales in marginal wards, as it was developing down to 5 May 1987, was improper. However it found, at p 202D, that from that date his state of mind must have been affected by the support being given by Mr England and Mr Lewis to "the policy determined by the chairmen's group on 5 May". The Divisional Court found misconduct established against Mr Phillips, but not wilful misconduct, either in relation to events down to 8 July 1987 or in relation to subsequent monitoring. F

As to Mr Hartley, the Divisional Court considered him to have been his own worst enemy in the evidence which he gave to the court. It took account of his relatively late involvement in the development of the policy and his reliance on the advice of Mr England and Mr Lewis "who both knew as much, if not more, about the genesis and development of the policy as he did". It also took account of Mr Hartley's own strongly held view that the city council should be selling as much as possible of its housing stock, whatever ward it was in. It concluded, at p 199, that Mr Hartley's action G H

"was still unlawful and amounted to misconduct despite his own proper motive, because of the improper motive of others of which he was aware. But we are prepared to accept that he did not appreciate the

A unlawfulness of his conduct and genuinely believed that his own proper purpose rendered his actions lawful. Accordingly, his misconduct was not, in our judgment, wilful."

I do feel some unease about these conclusions. They seem to me to have an air of "absolution by association", which can be no more acceptable an approach than that of guilt by association. Nevertheless I cannot say that B they are not conclusions which were open to the Divisional Court. I note also that the Divisional Court did not, in this part of its judgment, make any express findings as to whether (non-wilful) misconduct by any of these three individuals was causative of loss. The judgment went on to consider causation in relation to Dame Shirley Porter and Mr Weeks and found, in my view correctly, that the loss to the city council was caused by those C appellants as the promoters of the policy. Had the Divisional Court found it necessary to consider causation in relation to Mr Hartley and the two officers it might (especially in relation to the officers) have found a further ground for allowing their appeals in the lack of any sufficient causal link.

For all these reasons I would dismiss the appellants' appeals on the issue of liability.

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IX

Quantum

In case this matter goes further I should deal with the issue of quantum. I do so on the footing that the sales policy was unlawful although the majority of this court have reached a different conclusion. The differences between sections 19 and 20 of the 1982 Act have already been noted. E Whereas section 19 is concerned with unlawful expenditure, section 20 is (so far as now material) concerned with "a loss . . . incurred or deficiency caused by the wilful misconduct of any person". The auditor made calculations under both section 19 and section 20 but only the latter are now material. It is clear that the scope of section 20 is not restricted to a loss or deficiency arising from expenditure: see *Asher v Lacey* [1973] 1 WLR 1412, F the first round of the Clay Cross litigation. Neither side has based any submission on any perceived distinction between "loss" and "deficiency" and in what follows the simple expression "loss" will be used to cover both.

Both before the Divisional Court and (on a somewhat reduced scale) in this court the parties' submissions on quantum have been directed to various different items in a sort of balance sheet of items of loss, partly offset by items of gain, prepared by the auditor (volume 5, appendix 13 of his G decision; the overall summary, apart from interest, is at paragraph 129, showing a total loss of about £26·510m before interest). But before embarking on a detailed item-by-item scrutiny it is appropriate to note the way in which the issues as to quantum have developed, and to comment on some general submissions made to this court. In his note of preliminary findings issued on 13 January 1994 the auditor mentioned the sum of H £21·255m as the sum which he had to consider certifying. At the audit hearings (held between 19 October 1994 and 7 February 1995) the auditor heard evidence (on behalf of Dame Shirley Porter) as to quantum from three accountants, Mr Wheeler of Chantrey Vellacott, Mr Aldous of Robson Rhodes, and Mr Swinson of BDO Stoy Hayward. There was no evidence as to the valuation of the 618 dwellings sold under the designated sales policy.

The auditor also received supplementary statements from Mr Aldous and Mr Swinson in April 1995. On 17 August 1995 the auditor sent out a "revised provisional calculation" of loss supported by various appendices, and invited representations on them. No representations were received on behalf of Dame Shirley Porter or Mr Weeks.

The Divisional Court had before it four experts' reports bearing on the issue of quantum: from Mr Swinson and Mr Adams-Cairns of Savills on behalf of Dame Shirley Porter, and from Mr Dallas of Coopers & Lybrand and Mr Scott-Barrett of Cluttons for the auditor. It also, of course, had before it the auditor's findings in volume 5 of his final report. The Divisional Court rejected a further supplementary report by Mr Adams-Cairns which was produced just before he gave oral evidence.

The appellants' case on these points was argued in this court by Mr McMullen. He submitted that the auditor's function is the equivalent of assessing damages, and that the damages should be compensatory, and measured by the loss to the person who is to be compensated. I readily accept the conclusion to which that submission leads, but it seems to me a rather roundabout way of getting there. Section 20 focuses on loss from the start and the diversion into damages is unnecessary, even though occasional references to damages can be gleaned from the authorities on surcharges, for instance *R v Roberts* [1908] 1 KB 407, 419.

For similar reasons little or no assistance is to be derived from submissions addressed to this court about restitution and restitutionary damages. The expression "restitution" and its derivatives have different shades of meaning. In some contexts (and in particular in the traditional Latin phrase restitutio in integrum) it may be indistinguishable from compensation; restitutionary damages, as a term of art, must however be sharply distinguished from compensatory damages (see generally *Attorney General v Blake* [1998] Ch 439, 456–459, and the wealth of academic work there referred to); and sometimes a restitutionary remedy (such as an account of profits) is an alternative to damages of any sort, and the plaintiff must elect between them: see generally *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713, noting but refraining from comment on *Ministry of Defence v Ashman* (1993) 25 HLR 513. There is no suggestion whatsoever that either of the appellants has been unjustly enriched at the expense of the City of Westminster's ratepayers. The issue is what loss the ratepayers have suffered as a result of any wilful misconduct established against the appellants.

Any such loss must be measured in money. But it must be borne in mind (so far as damages provide any useful analogy here) that a successful plaintiff is not bound to lay out his damages in making good any physical loss to his property, and in practice he may be unable or unwilling to do so. As Lord Lloyd of Berwick said in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, 366, after citing the words of Viscount Haldane LC in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689:

> "Note that Lord Haldane does not say that the plaintiff is always to be placed in the same situation physically as if the contract had been performed, but in as good a situation financially, so far as money can do it."

A The Divisional Court may, with respect, have lost sight of that point when it said, 96 LGR 157, 205–206:

> "To put the council back into the position in which it originally was as owner of the dwellings requires one to envisage the council going out into the market place to acquire comparable dwellings as replacements."

B There is no suggestion in this case that the council was under a duty to acquire replacement dwellings, or that it did acquire them. The loss of part of its stock of social housing exacerbated the council's problems in performing its statutory duty to house the homeless, and that gave rise to a separate item of loss, which is one of the issues on this appeal. But the council could perform its statutory duty in a variety of ways, which were not limited to housing stock in the council's ownership. To provide for the cost C of notional replacement of part of the housing stock by the acquisition of new dwellings, as well as its actual replacement by use of bed and breakfast accommodation or private sector lettings, would not in my view be the right approach. It will be necessary to come back to this point.

The Divisional Court approached the issue of the burden and standard of proof on the appeal as a whole

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> "by considering, in relation to each appellant, whether the auditor appears to have gone wrong in any respect and whether, having regard to the high standard of proof appropriate to the seriousness of the allegation . . . on the material before us, wilful misconduct causing loss has been shown": see p 162.

E The correctness of that approach is challenged by the auditor in his respondent's notice. Conversely paragraph 20 of Lady Porter's notice of appeal contends that the Divisional Court "failed to consider adequately or at all in the light of the burden and standard of proof applicable whether any loss was caused to the council".

The burden and standard of proof appropriate to the central issue of wilful misconduct is not relevant on the issue of quantum. If wilful F misconduct is established proof of loss, and its quantification, must proceed in accordance with ordinary principles. Neither the auditor nor the court may speculate where there is no evidence. But in an area where judgments have to be formed on the basis of a mass of financial and statistical information (with some gaps) the auditor must do his best to reach a fair conclusion, erring if necessary in favour of those who are to be surcharged: G see the observations of Lord Denning MR in *Asher v Secretary of State for the Environment* [1974] Ch 208, 222. If the auditor proceeds in that way the court will be slow to interfere with the exercise of his judgment, especially in circumstances where the persons surcharged have had the opportunity of challenging his data and his reasoning, but have not taken that opportunity. The Divisional Court was in my view quite right not to accede to the last-minute attempt to introduce new expert evidence H challenging the valuations by Ellis & Co on which the auditor relied. It was not necessary for the auditor to require rigorous proof of every material fact, whether or not it had been put in issue, and had he done so the audit process would have been even more protracted and expensive than it was.

What the council lost as a result of the adoption of the unlawful designated sales policy was, in general terms, (i) 618 dwellings which formed part of its stock of social housing (at a time when it was already hard-pressed to perform its obligations under Part III of the Housing Act 1985 to house the homeless) together with (ii) funds used to pay capital grants which formed an integral part of the policy and (iii) the resources of its officers and others who were devoting their time and energy, at the council's expense, to promoting and carrying out the unlawful policy. However these losses were, as already noted, broken down into a number of items on both sides of a sort of balance sheet which the auditor set out in his final report; and Mr Swinson, the principal witness called on behalf of Dame Shirley Porter at the hearing before the Divisional Court, naturally adopted the same approach in his criticisms of the auditor's figures. (Indeed, the same approach can be seen in paragraph 11.4 of the original officers' report, dealing with financial implications.)

The figures put forward in the auditor's final report can be summarised as follows (with agreed corrections which mean that the totals in the Divisional Court judgment cannot be precisely reconciled):

	£m.
1. Capital grants (most of which were paid in 1987–88 and 1988–89)	2·462
2. Cost of keeping unsold property vacant (mostly incurred in 1988–89 and 1989–90)	1·567
3. Losses resulting from sales	
(a) discounts	15·476
(b) rent lost after sales (1989–95)	7·922
(c) subsidy lost after sales (1989–95)	8·013
(d) extra homelessness costs (1988–94)	4·237
4. Staff and professional costs (1988–90)	2·089
	41·766
offset by	
5. Interest on proceeds of sales (1989–95)	(15·197)
6. Service charges on property sold (1989–95)	(1·837)
7. Savings on landlord's outgoings (1989–95)	(1·044)
	23·688
8. Interest	5·157
	28·845

It should be noted that most of the 618 dwellings were not sold outright but were let on long leases granted in consideration of substantial premiums, and references to sales include those disposals by way of long lease at a premium. Item 6 above refers to service charges payable to the

A council as landlord under these long leases. The auditor took 8 July 1987 as the starting date for the purpose of assessing loss, disregarding the argument that some dwellings might have been kept empty in anticipation of the decision of the housing committee taken on that day. He took 31 October 1989 as the date on which the policy of designated sales was effectively discontinued. However what the auditor called "pipeline" sales continued until 4 May 1990, when the last of those sales was completed (see generally volume 5, appendix 13, paragraphs 56–63 of the auditor's final report).

Of the items set out above those numbered 1, 2, 3(b) and (c)—which were all relatively straightforward matters of computation—were not in the end challenged before the Divisional Court (although item 1 was challenged for the first time in this court). There was also relatively little between the experts on item 5 (interest on proceeds of sales) since the dispute was limited to how far the proceeds should be assumed to have been used to reduce the council's borrowings, as opposed to being used to swell the council's cash reserves. As the judgment of the Divisional Court records, both experts finally agreed that the proper approach was to assume a mixture of deposit and borrowing rates, and the Divisional Court accepted the evidence of Mr Dallas, which had not been challenged in cross-examination, as to the appropriate mixture.

In my judgment the belated challenge on capital grants (item 1) must fail. They were an integral part of the unlawful policy. Items 3(a) (discounts on vacant possession values), 3(d) (extra homelessness costs), 4 (staff and professional costs), 6 (service charge income), 7 (reduction in landlord's outgoings) and 8 (interest) were the main areas of controversy in the Divisional Court. The Divisional Court resolved all those issues in favour of the auditor except for the staff and professional costs, on which it reduced the auditor's figure of £2·089m to £1·146m by excluding the element of overhead and central costs (Mr Swinson, on behalf of Dame Shirley Porter, had been contending for a reduction to £0·579m). The reduction made by the Divisional Court is challenged in the final paragraph of the auditor's respondent's notice. The Divisional Court's decision not to make any reduction in respect of discounts or interest is challenged in paragraphs 22 and 24 of Dame Shirley Porter's notice of appeal, which are adopted on behalf of Mr Weeks. The skeleton argument on behalf of Dame Shirley Porter (which is adopted on behalf of Mr Weeks) does not contain any submissions challenging liability for interest on the loss, but does raise points (not raised expressly in the notice of appeal) as to the extra homelessness costs, the service charge income and the savings on landlord's outgoings. In this court, therefore, the main issues as to quantum have been the discounts and staff and professional costs, with further subsidiary issues as to homelessness, service charge income and landlord's outgoings. Two of these points (staff and professional costs and landlord's outgoings) have something in common in that they depend partly on the choice between marginal and proportionate cost (the issue of construction actually before the House of Lords in *Pepper v Hart* [1993] AC 593) as the correct measure of loss.

It may be helpful to set out again the amounts at which the auditor quantified the disputed items of loss (or offset), with Mr Swinson's competing figure and the Divisional Court's conclusion:

(£m)	Auditor	Swinson	Div Ct
Discounts	15·476	nil	15·476
Extra costs of homelessness	4·237	2·268	4·237
Staff, etc costs	2·089	0·579	1·146
Service charge income	(1·836)		(1·836)
		=(5·818)	
Savings of outgoings	(1·044)		(1·044)

The largest difference between the parties, both in monetary terms and as a matter of principle, is over the inclusion in the loss of the difference between the open market value, with vacant possession, of the dwellings disposed of and the discounted prices at which they were actually disposed of. (The discount was 30% to purchasers who were not already tenants of the council, or were tenants but did not have the right to buy; it was a variable amount, but always more than 30%, for existing tenants with the right to buy.) The primary dispute was as to whether that was the right approach in principle: there was a secondary dispute over whether the undiscounted valuation figures produced by Ellis & Co should be accepted as evidence of open market, vacant possession values.

The Divisional Court noted the argument (deployed in the evidence of Mr Swinson) that vacant possession values were not the right starting point because, had the unlawful policy not been adopted, the dwellings would have continued to be held by the council as social housing let at rents below the level of full market rents. What the council had lost, therefore, was the capital value of a rental stream from the letting of social housing.

The judgment of the Divisional Court then cited the well known observations of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39 and stated, 96 LGR 157, 205–206 (in a passage part of which has already been set out):

> "In the present case that restoration is not achieved by compensation based on the value of the dwellings 'to the council' assuming occupation of them at social rents. To put the council back into the position in which it originally was as owner of the dwellings requires one to envisage the council going out into the market place to acquire comparable dwellings as replacements. Whether it then chooses to let them at below market rents (and if so, how far below market level) or at full market rents in appropriate cases or to sell them under ministerial general consents at full market value or a discount is a matter for the council exercising its discretion in a proper way. As things stand, it has lost that opportunity. It is no answer to say that the designated dwellings sold as a result of the housing committee's decision of 8 July 1987 had sitting tenants at the date of that decision. It is agreed that all the dwellings disposed of as a result of that decision were sold with vacant possession—indeed, it was because they became vacant that they could be sold. All of them, therefore, were ones where during the relevant accounting periods the council came into full vacant possession. That is the proper basis for assessing the council's loss in respect of this item."

Mr Howell for the auditor did not seek to support the view that this was a "loss of a chance" case: see *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602, 1623–1624. He did, however, contend that the value of the lost dwellings to the council lay in enabling the council to discharge its

A statutory functions as a social landlord. The council could not, he said, have discharged its functions by acquiring replacement dwellings already occupied by sitting tenants.

Since the council never even considered the acquisition of replacement dwellings there is a degree of unreality in debating whether vacant or let dwellings would have formed the subject matter of such an acquisition. The B fundamental objection to this approach is that it loses sight of what the council lost as a result of adopting the unlawful policy of designated sales—that is, part of its stock of social housing. Had the designated dwellings, as they became vacant, not been boarded up and kept vacant until they were sold, they would have been available for reletting either to homeless persons or to others with priority needs. The focus on the fact that the dwellings were vacant at the time of sale seems to me to be, as Lord Hoffmann put it in C *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191, 211:

> "the wrong place to begin. Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation. A correct description of the loss for which the D [defendant] is liable must precede any consideration of the measure of damages."

In this case the relevant element of loss is the loss of part of the council's stock of social housing. It was not a loss in a commercial venture of selling dwellings with vacant possession. In my judgment the Divisional Court erred in its approach. It should have accepted the submission that there was E no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. There was ample evidence that the discounted prices did exceed that value, and it is not necessary to go into the subsidiary issue as to Ellis & Co's valuations. Any other approach would, it seems to me, be inconsistent with the auditor's separate investigation and conclusion as to the additional costs of housing homeless F persons which the council had to incur as a result of its own stock of social housing having been depleted by the designated sales policy.

It is convenient to take together the loss arising from additional staff and professional costs and the allowance for the reduction in landlord's liabilities for management and maintenance costs, since they raise the same point of principle, but with the auditor contending for a proportionate (rather than a marginal) approach to staff and professional costs, and the G appellants contending for a proportionate (rather than a marginal) approach to the landlord's liabilities. If a consistent approach is taken neither side can succeed on both points. The Divisional Court was consistent in adopting a restrictive approach on both points and taking into account only such liabilities as could be identified as directly resulting from the additional costs of the designated sales policy or from the reduced landlord's liabilities, as the case might be. Of the inclusion of an element of the "overhead and central H costs" of the policy the Divisional Court said, 96 LGR 157, 210A, that "Certainly this would be normal accounting practice, but the ascertainment of 'loss or deficiency' is not to be equated to a book-keeping exercise." Of Mr Swinson's evidence on the landlord's outgoings the court said, at p 211A, that "he was unable to identify any savings which the auditor has omitted

and his own [proportionate] method is plainly inappropriate". In my view the Divisional Court was right in its consistently cautious approach to these two points. I would not depart from the figures of a loss of £1·146m, and offsets of £1·836m and £1·044m, taken by the Divisional Court.

The last item which affects quantum is the additional cost of performing the council's statutory duty of housing the homeless. The auditor estimated this cost at £4·237m and the Divisional Court accepted that figure (Mr Swinson had contended for £2·268m). The auditor reached his figure by a complex four-stage process which can (with some sacrifice of precision) be described as follows. (1) The auditor calculated, for units of accommodation of different types (ranging from bedsitters to four-bedroom dwellings), the numbers of unit/weeks lost in each accounting period. (2) The auditor then reduced those figures by giving a credit for the number of additional vacancies created by (i) the introduction of the grant system or (ii) existing council tenants purchasing flats under the designated sales policy. (3) The auditor then calculated the percentage of the units no longer available to house the homeless which would in practice have been used for that purpose at the relevant time (these percentages were within a broad range of about 65% to 95% for different types of accommodation). (4) There was then a final filter of matching the provisional figures for lost unit/weeks against unmet demand at the relevant time: if the figure for unmet demand for a particular type of unit was lower only the lower figure was taken. The resulting figures for lost unit/weeks were then costed against average marginal costs for private sector leasing or (if that was not available) bed and breakfast accommodation, which was a more expensive resource.

Mr Swinson in his evidence to the Divisional Court made three main criticisms of the auditor's approach, two of which were relied on in the appellants' submissions in this court. The first point is concerned with the number of vacant units at any given time. Mr Howell is, it seems to me, correct in saying that the appellants' written submissions do not do justice to the complexity of the calculations which the auditor made (in paragraphs 104–117 of appendix 13). The auditor was well aware that demand varied for units of different sizes, and that if a vacant unit such as a bedsitter would not be used to house a homeless family (for instance, because at the relevant time all the homeless needed larger units) it would not be kept vacant but would be used to house another priority applicant. Mr Swinson relied on another witness's comment that "you do not carry forward empty properties". Certainly it was not the council's practice, before the introduction of the designated sales policy, to leave any part of its stock of social housing empty for longer than was necessary. But once that policy was introduced, its inevitable consequence was that units were kept for sale and, once sold, were a permanent depletion of the housing stock. The Divisional Court recognised force in Mr Swinson's argument on this point, but saw it as counterbalanced by the auditor's "overgenerous approach" to the costing of alternative accommodation (to the extent, as the Divisional Court found, of £1·541m). For my part I am not persuaded that there is any real force in the point about vacant units, but if there is it is amply counterbalanced by the costing point.

The other point relied on by the appellants in this court is concerned with the procedures adopted by the council in dealing with applicants who claimed to be homeless. An applicant who had not yet actually been housed

A would be classified as either "under offer", "OK" or "not OK". Those who were "OK" had provided all the information which the council needed and the council had completed any necessary inquiries. In the case of those who were "not OK" further information or inquiries were needed and some but not all of the applicants would not move on into the "OK" and "under offer" categories.

B The Divisional Court said on this point, at p 209:

> "Had [the 'not OKs'] all eventually been refused, this would reduce the homelessness costs by about £600,000. It is unlikely that all would have been refused, although some no doubt would have been. No firm data exists on this. We take the view that some allowance should have been made for this element."

C Again, however, the court was satisfied that any error had been compensated for by the auditor's approach to the costing. Mr McMullen criticised that as speculation, citing the observations of Forbes J in *Tate & Lyle Food and Distribution Ltd v Greater London Council* [1982] 1 WLR 149, 152. But he did not criticise the figure of £1·541m at which the Divisional Court quantified the "overgenerous approach" to costing, and in my view the D Divisional Court reached a sensible conclusion well within the scope of permitted principles.

I would therefore reduce the principal sum certified by the auditor to £7·092m, to which must be added interest at the rate taken by the auditor.

Appeal allowed
Leave to appeal

E 19 May. The Court of Appeal ordered the auditor to pay the appellants' costs in the High Court and the Court of Appeal on the standard basis other than those in relation to the appeal to the Court of Appeal on the question of fairness but refused the appellants' application for expenses against Westminster City Council pursuant to section 18(10) of the Audit Commission Act 1998. Leave to appeal from the order for costs was refused.

F *Solicitors: Nicholson Graham & Jones; Rowe & Maw.*

SLD

The auditor appealed.

G *John Howell QC* and *Karen McHugh* for the auditor. Councillors must exercise their statutory powers for the public purposes for which those powers are conferred: see *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419 and *R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council* [2001] 1 All ER 462. Statutory powers are held on trust and cannot validly be used for the purpose of promoting the electoral advantage of any particular party or H the re-election of an individual councillor. The power to dispose of land under section 32 of the Housing Act 1985 cannot be used for such an unlawful purpose: see *Crédit Suisse v Allerdale Borough Council* [1997] QB 306; *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858; *Padfield v Minister of Agriculture,*

Fisheries and Food [1968] AC 997; *R v Board of Education* [1910] 2 KB 165 and *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207.

"Wilful misconduct" within section 20 of the Finance Act 1982 is the wrongful and deliberate act or omission with knowledge of its wrongfulness or with reckless indifference as to whether or not it is wrong: see *Graham v Teesdale* (1981) LGR 117 and *Lloyd v McMahon* [1987] AC 625. Councillors are, in any event, required to discharge their duties to the best of their ability and judgment and may be liable to make good resources whose unlawful alienation they have procured: see *Asher v Lacey* [1973] 1 WLR 1412; *Asher v Secretary if State for the Environment* [1974] Ch 208; *Smith v Skinner* (1986) 26 RVR 45; *Parr v Attorney General* (1842) 8 Cl & Fin 409; *Attorney General v De Winton* [1906] 2 Ch 106; *Barrs v Bethell* [1982] Ch 294; *Charitable Corpn v Sutton* (1742) 2 Atk 400; *Attorney General v Wilson* (1840) Cr & Ph 1 and *Attorney General v Belfast Corpn* (1855) 4 Ir Ch R 119.

The Divisional Court's findings were well founded and the Court of Appeal was not entitled to interfere with or displace them: see *SS Hontestroom (Owners) v SS Sagaporack (Owners)* [1927] AC 37; *Watt or Thomas v Thomas* [1947] AC 484; *R v Birmingham City District Council, Ex p O* [1982] 1 WLR 679; [1983] 1 AC 578; *In re District Auditor for London, Ex p Riley* (unreported) 20 November 1944; *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378; *Pooley v District Auditor No 8 Audit Office* (1964) 63 LGR 60 and *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22.

The Divisional Court was correct to hold that the council suffered a loss when it disposed of the dwellings at less than their open market value: see *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191. The Divisional Court was also correct in holding that the additional homelessness costs incurred as a result of the unlawful disposal of any property involved no element of double-counting. Those costs would have been incurred whether the properties were disposed of at market value or at less than their market value, and no interest was assessed on the delayed recovery of the value lost on the disposal of the dwellings.

Jeremy McMullen QC, Stuart Cakebread and *Clare Roberts* for Dame Shirley Porter. Although a local authority must exercise its statutory powers consistently with the purposes for which they were conferred (see *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 and *Crédit Suisse v Allerdale Borough Council* [1997] QB 306), councillors are in general elected on a party political manifesto. Reality demands that Party political or electoral considerations may be relevant to the development of policy or the deliberations of councillors in committee and will not necessarily render their decision unlawful. The motivation of the individual members cannot be ascribed to the council. If, therefore, the voting members were ignorant of the unlawful purposes of non-voting members or knew of them but did not take them into account; those purposes would have no bearing on the lawfulness of the voting members' decision: compare *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378. The decision would only be unlawful if the voting members relied upon the political motivation of the non-voting members of the exclusion of local government reasons. Since the housing committee's decision was lawful the motivation of P was irrelevant: see *R v*

A *Sheffield City Council, Ex p Chadwick* (1985) 84 LGR 563; *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419; *Jones v Swansea City Council* [1990] 1 WLR 54; [1990] 1 WLR 1453; *R v Bradford City Metropolitan Council, Ex p Wilson (Note)* [1990] 2 QB 375; *R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council* [2001] 1 All ER 462; *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207; *R v Derbyshire County Council, Ex p The Times Supplements Ltd* (1991) 151 LG Rev 123; *Smith v Skinner* 26 RVR 45; *R v Bradford Metropolitan City Council, Ex p Wilson (Note)* [1990] 2 QB 375; *In re Magrath* [1934] 2 KB 415; *R v Secretary of State for Foreign and Commonwealth Affairs, Ex p World Development Movement Ltd* [1995] 1 WLR 386 and *In re District Auditor for London, Ex p Riley* (unreported) 20 November 1944.

C The test of wilful misconduct within the meaning of section 20 of the Local Government and Finance Act 1982 is defined in *Graham v Teesdale* 81 LGR 117. For a member to be liable for a decision of the council it is a necessary, but not sufficient, condition that the decision is unlawful: see *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220. Section 20 must be strictly construed; the law must be adequately accessible, clear and predictable and so defined that members and officers can regulate their conduct and reasonably know the circumstances in which they would risk certification. "Misconduct" means "improper conduct" and connotes malfeasance or culpable neglect: see *Horabin v British Overseas Airways Corpn* [1952] 2 All ER 1016. It must consist of conduct which takes place in relation to the member's office. Moving a political programme to achieve electoral advantage is not enough.

E The standard of proof for wilful misconduct is high and will only be satisfied if the member knew that his conduct was unlawful. The test of whether a councillor has acted with reckless indifference is no less stringent than that applicable to misfeasance in public office: see *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 1220. Reliance on legal advice is a defence: see *Asher v Lacey* [1973] 1 WLR 1412; *Asher v Secretary of State for the Environment* [1974] Ch 208; *Lloyd v McMahon* [1987] AC 625 and *Ex p Riley* (unreported) 20 November 1944. In assessing whether P had the necessary belief that her conduct was unlawful regard must be had to her knowledge and expertise. An unpaid lay councillor is not in the same position as a paid professionally qualified senior council officer: see *In re Waterman's Will Trusts; Lloyds Bank Ltd v Sutton* [1952] 2 All ER 1054 and *Bartlett v Barclays Bank Trust Co Ltd (Nos 1 and 2)* [1980] Ch 515. Liability should only be imposed on councillors where they are sufficiently aware of what they are doing.

The Court of Appeal was entitled to review the Divisional Court's findings: see *Watt or Thomas v Thomas* [1947] AC 484, equality of treatment is a fundamental principle. Like cases should be treated alike unless there is sound justification for not doing so. See also, *Arthur J S Hall & Co v Simons* [2002] 1 AC 615; *R v Westminster City Council, Ex p Union of Managerial and Professional Officers* [2000] LGR 611; *R v Hertfordshire County Council, Ex p Cheung* The Times, 4 April 1986; Court of Appeal (Civil Division) Transcript No 287 of 1986; *Police v Rose* [1976] MR 79; *Matadeen v Pointu* [1999] 1 AC 98 and *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252.

The object of the section 20 certificate is to restore a local authority to the position it would have been in if the unlawful act had not occurred. The Court of Appeal was correct to conclude that there was no loss if the discounted prices actually received by the Council exceeded the value of the dwellings as tenanted social housing. Since the Council did not intend to acquire replacement properties at full market price it was not reasonable that it be entitled to receive the difference between that price and the discounted price: see *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344; *Attorney General v Blake* [2001] 1 AC 268; *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25; *The Argentino* (1888) 13 PD 191; *East Ham Corpn v Bernard Sunley & Sons Ltd* [1966] AC 406; *CR Taylor (Wholesale) Ltd v Hepworths Ltd* [1977] 1 WLR 659; *Ministry of Defence v Ashman* (1993) 25 HLR 513 and *R v Roberts* [1908] 1 KB 407.

The decisions of the auditor and of the Divisional Court should in any event be set aside on the ground that they were unfair and in breach of P's rights at common law and under article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms: see *R v Lambert* [2001] 3 WLR 206; *R v Kansal (No 2)* [2002] 2 AC 69; *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326; *R v Benjafield* [2001] 3 WLR 75; *Klass v Federal Republic of Germany* (1978) 2 EHRR 214 and *King v Walden* [2001] STC 822. Although the Convention was not then part of the domestic law P may rely on it: see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

In exercising his wide discretions under the 1982 Act, the Auditor had to act consistently with the Convention: see *R v Secretary of State for the Home Department v Brind* [1991] 1 AC 696 and *Derbyshire County Council v Times Newspapers Ltd* [1992] QB 770. By virtue of article 6 he is obliged to determine issues impartially within a reasonable time and in accordance with principles of natural justice and fairness. It is relevant to consider the structural unfairness of the statutory scheme under which he operates: see *Preiss v General Dental Council* [2001] 1 WLR 1926. The multiplicity of roles he is required to perform—investigator, prosecutor and decision-maker—violates his article 6 obligation to act with independence and impartiality: see *Piersack v Belgium* (1982) 5 EHRR 169; *Findlay v United Kingdom* (1997) 24 EHRR 221; *De Cubber v Belgium* (1984) 7 EHRR 236; *Hauschildt v Denmark* (1989) 12 EHRR 266 and *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455.

Article 6 requires not only that its safeguards are met where the initial determination of civil rights or obligations is made by a court (see *De Cubber v Belgium* (1984) 7 EHRR 236) but also that, where that determination is made by an administrative or quasi-judicial body, an appeal lies to a judicial body which itself complies with article 6: see *Albert and Le Compte v Belgium* (1983) 5 EHRR 533. Where serious criminal charges are brought the accused is entitled to appear before a first instance tribunal which fully meets the requirements of article 6: see *Findlay v United Kingdom* 24 EHRR 221. Any appeal tribunal whether criminal or civil, must comply with Article 6: *Delcourt v Belgium* (1970) 1 EHRR 355. However, the auditor is not a tribunal within the meaning of article 6: see *Belilos v Switzerland* (1988) 10 EHRR 466. His office is not established by statute as a court and he is not obliged to administer justice in public. Nor is he an "inferior court" under English law whose functions can be protected

by contempt proceedings: see *Attorney General v British Broadcasting Corpn* [1981] AC 303. He is not a judicial forum applying the rules of due process which would be applied in a court or judicial tribunal.

"Wilful misconduct" under section 20 of the 1982 Act has a criminal or quasi-criminal character. Classification of offences under domestic law is not determinative for the purposes of the Convention: see *Deweer v Belgium* (1980) 2 EHRR 439. Thus the substance rather than the form of the "offence" has to be examined in the light of the severity and nature of the penalty and the stigma involved in any finding of "guilt": see *AP, MP and TP v Switzerland* (1997) 26 EHRR 541; *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340; *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084; *Lutz v Germany* (1987) 10 EHRR 182; *Bendenoun v France* (1994) 18 EHRR 54; *Georgiou (trading as Marios Chippery) v United Kingdom* [2001] STC 80; *King v Walden* [2001] STC 822; *Lloyd v McMahon* [1987] AC 625; *R (Greenfield) v Secretary of State for the Home Department* [2001] 1 WLR 1731; *Lauko v Slovakia* (1998) 33 EHRR 994; *Demicoli v Malta* (1991) 14 EHRR 47; *Engel v Netherlands (No 1)* (1976) 1 EHRR 647; *Weber v Switzerland* (1990) 12 EHRR 508; *Pierre-Bloch v France* (1997) 26 EHRR 202; *Campbell and Fell v United Kingdom* (1984) 7 EHRR 165; *Customs and Excise Comrs v City of London Magistrates' Court* [2000] 1 WLR 2020 and *Garyfallou AEBE v Greece* (1997) 28 EHRR 344. *G v France* (1988) 57 DR 100 is distinguishable on its facts.

Since, on the basis that for the purposes of the Convention, wilful misconduct is to be treated as criminal, the procedural safeguards of article 6, in particular the presumption of innocence (as well as under the common law: see *Woolmington v Director of Public Prosecutions* [1935] AC 462), must be observed whatever procedure is adopted. Although rules of evidence are for the domestic law to determine, a reverse onus rule must be within reasonable limits and the overall effect of the proceedings must safeguard P's rights. Here they failed to do so (see *Barberà, Messegué and Jabardo v Spain* (1988) 11 EHRR 360; *Allenet de Ribemont v France* (1995) 20 EHRR 557; *Salabiaku v France* (1988) 13 EHRR 379 and *Krause v Switzerland* (1978) 13 DR 73) and required P to prove her innocence: see *R v Roberts* [1908] 1 KB 407; *Jones v Attorney General* [1974] Ch 148; *Lloyd v McMahon* [1987] AC 625 and *X v Austria* (1972) 42 CD 145; contrast *Tyrer v District Auditor for Monmouthshire* (1973) 230 EG 973. Publicity given to the interim findings of the auditor both violated the presumption of innocence and gave an appearance of bias: see *Hoekstra v HM Advocate* [2001] 1 AC 216; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451. The auditor was not an independent and impartial tribunal in breach of article 6 (see *Bryan v United Kingdom* (1995) 21 EHRR 342), and this failure led to the appearance of bias such that his findings should be set aside: see *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HL Cas 759; *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Montgomery v HM Advocate* [2001] 2 WLR 779; *Hoekstra v HM Advocate* [2001] 1 AC 216; *Darmalingum v The State* [2000] 1 WLR 2303 and *R v Camborne Justices, Ex p Pearce* [1955] 1 QB 41.

The test for apparent bias is whether, on an objective evaluation, the circumstances would lead a fair-minded and informed observer reasonably to apprehend that there was a real possibility that the tribunal would unfairly consider the case of one party with favour or disfavour: see *R v Gough* [1993] AC 646; *Webb v The Queen* (1994) 181 CLR 41; *Johnson v Johnson* [2000] 201 CLR 488; *Valente v The Queen* [1985] 2 SCR 673; *Bradford v McLeod* 1986 SLT 244; *Doherty v McGlennan* 1997 SLT 444; *BOC New Zealand Ltd v Trans Tasman Properties Ltd* [1997] NZAR 49; *Moch v Nedtravel (Pty) Ltd* (1993) 3 SA 1; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147; *Delcourt v Belgium* 1 EHRR 355; *Findlay v United Kingdom* 24 EHRR 221; *Bryan v United Kingdom* 21 EHRR 342; *Pullar v United Kingdom* (1996) 22 EHRR 391; *Hauschildt v Denmark* 12 EHRR 266; *Piersack v Belgium* 5 EHRR 169; *De Cubber v Belgium* 7 EHRR 236; *Sander v United Kingdom* (2001) 31 EHRR 1003; *Gregory v United Kingdom* (1997) 25 EHRR 577; *Roylance v General Medical Council (No 2)* [2000] 1 AC 311; *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *Preiss v General Dental Council* [2001] 1 WLR 1926; *Kremzow v Austria* (1993) 17 EHRR 322; *Grant v United Kingdom* (1988) 55 DR 218 and *R v Williams* The Times, 8 October 2001.

Although unfairness can be cured on appeal the Divisional Court failed to do so; in any event the defect was systemic, as well as so gross and flagrant as to be incapable of cure: the only proper course was to quash the decision: see *Lloyd v McMahon* [1987] AC 625; *Calvin v Carr* [1980] AC 574; *Smith v Skinner* 26 RVR 45; *Jones v Attorney General* [1974] 1 Ch 148, the *Preiss* case [2001] 1 WLR 1926 and *Darmalingum v The State* [2000] 1 WLR 2303.

The auditor's inordinate delay also breached the reasonable time requirement in article 6(1). At common law, a complainant may need to show prejudice resulting from the delay: see *Bell v Director of Public Prosecutions* [1985] AC 937; *Minister of Home Affairs v Fisher* [1980] AC 319; *Barker v Wingo* (1972) 407 US 514; *R v Secretary of State for the Home Department, Ex p Phansopkar* [1976] 1 QB 606; *Martin v Tauranga District Court* [1995] 2 LRC 788; *R v Morin* [1992] 1 SCR 771; *Fisher v Minister of Public Safety and Immigration* [1998] AC 673; *Mungroo v The Queen* [1991] 1 WLR 1351; *Director of Public Prosecutions v Tokai* [1996] AC 856; *McCalla v Disciplinary Committee of the General Legal Council* (unreported) 30 July 1998; *Darmalingum v The State* [2000]1 WLR 2303; *Flowers v The Queen* [2000] 1 WLR 2396 and *Attorney General's Reference (No 2 of 2001)* [2001] 1 WLR 1869; contrast *Attorney General's Reference (No 1 of 1990)* [1992] QB 630; *Jago v District Court of New South Wales* (1989) 168 CLR 23 and *Tan v Cameron* [1992] 2 AC 205. The Convention test is different: prejudice does not have to be shown; but specific factors are to be taken into account, including the complexity of the case, the complainant's conduct and the manner in which the judicial and administrative authorities have dealt with the case: see *Eckle v Federal Republic of Germany* (1982) 5 EHRR 1 and *König v Federal Republic of Germany* (1978) 2 EHRR 170. Time runs from the institution of civil proceedings or from the time of a charge in criminal proceedings and includes appellate proceedings: see *Ausiello v Italy* (1996) 24 EHRR 568; *H v United Kingdom* (1987) 10 EHRR 95 and *Attorney General's Reference*

A *(No 2 of 2001)* [2001]1 WLR 1869. *Robins v United Kingdom* (1997) 26 EHRR 527 is not relevant where criminal matters are in issue. Whether the length of time is "reasonable" will depend on the test in the *König* case: see *Ciricosta and Viola v Italy* (unreported) 4 December 1995, Publications of the European Court of Human Rights, Series A no 337-A. The remedy for undue delay is to quash the decision in question: see the *Darmalingum* case. There may be alternative remedies, however: see *Attorney General's*
B *Reference (No 2 of 2001)* [2001] 1 WLR 1869; *Locabail (UK) Ltd v Waldorf Investment Corpn (No 4)* The Times, 13 June 2000 and *Sparks v Harland* [1997] 1 WLR 143.

Stuart Cakebread and *Clare Roberts*, for Mr Weeks, adopted the submissions of Dame Shirley Porter.

C *Howell QC* in reply. The Divisional Court was correct to conclude that the alleged delay did not prejudice P and W so as to make a fair trial impossible: see *Attorney General's Reference (No 1 of 1990)* [1992] QB 630; *Tan v Cameron* [1992] 2 AC 205; *Jago v District Court of New South Wales* 168 CLR 23; *Director of Public Prosecutions v Tokai* [1996] AC 856 and *Rochefoucauld v Boustead* [1897] 1 Ch 196. In any event, the Court of Appeal could only interfere with the Divisional Court's finding if it was
D satisfied that it was plainly wrong: see *SS Hontestroom (Owners) v SS Sagaporak (Owners)* [1927] AC 37.

The Human Rights Act 1998 does not apply to the present case: see *R v Lambert* [2001] 3 WLR 206. In any event, article 6 does not prescribe the consequences of proceedings where the reasonable time requirement is not met. The expedition required by article 6 must be consonant with the proper
E administration of justice: see *Bell v Director of Public Prosecutions* [1985] AC 937; *R v Morin* [1992] 1 SCR 771; *Ciricosta and Viola v Italy* 4 December 1995, Publications of the European Court of Human rights, Series A no 337-A and *Pretto v Italy* (1983) 6 EHRR 182.

The test of bias or apparent bias is whether the circumstances would lead a fair-minded and informed person to conclude that there was a real possibility that the tribunal would unfairly consider the case of a party. On
F that test, or the real danger test (see *R v Gough* [1993] AC 646) there was no apparent bias such as to vitiate the auditor's decision: see *Sander v United Kingdom* 31 EHRR 1003; *Pullar v United Kingdom* 22 EHRR 391; *Hauschildt v Denmark* 12 EHRR 266; *Montgomery v Lord Advocate* [2001] 2 WLR 779; *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700; *Gregory v United Kingdom* 25 EHRR 577; *Locobail*
G *(UK) Ltd v Bayfield Properties Ltd* [2000] QB 451; *Johnson v Johnson* 201 CLR 488; *In re Minister for Immigration and Multicultural Affairs, Ex p Epeabaka* [2001] 179 ALR 296; *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 and *Roylance v General Medical Council (No 2)* [2000] 1 AC 311.

The provisional view of a decision-maker does not disqualify him on the ground of actual or apparent bias (see *Kremzow v Austria* 17 EHRR 322
H and *Grant v United Kingdom* 55 DR 218) although a premature but concluded view will (see *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70).

Section 20(1) of the 1982 Act neither creates a criminal offence nor imposes a penalty for such an offence. The section merely enables a local

authority to recover compensation in the civil courts for the loss or deficiency suffered. Prospective disqualification is not a punitive sanction but a disciplinary or professional measure imposed for the regulation of persons in positions of trust: see *Lauko v Slovakia* 33 EHRR 994; *Pierre-Bloch v France* 26 EHRR 202; *Bendenoun v France* 18 EHRR 54; *Weber v Switzerland* 12 EHRR 508; *Demicoli v Malta* 14 EHRR 47; *Garryfallou AEBE v Greece* 28 EHRR 344 and *R v Secretary of State for Trade and Industry, Ex p McCormick* [1998] BCC 379.

Any lack of fairness in the proceedings conducted by the auditor may be cured by a rehearing on the merits: see *Lloyd v McMahon* [1987] AC 625; *Kingsley v United Kingdom* The Times, 9 January 2001 and *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

Their Lordships took time for consideration.

13 December. **LORD BINGHAM OF CORNHILL**

1 My Lords, the issue in this appeal is whether the auditor should have certified any sum to be due to the Westminster City Council from Dame Shirley Porter and Mr David Weeks and, if so, in what amount.

2 The appellant, Mr John Magill, is the auditor. He was appointed by the Audit Commission under section 13 of the Local Government Finance Act 1982 to audit the accounts of Westminster City Council for the years 1987–88 to 1994–95. He conducted a very lengthy and detailed audit and certified under section 20 of the Act that three councillors and three officers had, by wilful misconduct, jointly and severally caused a loss of approximately £31m to the council which they were liable to make good. All three of the councillors and two of the officers pursued appeals against the auditor's decision to the Queen's Bench Divisional Court (Rose LJ, Latham and Keene JJ). The councillors were Dame Shirley Porter, who was leader of the council at all material times, Mr David Weeks, who was deputy leader, and Mr Hartley, who from June 1987 was chairman of the council's housing committee. The two officers were Mr England, who was the council's director of housing, and Mr Phillips, who was managing director of the council. The Divisional Court upheld the auditor's finding that Dame Shirley Porter and Mr Weeks were liable, although it reduced the sum certified; it allowed the appeals of Mr Hartley and the two officers and quashed the auditor's certificate in relation to them: (1997) 96 LGR 157. On further appeal by Dame Shirley Porter and Mr Weeks, the Court of Appeal by a majority (Kennedy and Schiemann LJJ, Robert Walker LJ dissenting) upheld both appeals on liability: ante, p 370G [2000] 2 WLR 1420. Robert Walker LJ, although in favour of dismissing both appeals against liability, would have reduced the sum of the auditor's certificate: p 1504. On this quantum issue Kennedy LJ agreed with him (at p 371A) and Schiemann LJ (at p 389) expressed no opinion. The auditor now appeals to this House seeking to reinstate the certificate issued against Dame Shirley Porter and Mr Weeks in the sum certified by the Divisional Court. Mr Hartley and the two officers are no longer directly involved in the proceedings. It is necessary to decide whether the Court of Appeal was right to quash the certificate

A issued against Dame Shirley Porter and Mr Weeks and, if not, in what sum that certificate should have been issued.

3 My Lords, the facts giving rise to this appeal and much of the evidence have been summarised at some length by the Divisional Court 96 LGR 157, 164–166, 175–203, and by the Court of Appeal, ante, pp 373B–374F, 405G–425E and are the subject of a lengthy statement of facts agreed between the parties for purposes of this appeal. The facts and B the evidence are crucial to the appeal, but it is unnecessary to repeat the detailed summaries already made. It is enough, for present purposes, to highlight some of the key events in the narrative, which I take from the agreed statement of facts.

4 The council comprised 60 councillors elected to represent 23 wards. As a result of the local government elections in May 1986, the overall C Conservative party majority was reduced from 26 to 4. The close results of those elections prompted leading members of the council to consider how council policies could be developed in order to advance the electoral prospects of the Conservative party in the next local government election to be held in 1990. Dame Shirley Porter was determined that the Conservative party would have a greater majority at the 1990 elections than that which it had narrowly achieved in 1986. With this end in view, she reorganised the D party's administrative and decision-making structure and herself chaired a group of committee chairmen. This body comprised herself as leader, Mr Weeks, the deputy leader, the majority party's chief whip and the chairmen of the council's committees. It was not a committee or sub-committee appointed by the council. It met on a regular basis, sometimes with officers in attendance. It developed and promoted policy. One of these E concerned the designation of council-owned properties for sale.

5 The council first introduced a policy of designated sales in 1972. Under this policy, blocks of council dwellings were designated and, when a dwelling in a designated block became vacant, it was not re-let but offered for sale to an approved applicant with the intention that all dwellings in designated blocks would become owner-occupied. Under the scheme as it was in July 1987, 10 to 20 sales per annum were generated from the 300 F dwellings then designated. With a view to achieving greater success in the 1990 elections, the chairmen's group formulated a policy entitled "Building Stable Communities" (known for short as "BSC"). This included targets for increasing the numbers of Conservative voters in each of eight key wards, the target voter figures for those wards adding up to a total of 2,200. The eight most marginal wards in the election of May 1986 from the Conservative G party's point of view were Bayswater, Cavendish, Hamilton Terrace, Little Venice, Millbank, St James's, Victoria and West End. Those eight wards were chosen in mid-February 1987 by some members of the majority party on the council (including Dame Shirley Porter and Councillor Weeks), and were known as the "key wards". Both the eight key wards and the target voter figures (which envisaged an overall increase of 2,200 Conservative supporters in the eight key wards) were identified to officers in February H 1987. The target voter figures remained the same thereafter and the achievement of those figures (including the contribution of designated sales to them) was monitored by leading members and officers. The references in contemporary documents to "new residents", "more electors" and "new electors" in many instances were euphemisms for "more potential

Conservative voters", particularly in marginal wards. A major element of BSC was to increase designated sales of council properties in the eight key wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative. In some of the key wards there was very little council housing and few or no designated properties. But, even in respect of those wards, designated sales appeared on monitoring charts recording the progress towards the targets in the eight key wards. From July 1986, if not before, concentrating on marginal wards was majority party policy. The intention of the majority party was to develop council policies which would target marginal wards, including such housing policies as could affect the make-up of the electorate in those wards.

6 Very soon after the 1986 local government elections, the first suggestions for disposing of council housing, including increased designation, were made. On 19 May 1986, Mr England informed the then chairman of the housing committee that it would be virtually impossible for the council to meet its statutory obligations if a policy of wholesale disposal of council housing were to be adopted. On 3 June 1986 the chairmen's group decided that major policy initiatives should come down from it (and from the policy and resources committee) and it discussed marginal wards. On 5 June 1986 the chairman of the housing committee responded to Dame Shirley Porter's request for a note on "balancing the social mix" by identifying a number of factors contributing to the drop in the Conservative party's "natural support" and suggesting various options for increasing home ownership, including increased designated sales which would, however, lessen the council's "already stretched ability to meet our statutory requirements". On 24 June 1986 Dame Shirley Porter and Mr Weeks attended the chief officers' board when the officers were told that the focus of attention would be on winning the next election, and there was discussion of the majority party's objective of "social engineering including housing". On 30 June 1986 a working lunch, attended by Dame Shirley Porter and others, was held to discuss a prospective planning study: Mr England made a note of the discussion which included references such as "economic justification for gmander on hsg", "who is a Tory voter?", "gentrification" and "will company lets vote Tory?". On 29 July 1986 Dame Shirley Porter had a discussion with Mr Phillips concerning properties in key wards, voting records and decanting and she asked Mr England for information in respect of key wards. By the beginning of September 1986 the council's policy unit had prepared a paper on "homelessness/gentrification". It stated that "homelessness is reaching crisis proportions" and described "gentrification" as:

> "ensuring that the right people live in the right areas. The areas are relatively easy to define: target wards identified on the basis of electoral trends and results. Defining 'people' is much more difficult and not strictly council business . . . the housing/planning study should be used to define which initiatives are likely to produce the desired results, and in which areas."

On 1 September 1986 Mr England produced a paper for Mr Weeks on "Gentrification" in which he identified the major constraints on initiatives to increase home ownership as the duties to the homeless and other high priority rehousing requirements.

A 7 Dame Shirley Porter wrote a paper setting out her "Strategy to 1990" in which she gave top priority to winning the 1990 elections. Two of the key issues identified in the "Strategy to 1990" in relation to electoral success were "homelessness/gentrification" and how best to use the study about to be commissioned from consultants. The paper prepared by the policy unit on "homelessness/gentrification" formed part of Dame Shirley Porter's
B paper. Her "Strategy to 1990" was agreed by the chairmen's group on 2 September 1986 and on 3 September was circulated by the head of the policy unit to all chief officers. Officers recommended that the consultants' study should be used to establish the key wards and the need for increased home ownership in them. At a meeting on 15 September 1986 with representatives of the consultants, attended by Dame Shirley Porter and Mr Weeks, there was a discussion of a strategy "to push Labour voters out of
C marginal wards. Housing Dept can't say privatise/gentrify council blocks in marginal wards—400 in B & B but we could say—preserve economic base—need to boot out these blocks". Reference was also made to an aim to "preserve local communities—but boot out certain categories" and to community groups which "don't vote Tory". Dame Shirley Porter told the consultants "we want the right answers". In January 1987 a paper on home
D ownership was written at Dame Shirley Porter's request by the then vice-chairman of the housing committee, Mr Segal. That paper, written in advance of the consultants' report, identified the short-term objective as being "to target the marginal wards and, as a matter of the utmost urgency, redress the imbalance by encouraging a pattern of tenure which is more likely to translate into Conservative votes". The paper assumed that owner-occupiers were more inclined to vote Conservative and drew attention to the
E low proportion of owner-occupiers in Westminster relative to the national average. It called for the council to reappraise its designation policy and to "identify far more blocks particularly in key marginal wards". The paper was submitted to, and generally endorsed, by the chairmen's group at its meeting on 27 January 1987. Further work on designated sales in marginal wards followed. At least from the time of this paper in January 1987,
F targeting designated sales in marginal wards was firm political policy. The chairmen's group decided on 24 March 1987 to adopt a target of 250 designated sales per annum in the marginal wards. At that meeting, attended by Dame Shirley Porter and Mr Weeks, she stated: "need a peg in the [consultants'] report". The chairmen's group also considered a draft report. Dame Shirley Porter indicated that she did not want the report to go into detail because it exposed the other sales policies for discussion,
G notwithstanding that the report had been prepared, according to Mr England, to give members a "smokescreen" to identify the designated area for growth. Mr England explained to the managing director in a memorandum dated 26 March 1987 that the intention was to plant a question at the housing committee on 1 April 1987 in order to obtain authority for officers to provide a report on how to increase designated sales
H to at least 250 per annum, and that he intended to report back "once we have [the consultants'] steer on 250 in certain wards".

8 By this stage legal concerns were beginning to surface. On 20 March 1987 the deputy city solicitor advised the then chairman of the housing committee on the need to have sufficient justification for a major change in policy on designated sales, reinforcing (as he put it) the notes of caution that

had already been expressed. On 24 March 1987 one of Dame Shirley Porter's aides (Mr Greenman) addressed certain questions to the director of housing and the city solicitor. In response to the first question addressed to him, namely, whether the council's new policy on 100% designation for sale in the eight target wards would conflict with the council's statutory obligations, the city solicitor replied on 24 March 1987 to Dame Shirley Porter that:

> "If the policy is to be introduced then as a matter of law the reasons for its introduction have got to be carefully argued. The needs of the homeless and the impact of a decision to sell accommodation which might otherwise be available for them is a highly relevant consideration which will have to be balanced against the advantages of selling. It is fundamental that the arguments in favour of selling be soundly based and properly argued. Anything which smacks of political machinations will be viewed with great suspicion by the courts."

A further question was addressed: "Is there any possibility that this policy will lay the council open to (a) judicial review of its policy or (b) surcharging for illegality etc". To this question the city solicitor replied:

> "(a) Yes. The way to avoid successful challenge is to devise legitimate arguments and to ensure that all possible ramifications have been considered by those taking the decision. If this is done judicial review may be successfully resisted unless it can be demonstrated that the decision takers have acted irrationally or relied on an irrelevant consideration.
>
> (b) . . . The possibility of surcharge exists but it will be necessary for those challenging to demonstrate that the loss flowed from the act of wilful misconduct. This re-emphasises the need for a good argument to be constructed in favour of sale."

In response to a further question the city solicitor said:

> "It is crucial that any report should critically examine a proposal to designate for sale. The advantages of sale have to be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority. A general policy of disposal is much more likely to be susceptible of challenge than decisions taken in respect of each block or each property. It might be sensible to go forward in stages rather than offer a broad target. Lawyers should be involved in consideration of any reports at the earliest possible stage. Since a general policy will inevitably draw fire the advice of counsel should be sought at an early stage so that if judicial review is commenced the prospects of successful challenge can be minimised."

9 The consultants' report was received by the council on about 10 April 1987. The Divisional Court found that Dame Shirley Porter plainly hoped and was deeply interested in the possibility that the report would provide a peg on which to hang the policy of increasing designated sales in marginal wards. Both she and Mr Weeks knew that, without the consultants' support, the officers could not provide professional justification for designation only in the eight wards. In fact, the consultants' report gave no such support. The report did not identify the eight key wards. Of the five "stress" wards it

A considered, only two were among the eight key wards. On its face the report gave no support for any increase in designated sales. It recommended that the council should exercise its powers with a view to "making available a supply of low and medium priced rented housing".

10 Before receipt of this report, on 17 March 1987, a memorandum from the director of housing to the chairmen's group advised that, with the scale of designation then proposed, namely of all council properties in the B eight key wards (490 sales per annum), the council might find it impossible to meet its statutory obligations to a number of homeless households; that it was not possible in professional terms to justify a designation of all properties in the eight key wards given the impact on the homeless and other priority cases; that the "key ward analysis" would have to be provided by the forthcoming consultants' study; and that members should seek legal advice C on the reasonableness of the proposed course of action. In a further memorandum on the following day, the director of housing advised Dame Shirley Porter in addition that it was necessary to consider providing additional properties for the homeless and "non-statutory groups" in non-key wards but that the time required for such provision might conflict "with the objective of achieving the number of sales within the three year period". A later discussion paper on designated sales, prepared in the housing D department and presented to Dame Shirley Porter and the chairmen's group on 5 May 1987, stated that the housing committee would need to set the number of designated sales per annum to be achieved and select the relevant properties for designation. It recorded that the city solicitor and secretary had advised that it was imperative that counsel's advice should be obtained on the final shape of the committee report and that there were four further E matters for decision by the committee. The fourth of these was:

> "Given the inevitable impact on rented supply . . . should the council's target be 250 per annum or will this have an impact on the council's re-housing abilities which could not be justified? The [consultants'] report suggests a need to supplement the rented supply. There is nothing in the [consultants'] report which at the moment would justify a designated F sales programme on the scale presently proposed."

Having read this discussion paper, Dame Shirley Porter summoned its author and the deputy city solicitor to her office at 9.45 a m on 5 May 1987. She told the author that the paper was not what was required; that the policy was clear; and that the note needed to spell out how it was to be achieved, not give options. She told the deputy city solicitor to obtain leading G counsel's advice. She also required that a revised note be prepared for the chairmen's group meeting that evening.

11 That afternoon, Mr Jeremy Sullivan saw the deputy city solicitor, Mr England and the author of the discussion paper in consultation. He was informed that the majority group wished to target sales in marginal wards for electoral advantage. He advised that the council could not lawfully sell 250 properties per annum in the marginal wards alone. He advised that H properties had to be designated for proper reasons, across the whole of the city and not in particular wards and that, in identifying properties to be designated, the same criteria had to be applied across the whole city and, ultimately, choice made without reference to anything other than those proper criteria. He also advised on a number of other matters, including the

legality of a scheme of capital grants which was not ultimately adopted. Following this consultation, Mr England wrote a note to Dame Shirley Porter suggesting action in relation to the matters identified in the discussion paper. The note was relayed to the chairmen's group at its meeting on the evening of 5 May 1987. That meeting was attended (among others) by Dame Shirley Porter, Mr Weeks and Mr Hartley. In interview on 5 November 1992, in his affidavit and in cross-examination Mr England accepted that Mr Sullivan had not advised that marginality of a ward was a proper factor when designating for sale. In the course of his note Mr England stated:

> "The housing committee has already decided that the designated sales target should be 'at least 250' . . . Counsel advises that designated estates should be identified in both marginal and non-marginal wards in order to protect the council. The Group will, therefore, need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300–350 properties will need to be sold across the city. This will clearly exacerbate the problems of dealing with housing demand . . .
>
> "The target set by the housing committee is 'at least 250'. Counsel advises that this cannot be targeted solely in key wards, therefore, the Group will have to decide whether the final target is 250 or some greater figure which would yield 250 in the marginal wards. Counsel also advises that reference to affordable housing contained in the [consultants'] study should be included in the report. This report has now been released to the opposition.
>
> "The housing committee has set a target of at least 250. If the Group wishes to go for a larger global target in order to achieve 250 in the marginal wards, this will require a decision by the committee. Counsel confirms that the report should be considered at the same meeting."

On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course described in Mr England's note of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards.

12 On 13 May 1987, Dame Shirley Porter was re-elected leader and Mr Weeks deputy leader of the majority party. Dame Shirley Porter appointed Mr Weeks as lead chairman for BSC with responsibility for ensuring that its performance met time-scales. She appointed Mr Hartley to be chairman of the housing committee.

13 The chairmen's group met on 13–14 June 1987. In a note by Dame Shirley Porter presented to the meeting it was stated that:

> "We face a tremendous challenge. The electoral register for the 1990 elections will be compiled in just over *two* years' time. Some very ambitious policies must be implemented by then: providing a great deal of affordable housing in key areas; protecting the electoral base in other areas . . . There is very little time to achieve these radical policy objectives . . ."

A In a note by Dame Shirley Porter on BSC the key elements of the policy were summarised. One of these was the targeting of key areas, under which heading the voter targets for the eight marginal wards, in the total of 2,200 voters already mentioned, were listed. The note said that:

> "A key element in BSC must be to attract homeowners into Westminster. This means finding innovative ways of ensuring that the
B right sort of housing is available to the right sort of buyer or tenant. And it must be available by October 1989."

October 1989 was the qualifying date for inclusion in the electoral register for the 1990 local government elections. At this meeting the chairmen's group endorsed the target of 500 sales per annum across the council area in order to produce the number of sales desired in the marginal wards.
C Mr Hartley, the new chairman of the housing committee, knew that the policy for designated sales which he had to carry forward was to produce 250 sales in the marginal wards, in order to improve the Conservative vote in those wards. The target of 500 was passed on to officers, and members agreed that they would select at the housing committee the estates they wished to see designated for sale. A meeting was held on 6 July 1987, two
D days before the housing committee was to meet, attended by Dame Shirley Porter, Mr Weeks, Mr Hartley and others to discuss how to monitor the impact of BSC policies on each key ward in the context of electoral considerations and to monitor targets for such policies including designated sales. It was recorded that "the leader reaffirmed the agreed BSC programme of action as agreed by chairmen as an all embracing strategic council policy with priorities for BSC initiatives" and that both she and Mr Hartley "felt
E that the city council had an agreed plan of action which could be clearly understood and implemented by officers".

14 At the meeting of the housing committee on 8 July 1987, Mr Hartley presented a joint report in which option 3, designation of sufficient properties to produce 500 sales per annum, was the majority party's preferred option. That option was placed before the committee because
F Dame Shirley Porter and Mr Weeks hoped to increase the Conservative vote in marginal wards by selling each year 250 council properties in those wards. They knew, or had every reason to believe, that as adoption of option 3 was Conservative policy, promulgated by Mr Hartley as chairman of the committee, it would become council policy. There was no instance of the housing committee, at this time, not adopting the majority party's policy. Mr Hartley knew that he was promoting this policy in order to produce 250
G sales per annum in the eight marginal wards in order to increase the number of Conservative party voters in them. He also knew that, in supporting this policy, it would be adopted by the housing committee. The committee resolved to designate a number of specific properties for sale which were expected to produce 500 sales per annum. The committee further resolved to introduce a scheme of capital grants. 20,697 properties had been identified in the joint report to the committee as eligible for designation. Of
H these, 5,912 dwellings (29%) were in the eight key wards, 13,633 dwellings (66%) were in the other fifteen wards and there were in addition 1,152 scattered miscellaneous properties. The list of properties to be designated was not recommended by officers; it was presented by the chairman of the housing committee. 9,360 dwellings were designated, including all the

scattered miscellaneous properties. 74% of all eligible dwellings in the eight key wards were designated; only 28% of all eligible properties in the other wards were designated.

15 There were seven Conservative party members who voted at the meeting of the housing committee: Councillors Hartley, Dutt, Warner, Bianco, Buxton, Evans and Hooper. Councillors Hartley, Dutt, Evans, Hooper and Bianco were appointed to be members of the housing committee by Dame Shirley Porter acting as the chairman of the Policy and Resources Committee. For five of these members (Councillors Hartley, Dutt, Evans, Buxton and Hooper) it was the first meeting of the housing committee they had attended as voting members. There were five members of the committee who were members of the Labour Party. Designated sales was the seventh of eighteen items on the agenda. The committee adopted the list proposed by Councillor Hartley by seven votes to five. The Conservative members voted in favour; the opposition members voted against.

16 At a meeting on 29 July 1987 the council received a report from the housing committee. The city solicitor informed the council that a report on designated sales had been prepared following a consultation with leading counsel and that it had been seen and approved by leading counsel before it went to the housing committee. The council voted to receive the report.

17 The achievement of the electoral targets set out in the BSC campaign "plan for action", including those for designated sales, was monitored by the chairmen's group and by members' and officers' steering groups. On 14 September 1987, the chairmen's group decided that the managing director of the council should produce a BSC monitoring report to every other of its meetings, and confidential BSC monitoring reports were produced to such meetings on a number of dates thereafter. The reports considered what progress was being made in each of the eight key wards towards the sales target for that ward in 1987–88. Two reports which were presented to the policy and resources committee of the council, in October 1987 and May 1988, referred to BSC but did not refer to the key wards, the targets established for them or the system established to secure the achievement of those targets. Documents which were intended for public consumption did "not speak to key wards". In 1988, opposition members of the council raised questions about why the key/marginal wards were being monitored. There were deliberate attempts by officers to conceal the system of monitoring which had been established by giving deliberately misleading answers to proper questions from members of the minority party on the council. Under this pressure from the opposition, the BSC members' steering group (which Mr Weeks chaired) sought, but was unable to find, a rationale (other than their electoral marginality) for the selection of the eight key wards. On 12 April 1988 the chairmen's group, with Dame Shirley Porter and Mr Weeks in attendance, were informed that the BSC members' steering group would consider a BSC monitoring report (in the form requested by the chairmen) and a "rationale for key wards" at its meeting on 28 April 1988. Item 3 on the agenda for that meeting was "Rationale for Key Wards". This took the form of a paper by an officer, which did not provide any rationale for the selection of the eight key wards. The minutes recorded that "the paper looked at ways of going public on targeted wards. It was agreed that no such paper should be a formal document; each ward should be taken individually". Mr England's note of the meeting, under "area approach"

A recorded "Minority Party interest . . . not easy to confirm just the 8 . . . Keep on Dodging???". Subsequent attempts were made to find a rationale (other than their electoral marginality) for the eight key wards. On 25 July 1988 Mr England met with Dr Dutt and discussed (among other things) "explanation for eight wards", "public audit . . . can we justify why eight were chosen" and "why did we pick them? Members will ask us", and
B Mr England's action list as a result of the meeting included "key wards—find defence of eight wards". In a memorandum dated 24 August 1988, the city solicitor asked why the eight wards were chosen, by whom they were chosen and why they were regarded as key, but those questions were never answered.

18 On 19 July 1989 the BBC transmitted a "Panorama" programme on the designated sales policy in Westminster. Charts presented to the
C BSC members' steering group after 28 July 1989 recorded rights to buy and designated sales in all 23 wards in the city, not just the eight key wards. The auditor was appointed following objections made by a number of local government electors in letters dated 18 July, 20 July and 8 November 1989.

The underlying legal principles

D 19 The legal principles which underlie the auditor's findings against Dame Shirley Porter and Mr Weeks are not in the main controversial, but since they are the bedrock of his decision they should be briefly summarised.

(1) *Powers conferred on a local authority may be exercised for the public purpose for which the powers were conferred and not otherwise.* A very clear statement of this principle is to be found in *Wade & Forsyth, Administrative Law*, 8th ed (2000), pp 356–357. The corresponding passage
E in an earlier edition of that work was expressly approved by Lord Bridge of Harwich in *R v Tower Hamlets London Borough Council, Ex p Chetnik Developments Ltd* [1988] AC 858, 872:

> "Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely—that is to say, it can validly be used only in the
F right and proper way which Parliament when conferring it is presumed to have intended."

The principle is routinely applied, as by Neill LJ in *Crédit Suisse v Allerdale Borough Council* [1997] QB 306, 333 who described it as "a general principle of public law".

(2) *Such powers are exercised by or on the delegation of councillors. It is*
G *misconduct in a councillor to exercise or be party to the exercise of such powers otherwise than for the public purpose for which the powers were conferred.* Where public powers are conferred on a council, it is the body of elected councillors who must exercise those powers save to the extent that such exercise is lawfully delegated to groups of councillors or to officers. All will act in the name or on behalf of the council. It follows from the
H proposition that public powers are conferred as if upon trust that those who exercise powers in a manner inconsistent with the public purpose for which the powers were conferred betray that trust and so misconduct themselves. This is an old and very important principle. It was clearly expressed by the Lord Chancellor of Ireland in *Attorney General v Belfast Corpn* (1855) 4 Ir Ch R 119, 160–161:

"Municipal corporations would cease to be tangible bodies for any purpose of redress on account of a breach of trust, if the individuals who constitute its executive, and by whom the injury has been committed, cannot be made responsible. They are a collection of persons doing acts that, when done, are the acts of the corporation, but which are induced by the individuals who recommend and support them; and this court holds that persons who withdraw themselves from the duties of their office may be rendered equally answerable for the acts of those whom they allow, by their absence, to have exclusive dominion over the corporate property . . . As the trustees of the corporate estate, nominated by the legislature, and appointed by their fellow-citizens, it is their duty to attend to the interests of the corporation, conduct themselves honestly and uprightly, and to see that every one acts for the interests of the trust over which he and they are placed."

(3) *If the councillors misconduct themselves knowingly or recklessly it is regarded by the law as wilful misconduct.* The auditor's power to surcharge councillors under section 20(1)(b) of the 1982 Act is dependent on a finding of wilful misconduct. That expression was defined by Webster J in *Graham v Teesdale* (1981) 81 LGR 117, 123 to mean "deliberately doing something which is wrong knowing it to be wrong or with reckless indifference as to whether it is wrong or not". That definition was approved by the Court of Appeal in *Lloyd v McMahon* [1987] AC 625, 646–647, 655 and 674 and by the House of Lords, at pp 697 and 702. It was adopted by the Divisional Court in the present case 96 LGR 157, 167–168. It was also accepted by the Court of Appeal: ante, pp 385E–386A. There was no challenge to this definition before the House and I would accept it as representing the intention of Parliament when using this expression.

(4) *If the wilful misconduct of a councillor is found to have caused loss to a local authority the councillor is liable to make good such loss to the council.* This is the rule now laid down in section 20(1) of the 1982 Act. But it is not a new rule. A similar provision was expressed in section 247(7) of the Public Health Act 1875 (38 & 39 Vict, c 55), section 228(1)(d) of the Local Government Act 1933 and in section 161(4) of the Local Government Act 1972 (although in the two earlier sections the reference was to "negligence or misconduct" and not to "wilful misconduct"). Even before these statutory provisions the law had been declared in clear terms. One such statement may be found in *Attorney General v Wilson* (1840) Cr & Ph 1, 23–27 where Lord Cottenham LC said:

"The true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purposes of injuring its interests and alienating its property, shall the corporation be estopped in this court from complaining because the act done was ostensibly an act of the corporation? . . . As members of the governing body, it was their duty as the corporation, whose trustees and agents they, in that respect, were, to preserve and protect the property confided to them; instead of which, having previously, as they supposed, placed the property, by the deeds of the 30 May 1835, in a convenient position for that purpose, they take measures for alienating that property,

A with the avowed design of depriving the corporation of it; and, with this view, they procure trusts to be declared, and transfers of part of the property to be made to the several other defendants in this cause, for purposes in no manner connected with the purposes to which the funds were devoted, and for which it was their duty to protect and preserve them. This was not only a breach of trust and a violation of duty towards the corporation, whose agents and trustees they were, but an act of B spoliation against all the inhabitants of Leeds liable to the borough rate; every individual of whom had an interest in the fund, for his exoneration, pro tanto, from the borough rate. If any other agent or trustee had so dealt with property over which the owner had given him control, can there be any doubt but that such agent or trustee would, in this court, be made responsible for so much of the alienated property as could not be C recovered in specie? But if Lord Hardwicke was right in the *Charitable Corpn* case, and I am right in this case, in considering the authors of the wrong as agents or trustees of the corporation, then the two cases are identical. I cannot doubt, therefore, that the plaintiffs are entitled to redress against the three trustees and those members of the governing body who were instrumental in carrying into effect the acts complained of; and it is proved that the five defendants fall under that description." D

(5) *Powers conferred on a local authority may not lawfully be exercised to promote the electoral advantage of a political party.* Support for this principle may be found in *R v Board of Education* [1910] 2 KB 165, 181 where Farwell LJ said:

> "If this means that the Board were hampered by political E considerations, I can only say that such considerations are pre-eminently extraneous, and that no political consequence can justify the Board in allowing their judgment and discretion to be influenced thereby."

This passage was accepted by Lord Upjohn in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, 1058, 1061. In *R v Port Talbot Borough Council, Ex p Jones* [1988] 2 All ER 207, 214, where F council accommodation had been allocated to an applicant in order that she should be the better able to fight an election, Nolan J regarded that decision as based on irrelevant considerations.

20 Counsel for Dame Shirley Porter and Mr Weeks urged upon the House what were said to be the realities of party politics. Councillors elected as members of a political party and forming part of that party group on the council could not be expected to be oblivious to considerations of party G political advantage. So long as they had reasons for taking action other than purely partisan political reasons their conduct could not be impugned. Reliance was placed on observations of Kennedy LJ in the Court of Appeal, ante, p 386D–E:

> "Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the H possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct. That seems to me to be unreal. In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it. In most cases they cannot seriously be expected to disregard it, but they know that if the

action which they take is to withstand scrutiny (to be 'judge-proof') there must be sound local government reasons, not just excuses, on which they can rely."

Schiemann LJ, ante, pp 390C–D, 391C–D, spoke to similar effect:

"Whether or not the decision of the housing committee was unlawful depends, in the circumstances of this case, on the motivation of the committee at the time of the vote. If its motive was purely to secure electoral advantage for the Conservative Party then the decision was unlawful. If purely Housing Act considerations were its motivation then its decision would be lawful . . . There is a complication. Frequently individual persons act from mixed motives. Further, group decisions may have multiple motivations—in part because there are many votes cast and in part because each voter may himself have several motivations . . . It is legitimate for councillors to desire that their party should win the next election. Our political system works on the basis that they desire that because they think that the policies to which their party is wedded are in the public interest and will require years to be achieved. There is nothing disgraceful or unlawful in councillors having that desire. For this court to hold otherwise would depart from our theory of democracy and current reality."

21 Whatever the difficulties of application which may arise in a borderline case, I do not consider the overriding principle to be in doubt. Elected politicians of course wish to act in a manner which will commend them and their party (when, as is now usual, they belong to one) to the electorate. Such an ambition is the life blood of democracy and a potent spur to responsible decision-taking and administration. Councillors do not act improperly or unlawfully if, exercising public powers for a public purpose for which such powers were conferred, they hope that such exercise will earn the gratitude and support of the electorate and thus strengthen their electoral position. The law would indeed part company with the realities of party politics if it were to hold otherwise. But a public power is not exercised lawfully if it is exercised not for a public purpose for which the power was conferred but in order to promote the electoral advantage of a political party. The power at issue in the present case is section 32 of the Housing Act 1985, which conferred power on local authorities to dispose of land held by them subject to conditions specified in the Act. Thus a local authority could dispose of its property, subject to the provisions of the Act, to promote any public purpose for which such power was conferred, but could not lawfully do so for the purpose of promoting the electoral advantage of any party represented on the council.

22 The House was referred to a number of cases in which the part which political allegiance may properly play in local government has been explored: *R v Sheffield City Council, Ex p Chadwick* (1985) 84 LGR 563; *R v Waltham Forest London Borough Council, Ex p Baxter* [1988] QB 419; *Jones v Swansea City Council* [1990] 1 WLR 54; *R v Bradford City Metropolitan Council, Ex p Wilson* [1990] 2 QB 375; *R v Local Comr for Administration in North and North-East England, Ex p Liverpool City Council* [2001] 1 All ER 462. These cases show that while councillors may lawfully support a policy adopted by their party they must not abdicate their

A responsibility and duty of exercising personal judgment. There is nothing in these cases to suggest that a councillor may support a policy not for valid local government reasons but with the object of obtaining an electoral advantage.

The findings made against Dame Shirley Porter and Mr Weeks

B 23 Reference has already been made to the detailed and protracted investigation conducted by the auditor. Details are given in the judgment of the Divisional Court 96 LGR 157, 161–162. He made very lengthy findings. The Divisional Court in its turn received a mass of written material, heard evidence from Dame Shirley Porter and Mr Weeks and conducted a hearing extending over 23 sitting days. The decision of the auditor and the C Divisional Court adverse to Dame Shirley Porter and Mr Weeks rested on four main findings.

24 The first of these findings was that the Westminster City Council adopted a policy the object of which was to achieve a specified annual level of sales of properties owned by the council in the eight marginal wards with the intention that the properties thus vacated should be sold to new residents who, as owner-occupiers, might reasonably be expected to vote Con- D servative and so increase the electoral strength of the Conservative Party in those wards in the 1990 council elections. The auditor put his conclusions on this point in a number of different ways. It is enough to quote paragraph 53(2)(d)(v) of his summary of his findings and views:

> "both the decision to increase the number of designated sales and the selection of the properties designated for sale were influenced by an E irrelevant consideration, namely the electoral advantage of the majority party. I have found that the electoral advantage of the majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant consideration which influenced both the decision to increase designated sales by 500 per annum and the selection of properties designated for sale. My view is that the council F was engaged in gerrymandering, which I have found is a disgraceful and improper purpose, and not a purpose for which a local authority may act."

The Divisional Court, at pp 164–165, accepted this conclusion:

> "In the 1986 local government elections the Conservative Party on the G council were returned with a very small majority. With a view to greater success in the 1990 elections, the party formulated a policy of 'building stable communities'. A major element in this policy was to increase designated sales of council properties in eight key marginal wards to potential owner-occupiers. It was believed that owner-occupiers would be more likely to vote Conservative . . . On 8 July 1987 the housing committee, having received a much amended joint report from council H officials, resolved to extend the programme of designated sales so as to produce 500 sales per annum city-wide and introduced a scheme for capital grants of £15,000 to encourage tenants to move. On 29 July 1987 the council refused to overturn the committee's decision. Thereafter, the progress of the policy in marginal wards was monitored."

In the Court of Appeal Robert Walker LJ could see no reason why that court, which had not heard the witnesses, could or should depart from the Divisional Court's findings, which there was ample documentary evidence to confirm and virtually no evidence to contradict. These conclusions are clearly accepted in the agreed findings briefly summarised in paragraphs 4–18 above.

25 Nothing that the House has heard gives any ground for doubting the correctness of the conclusion of the auditor and the Divisional Court on this point. It follows from the legal principles already summarised that the council's policy was unlawful because directed to the pursuit of electoral advantage and not the achievement of proper housing objectives.

26 The decision of the auditor and the Divisional Court adverse to Dame Shirley Porter and Mr Weeks was based, secondly, on the conclusion that they were both party to the adoption and implementation of this unlawful policy.

27 With regard to Dame Shirley Porter the auditor found, at p 417, para 1147 of his decision:

> "I find as a fact that Councillor Lady Porter was one of the members responsible for determining the direction and content of the policy of the majority group on the council. She formulated the '*Strategy to 1990*' which aimed to give top priority in the development of council policies to electoral success. I find that, after the local government elections in May 1986, her top priority was to secure that the Conservative Party was successful in the local government elections for the council in 1990 and she ensured that the policies of the council on matters such as home ownership and homelessness were directed to that end. I find as a fact that she was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For her, the designated sales policy was a means to that end."

The auditor made similar findings concerning Mr Weeks, p 578, paras 1579–1580:

> "I have found that Councillor Weeks was one of the members responsible for determining the direction and content of the policy of the majority group on the council. He was aware of, and supported, the Leader's 'Strategy to 1990' which aimed to give top priority in the development of council policies to electoral success. He was aware of, and supported, the initial housing strategy, evolved after the May 1986 local government elections, which involved concentration of activity in marginal wards to help the Conservative party to win the 1990 local government elections, including increased designated sales. I have found as a fact that he was concerned to secure an increase in the number of home owners and a reduction in the number of homeless households accommodated in marginal (or key) wards by 1990, in order to increase the number of likely Conservative voters in those wards in the 1990 local government elections. For him, the designated sales policy was a means to that end.

A "I have found that thereafter, Councillor Weeks promoted and supported the Leader's 'Strategy to 1990' and a policy of targeting designated sales and other Council policies in marginal wards in order to secure electoral advantage for the Conservative Party."

The Divisional Court reached similar conclusions, at pp 175, 176 and 183:

B "[Dame Shirley Porter] was by title leader of the majority party and by personality a leader not a follower. Targeting marginal wards was, probably from the end of July 1986 at the latest, central to her political objectives, as a succession of contemporaneous documents makes plain . . . [Mr Weeks] said that the idea of targeting designated sales in marginal wards had 'not got to a detailed stage by March 1987': it was still 'pretty loose' and remained so, even after 5 May. Although he was C the lead BSC chairman monitoring the performance of other chairmen, he said he had no direct responsibility for designated sales policy which was a matter 'wholly within the . . . view of the housing committee'. We reject this. As we have said, one of [Dame Shirley Porter's] central objectives from July 1986 was targeting marginal wards and we accept [Mr England's] evidence that, at least from the time of the Segal paper D in January 1987, targeting designated sales in marginal wards was firm political policy. As deputy leader and, as he admitted, one who worked closely with the leader and was 'the details man', [Mr Weeks] was well aware of [Dame Shirley Porter's] objectives and determination and we find that one of his roles was to ensure by supervision that the housing committee fulfilled the objectives of the leader and the E majority party, particularly in targeting designated sales in marginal wards. Whereas in his affidavit he said that key wards were not selected because of their marginality, in his oral evidence he said that marginality was the reason for their selection . . . We find that designated sales in marginal wards was, as [Mr Hartley] put it, very much [Dame Shirley Porter's] 'baby' and it was embraced by the chairmen's group including [Mr Weeks]. We have no hesitation in F finding that the eight wards were identified in early 1987 by members of the majority party *because* they were marginal, albeit that there were also particular problems to be addressed in some of them, such as those in the central activity zone."

In the Court of Appeal Robert Walker LJ summarised the facts at G considerable length, but expressed his conclusion briefly, ante, p 428E–F:

"The overall impression throughout, from mid-1986 to mid-1989, is that the most influential members of the Conservative group on the city council, led by Dame Shirley and Mr Weeks, had electoral advantage as the overriding objective in formulating their housing policy, securing its adoption by the council, and implementing it with high priority given to H the marginal wards."

28 These findings again are clearly accepted in the agreed findings already summarised. There is no reason to doubt their correctness.

29 The third finding crucial to the decision against Dame Shirley Porter and Mr Weeks is that they both knew the designated sales policy targeted on

marginal wards to be unlawful. The auditor found, at p 500 of his decision, paras 1363–1364:

> "I find as a fact that Councillor Lady Porter knew that Council facilities could not lawfully be used for party political purposes and that the council was not entitled to exercise its powers or expend its resources to promote the electoral advantage of her party. As she told Councillor Peter Bradley, in answer to a question from him at a meeting of the council on 10 June 1987: 'As the member well knows, council facilities must not be used for party political purposes.'
>
> "I find as a fact that although Councillor Lady Porter may have believed that leading counsel had advised that the council could lawfully extend its programme of designated sales on the basis of the joint report without acting inconsistently with its statutory duties to the homeless, Councillor Lady Porter knew that it was unlawful and wrong for the council to exercise its powers to secure an electoral advantage for any political party or to gerrymander or, in pursuit of such advantage for her party, she was at least recklessly indifferent as to whether it was right or wrong."

Save for the reference to Dame Shirley Porter's answer to Councillor Peter Bradley, the auditor made identical findings in relation to Mr Weeks, p 584, paras 1597–1598.

30 The Divisional Court made a number of findings on this point, at pp 184–185:

> "[Dame Shirley Porter] failed to explain to us why and by whom the eight wards were identified. In our judgment, this failure is explicable not by the effect of the subsequent passage of time on recollection but by the realisation on her part that the more knowledge of detail which she admitted the more closely she would become identified with a policy of targeting designated sales to enhance Conservative prospects in marginal wards which she knew in 1987 and knows now was unlawful . . . From March 1987 when [Dame Shirley Porter] saw [the city solicitor's] answer to the Greenman questions she knew, as she asserts in her affidavit, that the advantages of sale had to 'be considered not from any ulterior motive but from the standpoint of what is right in view of the council's role as a housing authority'. She told us that she was not surprised by that advice and that she did not understand counsel's advice on 5 May to be any different. If this is true, [Dame Shirley Porter] cannot have thought that the suggestion of increasing the numbers city-wide came from Sullivan, because this would have left untouched the continuing ulterior motive in relation to marginal wards which [the city solicitor] had advised against. Clearly there was nothing in Sullivan's advice, as reported by [Mr England], which legitimated designated sales targeted in marginal wards. Indeed, on 10 June [Dame Shirley Porter] answered a question at a council meeting in these terms: 'Council facilities must not be used for party political purposes'. As all members and officers of the council well knew, council properties could not be sold for these purposes. [The city solicitor's] view expressed to the auditor, was that 'everyone in the Conservative Party in Westminster would have known that they could not take party political advantage into account in deciding this policy' . . .

> Because [Dame Shirley Porter] and [Mr Weeks] knew the targeting policy was unlawful they were content, without further inquiry of Sullivan, [Mr England], [the deputy city solicitor] or anyone else, to adopt the suggestion in [Mr England's] note that it be dressed up in city-wide clothes: neither claims this was a proper course. Their purpose throughout was to achieve unlawful electoral advantage. Knowledge of the unlawfulness and such deliberate dressing-up both inevitably point to, and we find, wilful misconduct on behalf of each of them."

In the Court of Appeal Robert Walker LJ concluded, ante, p 431E, that Dame Shirley Porter cannot at any stage have believed that targeting marginal wards for electoral advantage was a lawful use of council resources, and that the position was similar but even clearer in relation to Mr Weeks.

31 Both Dame Shirley Porter and Mr Weeks, in their respective printed cases, accept that they knew that the council could not use its powers for electoral advantage. They plainly did know that. It follows, subject to the points discussed below, that in adopting and implementing the designated sales policy both acted in a way they knew to be unlawful.

32 Fourthly, it was found that the designated sales policy promoted and implemented by Dame Shirley Porter and Mr Weeks caused financial loss to the council. The auditor's conclusion (p 499, para 1361) was as follows:

> "The fact that Councillor Lady Porter was not present at the meeting of the housing committee on 8 July 1987 or at the meetings of the Appointed Members' Panels on 4 September 1987, and did not, at those meetings, vote for the extended designated sales policy, which she had sought to procure, does not mean that she was not responsible for the consequences of those decisions. Without Councillor Lady Porter's promotion and support there would have been no proposal put to the housing committee for an increased programme of designated sales, targeted in the key/marginal wards and on the scale proposed. I find as a fact that she was one of those responsible for the decisions taken and the consequences which ensued. The resulting financial consequences were caused, in my view, by her misconduct."

An identical finding was made in relation to Mr Weeks: p 583, para 1595. The Divisional Court found 96 LGR 157, 204, that such loss as resulted to the council from the decisions taken by the housing committee and the council in July 1987 was caused by the wilful misconduct of Dame Shirley Porter and Mr Weeks. In the Court of Appeal Robert Walker LJ, ante, p 439B accepted that conclusion. But Dame Shirley Porter and Mr Weeks have raised an issue on causation which it is necessary to consider in more detail below.

33 In argument before the House, counsel for Dame Shirley Porter and Mr Weeks raised a large number of points in resistance to the auditor's appeal. The three most substantial of these arguments are considered in the sections which follow.

Reliance on legal advice

34 On behalf of Dame Shirley Porter and Mr Weeks it was argued before the House that whatever the lawfulness or unlawfulness of the

designated sales policy they acted, in promoting it after 5 May 1987, in accordance with what they believed to be legal advice given to the council and were accordingly not guilty of wilful misconduct. A

35 The auditor's findings on this matter in relation to Dame Shirley Porter were set out in paras 1362 and 1366 of his decision, at pp 499–500:

> "I find as a fact that Councillor Lady Porter did not act reasonably or in the belief that any expenditure resulting from the decisions of the housing committee and the appointed Members' Panels, was authorised by law. Councillor Lady Porter did not receive any legal advice which could have led her to believe that it was open to the council to engage in gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. She does not claim that the council was engaged in gerrymandering or in exercising its powers to secure an electoral advantage for the Conservative Party. She does not claim that she received legal advice that it was lawful for the council to engage in gerrymandering or to exercise its powers to secure an electoral advantage for the Conservative Party. On the contrary, she received legal advice from the City Solicitor that the council was not entitled to exercise its powers for an ulterior purpose. Neither this advice nor the advice from Mr Sullivan QC gave any support for targeting designation in the key/marginal wards to promote the electoral advantage of the Conservative Party. As Councillor Lady Porter was aware, that could not lawfully be done.
>
> "I am further strengthened in my conclusion by the evasive, false and misleading evidence given to me by Councillor Lady Porter in interview as to the reason for the selection of the eight key wards, the nature of the targets adopted and the monitoring which took place against those targets and by the misleading answers she gave in response to questions at Council meetings. Councillor Lady Porter did not admit that the designated sales policy was introduced for the purpose of securing electoral advantage for the Conservative Party in the 1990 local government elections in the City of Westminster. If Councillor Lady Porter had believed that the policy of adopting an extended programme of designated sales in order to secure electoral advantage for the Conservative Party was legally acceptable and supported by legal advice, she had ample opportunity to tell me that this was what the council was doing and that she had received legal advice that it was lawful for the council so to do."

B C D E F

In relation to Mr Weeks, very similar findings were made in paras 1596 and 1600, at pp 583–585. G

36 The Divisional Court found as follows, at p 179:

> "The position of [Dame Shirley Porter] in relation to legal advice was initially, as reflected in the opening skeleton argument on her behalf, that she never sought or received advice which could have led her to believe that it was open to the council to exercise its powers to secure an electoral advantage for the majority party. In her affidavit she said her duty as a councillor was 'to decide matters in council only upon considerations relevant to local government factors identified by officers' . . . She also said that [the city solicitor's] advice that there must not be any ulterior motive came as no surprise in the light of her experience and she did not

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A understand leading counsel's advice on 5 May to have differed from that of [the city solicitor]. In the light of this evidence, although we accept that [Dame Shirley Porter] was always anxious to obtain and follow legal advice, it is, in our judgment, impossible for [Dame Shirley Porter] to contend that she believed at any stage that targeting marginal wards for electoral advantage was legally permissible."

B The Divisional Court then, in relation to Mr Weeks, found, at p 179:

"[Mr Weeks's] evidence in cross-examination was that, as a result of counsel's advice on 5 May it was clear 'that you could not just designate for 250 in the marginal wards' and that he greeted that advice 'with some relief' because a major aspect of contentiousness could be removed. He said that, following counsel's advice, he and other members 'immediately C abandoned' talk of designating blocks in marginal wards and the lists produced 'after 5 May were constructed on other grounds'. Whether that evidence is credible we shall consider later. But it provides no basis whatever for suggesting that, if [Mr Weeks] continued to be party to a scheme for targeting designated sales in marginal wards for electoral advantage, he did so in reliance on legal advice."

D 37 In the Court of Appeal Robert Walker LJ, in a passage to part of which reference has already been made, said, ante, p 431B–E:

"The way in which Dame Shirley's case has been presented has varied from time to time. Only in this court, I think, has much emphasis been placed on her reliance on legal advice. In her oral evidence she said that she was well aware that local authority resources must not be used for E party political ends, and that the legal advice which she received came as no surprise to her. She also said that it never occurred to her to ask to see Mr Sullivan's advice in writing. She did not contend, either in her oral evidence or through her counsel (apart from drawing attention to [the city solicitor's] unfortunate references to devising or constructing arguments), that she was relying on any legal advice to the effect that an unlawful policy could be made lawful by camouflage. On the basis of Mr England's F 'Note to Leader' it seems likely that Mr Sullivan's unambiguous advice was distorted in the course of transmission to Dame Shirley, although in the absence of any minutes of the meeting of the chairmen's group on the evening of 5 May 1987 (at which Mr England was present) it is impossible to gauge the degree of distortion. But as the Divisional Court found, she cannot at any stage have believed (either in reliance on legal G advice or otherwise) that targeting marginal wards for electoral advantage was a lawful use of council resources."

As already noted, Robert Walker LJ considered the position of Mr Weeks to be similar but if anything even clearer.

38 Counsel for Dame Shirley Porter and Mr Weeks naturally placed much reliance on the contrary views expressed by the majority in the Court H of Appeal. In the course of his judgment, ante, pp 387–388, Kennedy LJ said:

"I remind myself that the Divisional Court had the advantage of seeing the two appellants, as well as others, when they gave evidence, and clearly that court was not particularly impressed by these two appellants, but

what I cannot follow is how the court was able to find these appellants guilty of wilful misconduct having regard to its conclusions in relation to those important factual issues which I set out at the beginning of this section of the judgment, conclusions which led the court to conclude that three out of five appeals must be allowed. I recognise that long before 5 May 1987 Dame Shirley, but not Mr Weeks, had received legal advice from [the city solicitor], but on 5 May 1987 the possibility of targeting sales in marginal wards for political gain was put to leading counsel of considerable standing. Mr England, who received and reported upon counsel's advice, was led to believe that designating city-wide would not be unlawful merely because it met Dame Shirley's objective of 250 in marginal wards. The judgment of the Divisional Court simply does not explain why the advice of leading counsel did not affect Dame Shirley and Mr Weeks as it affected Mr England, and for that matter Mr Hartley and Mr Phillips, and I cannot make good the omission because there seems to have been no reason to make any distinction. The Divisional Court said that the purpose of the appellant throughout was 'to achieve unlawful electoral advantage'. The use of the word 'unlawful' begs the question. Their submission is that having taken legal advice they, like the others, believed that electoral advantage could lawfully be pursued by the route envisaged in Mr England's report of his consultation with Mr Sullivan, and thereafter the route chosen was, they believed, entirely legitimate . . . I recognise, of course, that in the Divisional Court the appellants contended that the great increase in the number of designated properties was not promoted in order to achieve 250 sales per annum in marginal wards, and that the Divisional Court held otherwise, but in all essential matters the records speak for themselves. On 5 May 1987 counsel and the officers who attended on him knew all there was to know about Dame Shirley's ambition as to sales in marginal wards. The Divisional Court was critical of both appellants for saying that, in the light of Mr Sullivan's advice, the policy was abandoned. The court said, 96 LGR 157, 185, that they 'lied', but on any view option 3 was not the proposal which Mr Sullivan was asked to consider. It was only formulated as a result of his advice. As Mr McMullen pointed out, those who wish to offend against the law do not usually consult lawyers of good reputation, give them access to all relevant information, and then act in accordance with their understanding of the lawyer's advice, arranging for further advice to be obtained as events progress. In most cases where a breach of section 20 has been found proved, the evidence shows an unwillingness to obtain or a defiance of legal advice. That is not this case."

Schiemann LJ, ante, p 394E–F, said:

"As the division of opinion in this court shows, there is no doubt that the borderline between what is permissible and what is not permissible in the context of what Dame Shirley was trying to achieve is not easily perceived by lawyers and even less easily perceived by laymen. It is clear to me that Dame Shirley was seeking to avoid doing anything illegal and that this was the reason why she laid bare her hopes to her legal advisers and asked for legal advice."

A 39 The issue of inconsistency of findings is one which I consider separately below. The issue here is whether the majority of the Court of Appeal had any sustainable grounds for rejecting the very clear conclusions reached by the primary fact-finders, the auditor and the Divisional Court. Before the auditor Dame Shirley Porter and Mr Weeks did not contend that they had pursued the designated sales policy on legal advice. At that stage they were seeking to distance themselves from the policy. In the Divisional B Court they contended that the policy had been abandoned after 5 May 1987, a contention found by that court to be dishonest and untrue. Only in the Court of Appeal was the case made that reliance had been placed on legal advice, as Robert Walker LJ pointed out in the passage quoted in paragraph 37 above. It is not clear to me how the Court of Appeal majority felt able to reject the very clear findings of the auditor and the Divisional Court, which C in my opinion are entitled to stand. But I draw attention to two particular, in my view fatal, weaknesses in the majority reasoning. First, it is simply not true that Mr Sullivan was given access to all relevant information or that Dame Shirley laid bare her hopes to her legal advisers. Mr Sullivan received no written instructions and gave no written advice. There were two questions which the council should have put to him. The first was whether it was lawful to promote a policy of designating council properties for sale in D marginal wards for the purpose of securing an electoral advantage for the majority party at the forthcoming council elections. That question was put to Mr Sullivan and he answered it in the negative, as he was bound to do. The second, follow-up, question should have been whether, if that policy would be unlawful, the policy would become lawful if, with the same objective, and in order to conceal the targeting of sales in marginal wards, E the designated sales policy were extended across the City of Westminster. That question was never put. No one, including Dame Shirley Porter and Mr Weeks, could have had any doubt at all what the answer would have been if it had. Mr Sullivan was never told of the course on which the council proposed to embark or had embarked. The second weakness is found in the history of pretence, obfuscation and prevarication which surrounded the policy from May 1987 onwards. If the policy was genuinely believed to be F lawful, albeit controversial, there was no need for such intensive camouflage.

40 I can for my part see no reason to question the very clear findings made by the auditor and the Divisional Court on this question.

Inconsistency

G 41 The auditor's findings of wilful misconduct against Mr Hartley, Mr England and Mr Phillips were not upheld by the Divisional Court, and it is argued on behalf of Dame Shirley Porter and Mr Weeks that they cannot fairly or rationally be found liable if those others are to be exonerated. The inconsistency, as he saw it, of the Divisional Court findings was the main ground upon which Kennedy LJ allowed the appeal by Dame Shirley Porter and Mr Weeks.

H 42 In the case of Mr Hartley the Divisional Court found his conduct to be unlawful and so to amount to misconduct because of the improper motives of others of which he was aware. But the Divisional Court was prepared to accept that he did not appreciate the unlawfulness of his conduct and genuinely believed that his own overriding belief in wider home

ownership rendered his conduct lawful: p 199. It accordingly found that his misconduct was not wilful.

43 In the case of Mr England the Divisional Court found that he was not guilty of wilful misconduct down to 8 July 1987, whatever his doubts and equivocations, and although critical of his conduct thereafter the Divisional Court did not find him guilty of wilful misconduct: p 195.

44 The Divisional Court found that Mr Phillips was guilty of misconduct. But it was not prepared to conclude that he must have known that what was proposed was unlawful as well as improper: p 202. The Divisional Court considered whether he was reckless. In the results it was not satisfied to the standard required that he had been reckless: p 203.

45 Robert Walker LJ found this the most difficult aspect of the whole case and it caused him some anxiety (p 437F) and unease (p 439A–B) and he thought there had perhaps been some element of mercy in the Divisional Court's conclusions: pp 437, 438. But he could not say they were not conclusions which were open to the Divisional Court (p 439A–B). I share Robert Walker LJ's anxiety and unease. It is understandable that the Divisional Court was reluctant to be excessively critical of officers, who were subject to considerable pressure from elected members, as the Divisional Court pointed out: p 186. Mr Hartley's conduct does not earn that measure of indulgence. But the Divisional Court had the advantage of hearing these three witnesses. It was rightly alert to the high standard required before a finding of this gravity could be sustained. It may very well be that Messrs Hartley, England and Phillips were fortunate to be exonerated, to the limited extent that they were exonerated. But the findings made against Dame Shirley Porter and Mr Weeks were, in truth, very strong. They were the leader and deputy leader of the council, and were respectively the prime architect and midwife of this policy. I am satisfied that no injustice is done to either of them by upholding the findings of the auditor and the Divisional Court.

Causation

46 At the forefront of their submissions on behalf of Dame Shirley Porter and Mr Weeks counsel advanced an argument to the effect that whatever the impropriety or unlawfulness of their clients' purpose and motive this did not render the decision of the housing committee on 8 July 1987 unlawful. That was a decision lawfully made by the members of the committee (not including Dame Shirley Porter and Mr Weeks) for lawful housing reasons, untainted by the unlawful designated sales policy, and accordingly anything which happened thereafter was not attributable to any unlawful motivation on the part of Dame Shirley Porter and Mr Weeks. As Schiemann LJ made plain, ante, pp 393D–395E of his judgment, this was an argument which particularly impressed him (although he made plain, ante, p 395D–E, that he did not accept that Dame Shirley Porter had been either dishonest or improperly motivated). In my opinion this argument must be rejected. It is an agreed fact (recited in paragraph 14 above) that once the city-wide designated sales policy had been adopted by the majority party it was to all intents and purposes bound to be approved by the committee. The auditor concluded (p 325 of his decision, para 885):

A "In the event that taking into account party electoral advantage does not invalidate a decision unless it becomes the dominant factor, I give my view as to whether party electoral advantage was such a dominant factor. I have concluded that the overwhelming inference to be drawn from the evidence is that party electoral advantage was the dominant consideration which influenced the housing committee in reaching a B decision to adopt option 3 (increase designated sales by 500 per annum) and in selecting the properties designated for sale. I find as a fact that the electoral advantage of the majority party was the driving force behind the policy of increased designated sales and that that consideration was the predominant consideration which influenced both the decision to adopt option 3 and the selection of the properties designated for sale."

C The conclusion of the Divisional Court on the committee's decision of 8 July 1987 (at p 181) is one that I would, for my part, accept:

"In our view this decision was substantially influenced by a wish to alter the composition of the electorate by increasing the Conservative vote in marginal wards by the sale of council properties, and was therefore D unlawful. The policy proposed at the meeting by [Mr Hartley] and adopted by the committee was one which gave effect to this purpose, whatever may have been the reasons for the votes of individual members. It is perfectly possible, in law and common sense, for a corrupt principal to cause a result through an innocent agent or (in the context discussed by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385) a dishonest third party to be liable for a breach of E trust perpetrated by a trustee acting innocently. In the present case, whatever the reasons of individual members for voting as they did, the option for which they voted was placed before the committee, in part at least, in order to achieve the improper purpose to which we have referred."

47 If however it is appropriate to inquire into the motivation of the F majority party members who voted for option 3 in the committee on 8 July 1987, the conclusion does not assist Dame Shirley Porter and Mr Weeks. Whatever his own reasons for supporting that option, Mr Hartley was very well aware of the purpose which underlay the policy. He was, as already noted, found guilty of misconduct by the Divisional Court. In the auditor's decision he said that the late Dr Dutt, who was vice-chairman of the G committee,

"was also aware of the objective to increase the majority party's voting strength in marginal wards by the adoption of an extended programme of designated sales in those wards. In my view, he took into account the electoral advantage of the Conservative Party and sought to promote it in his voting and otherwise."

H (The auditor in his provisional findings expressed conclusions adverse to Dr Dutt, who disputed those findings and took his own life. The auditor, in his decision, made no finding of personal liability against Dr Dutt.) If those two tainted votes are discounted, the majority party had no majority of votes on the committee. The auditor found that Councillor Warner tried to

exercise an independent judgment but was influenced by the joint report laid before the committee (which contained no hint of the true purpose of the policy) and by the views of Mr Hartley (p 323, para 879). The same finding was made in relation to Councillors Bianco and Hooper, save that they were unable to and did not exercise any independent judgment in relation to adoption of the list of properties for designation circulated at the meeting, which had been devised by officers working with the chairman to achieve target numbers of sales in certain marginal wards in order to secure an electorate advantage for the majority party in those wards (pp 323–324, para 880). In the case of Councillors Evans and Buxton the auditor found that they neither sought to exercise nor exercised any independent judgment in relation to voting for the adoption for option 3: they simply relied on the joint report and the views of Mr Hartley. The inescapable truth is that while the chairman and vice-chairman of the committee knew of the purpose which underlay option 3, the back bench members were in no position to exercise an informed independent judgment because they were never given a clear picture of why the policy had been adopted and what it was intended to achieve. The committee was used by the party leadership to secure approval of a policy of which the purpose was never fully explained. In my opinion there was no informed exercise of independent judgment by members of the committee such as could break the chain of causation between the conduct of Dame Shirley Porter and Mr Weeks and the consequences which followed.

The liability of Dame Shirley Porter and Mr Weeks

48 The Divisional Court's findings adverse to Dame Shirley Porter and Mr Weeks, reached on a mass of evidence, were fully justified, if not inevitable. The Court of Appeal majority erred in departing from them. The passage of time and the familiarity of the accusations made against Dame Shirley Porter and Mr Weeks cannot and should not obscure the unpalatable truth that this was a deliberate, blatant and dishonest misuse of public power. It was a misuse of power by both of them not for the purpose of financial gain but for that of electoral advantage. In that sense it was corrupt. The auditor may have been strictly wrong to describe their conduct as gerrymandering, but it was certainly unlawful and he was right to stigmatise it as disgraceful.

Preparation of papers

49 The auditor held Dame Shirley Porter and Mr Weeks responsible for a sum amounting (with interest) to £10,126 attributable to the cost of preparing papers relating to the promotion of the electoral advantage of the majority party. The basis of his finding was that this was an unlawful misuse of the time of council officers. There is no dispute concerning the quantum of this sum. The Court of Appeal held by a majority that since Dame Shirley Porter and Mr Weeks did not transgress, the cost of preparing these papers could not be laid at their door: ante, p 389C–D. For reasons already given, I would hold that they did transgress and would hold them liable to make good this sum.

A *Quantum*

50 The power of local authorities to dispose of land held by them under section 32(1) of the Housing Act 1985 was subject to the consent of the secretary of state. By section 34(2) of that Act the secretary of state's consent could be given generally, and was so given by a ministerial letter issued in 1981 and continuing to have effect under the 1985 Act by virtue of B section 2(2) of the Housing (Consequential Provisions) Act 1985. By paragraph B(2) of this letter it was stated:

> "A local authority may dispose of any house, if that house is vacant, to any individual who intends to use it as his only or principal home, provided that the disposal is effected for a price, consideration or rent which is equal to the current market value of the house with vacant C possession."

It was also open to a local authority to dispose of properties at a discount of between 30% and 70%, which is what the council in fact did.

51 As explained by the Divisional Court, at p 204 of its judgment, the auditor certified in accordance with section 20(1) of the Local Government Finance Act 1982 that some £31·67m was due jointly and severally from D Dame Shirley Porter and Mr Weeks (in addition, at that stage, to Mr Hartley, Mr England, Mr Phillips and another officer). This was a net sum, arrived at by calculating the gross loss or deficiency and then deducting from that figure the financial benefits enjoyed by the council as a result of the sale of designated dwellings, such as the reduced cost of management and maintenance of the council—owned housing stock. The net sum also E allowed for interest on the net losses. Most of the items in the auditor's computation are not (subject to liability) in dispute. But there is one major issue: the treatment of the discounts allowed by the council on selling designated properties pursuant to what must, for present purposes, be treated as an unlawful policy. The auditor based his calculation on the open market value, with vacant possession, of the properties sold. He did not F reduce his calculated figure of loss to reflect the discounted prices at which the council sold, and at which the council would have sold even if the policy had been a lawful one, if pursuant to a lawful policy the council would have sold at all. On this basis he reached a loss figure under this head of £15·476m.

52 Robert Walker LJ (with, as already noted, the assent of Kennedy LJ on this point) took a different view. He said, ante, p 445D–F:

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> "In this case the relevant element of loss is the loss of part of the council's stock of social housing. It was not a loss in a commercial venture of selling dwellings with vacant possession. In my judgment the Divisional Court erred in its approach. It should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted H social housing. There was ample evidence that the discounted prices did exceed that value, and it is not necessary to go into the subsidiary issue as to Ellis & Co's valuations. Any other approach would, it seems to me, be inconsistent with the auditor's separate investigation and conclusion as to the additional costs of housing homeless persons which the council had to

incur as a result of its own stock of social housing having been depleted by the designated sales policy."

On this basis he would have disallowed the full sum for which the auditor held Dame Shirley Porter and Mr Weeks liable under this head.

53 Although the sum involved is very considerable, the point which divides the parties is (as it seems to me) a very narrow one. Should the prices at which the council actually sold be compared with the prices at which it would have sold if selling in lawful pursuance of its powers under section 32? If so, it has suffered no loss under this head. Or should the prices at which the council actually sold be compared with the open market value of the properties with vacant possession at the time of sale? If so, it has suffered the loss certified by the auditor.

54 Section 20(1) of the 1982 Act provides for the certification by the auditor of the amount of a loss or deficiency incurred or caused by the wilful misconduct of any person. It is that amount which is due and recoverable for the benefit of the body which has suffered the loss or deficiency. The underlying principle is one of compensation, to put the body which has suffered the loss or deficiency in the same position as it would have been in had the wilful misconduct which caused the loss or deficiency never occurred.

55 In this case the council was the freehold owner of a number of properties. The wilful misconduct of Dame Shirley Porter and Mr Weeks caused the sale of some of those properties pursuant to an unlawful policy of designated sales. Thus the council parted with those properties. The council did not lose the full market value of the properties because it received discounted prices for them. But it lost the difference between the full market value of the properties and the discounted prices received. Had the council wished to replace the properties sold under the unlawful policy it would have had to pay the full market value of comparable properties. I do not think it is open to those responsible for an unlawful sales policy to contend that if the properties had been sold under a lawful policy they would have been sold at equally discounted prices since, if the policy of the council had been lawful the council might never have sold the properties at all, and it is in any event a matter for the owner of an asset to decide whether he will exploit its value to the maximum extent or not. A wrongdoer is not entitled to reap the benefit of a benign policy which might, but only might, have been pursued by the owner had it not been unlawfully deprived of the asset.

56 I do not for my part detect any element of double counting in the auditor's calculation, which is in my opinion correct.

Impartiality, fairness and delay

57 Before the Divisional Court and in the Court of Appeal Dame Shirley Porter and Mr Weeks challenged the impartiality of the auditor, the fairness of his investigation and the time taken to carry out the audit. This challenge was very fully considered by the Divisional Court, but failed both in that court and in the Court of Appeal. The challenge has been further pursued before the House. It must in my opinion be rejected for the detailed reasons given by my noble and learned friend Lord Hope of Craighead.

58 For all these reasons I would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court. The parties (and

A Westminster City Council, if so advised) are invited to make written submissions on costs. I would in conclusion pay tribute to the clear and comprehensive judgment of the Divisional Court.

LORD STEYN

59 My Lords, I am in complete agreement with the opinion of Lord Bingham of Cornhill. I am also in complete agreement with the reasons B given by my noble and learned friend Lord Hope of Craighead in regard to the issues of impartiality, fairness and delay. I would therefore also allow the auditor's appeal and restore the certificate in the sum upheld by the Divisional Court.

LORD HOPE OF CRAIGHEAD

C 60 My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Bingham of Cornhill. I agree with all that he has said on the issue of liability and, subject to some observations of my own, with what he has said on the issue of quantum. I wish to concentrate in this speech with the remaining issues in the case, which are those of impartiality, fairness and delay.

D *Introduction*

61 In the Court of Appeal four matters were identified under the broad heading of unfairness: ante, p 396C–D per Schiemann LJ. These were (a) apparent bias on the part of the auditor, (b) unreasonable delay on the part both of the auditor and on the part of the Divisional Court in confirming the decision by the auditor, (c) failure on the part of the Divisional Court to E hold a fair balance between the auditor and Dame Shirley Porter and (d) breach by the Divisional Court of the presumption of innocence. The Court of Appeal was not persuaded that there had been any unfairness which would justify allowing the appeal.

62 Before your Lordships the respondents have contended that the Court of Appeal should have upheld their appeals on the ground that the F proceedings were unfair, applying common law principles as understood before the coming into force of the relevant provisions of the Human Rights Act 1998. They also contend that the auditor violated their Convention rights and that, as victims, they are entitled to rely directly on those rights under the 1998 Act. In addition they contend that the Divisional Court violated their Convention rights, that these are legal proceedings brought by the auditor and they are entitled to rely on that violation in these G proceedings under the Act. The main thrust of their contentions on the issue of unfairness was directed to their arguments that the auditor lacked the Convention requirements of independence and impartiality, that he gave the appearance of bias contrary to the requirements of the common law and that there was unreasonable delay.

63 Before dealing with the substance of the points raised by these H arguments I must first outline the statutory background and set out the facts. I shall then deal with a preliminary question which must be addressed. This is whether it is open to the respondents to rely directly on the provisions of the Human Rights Act 1998 in this appeal. I shall explain why, notwithstanding the decision of this House in *R v Kansal (No 2)* [2002] 2 AC 69, I consider it appropriate to deal with the merits of

the points which have been raised on the assumption that they can do so. As to the merits, I shall deal first with the questions relating to independence and impartiality and to the appearance of bias on the part of the auditor. I shall then deal with the issue of delay. Finally I shall deal with the points which have been raised about the conduct of the hearing by the Divisional Court.

The statutory background

64 Provision has been made for many years in local government legislation to protect ratepayers against losses caused by unlawful expenditure or wilful misconduct on the part of members or senior officers of local authorities. Procedures were laid down for the audit of local authority accounts and, in the event of unlawful expenditure or wilful misconduct by of a member or senior officer, for the surcharge of that member or officer on a certificate given by the auditor. The provisions which were in force during the period to which this case relates were those in Part III of the Local Government Finance Act 1982. These provisions were repealed by and re-enacted in the Audit Commission Act 1998, but I shall concentrate on those which are to be found in the 1982 Act.

65 Prior to the coming into force of the 1982 Act local authorities and other bodies subject to audit were able to choose whether their accounts should be audited by a district auditor appointed by the Secretary of State or by a private auditor. The Layfield Committee of Inquiry into Local Government Finance (1976) (Cmnd 6453) considered that it was wrong in principle that any public body should be able to choose its own auditor. It recommended that the audit service should be made completely independent of both central government and local authorities, with a head of local audit reporting to a specially constituted higher institution: ch 6, paras 18, 30–31. Section 11 of the 1982 Act provided for the establishment of a body to be known as the Audit Commission for Local Authorities in England and Wales. Section 12 provided that local authority accounts were in future to be subject to audit by an auditor or auditors appointed by the Commission. Section 13 provided that an auditor appointed by the Commission to audit the accounts might be an officer of the Commission, an individual with prescribed qualifications who was not such an officer or a firm of such individuals. Section 14 provided that the Commission was to prepare and keep under review a code of audit practice prescribing the way in which auditors were to carry out their functions under the Act. It was to be laid before Parliament and approved by a resolution of each House. Section 15 sets out the general duties of auditors when auditing accounts in accordance with Part III of the Act. Among these, in terms of subsection (3), is the auditor's duty to consider whether in the public interest he should make a report on any matter coming to his notice in the course of the audit.

66 That, in brief, was the system under which Mr John Magill was appointed by the Commission under sections 12 and 13 of the 1982 Act. His task was to audit the Council's accounts for the years 1987–88 to 1994–95. The Code of Audit Practice for Local Authorities and the National Health Service in England and Wales 1990 stated in paragraph 10 that, in order that his opinions, conclusions, judgments and recommendations would be and would be seen to be impartial, he was to maintain an independent and objective attitude of mind and ensure that his independence was not

impaired in any way. Paragraph 15 of the Code stated that the audit was to be carried out in a professional and timely fashion. His duties and powers in respect of hearing objections by local government electors and in regard to loss due to wilful misconduct were those set out in sections 17, 19 and 20 of the Act.

67 Section 17(1) of the 1982 Act deals with the right of members of the public to inspect the accounts to be audited and all books and other documents relating to them, and subsection (2) of the section provides that at the request of any local government elector the auditor shall give the elector, or any representative of his, an opportunity to question him about the accounts. Sections 17(3) and 17(4) provide:

> "(3) Subject to subsection (4) below, any local government elector . . . or any representative of his, may attend before the auditor and make objections—(a) as to any matter in respect of which the auditor could take action under section 19 or 20 below; or (b) as to any other matter in respect of which the auditor could make a report under section 15(3) above.
>
> "(4) No objection may be made under subsection (3) above by or on behalf of a local government elector unless the auditor has previously received written notice of the proposed objection and of the grounds on which it is to be made."

68 Section 19(1) of the Act provides that, where it appears to the auditor that any item of account is contrary to law, he may apply to the court for a declaration that the item of account was unlawful except where it is sanctioned by the Secretary of State. Where the court is persuaded that it should make the declaration, it has power under section 19(2) to order any person responsible for incurring or authorising the unlawful expenditure to repay it in whole or in part to the body in question, if the expenditure exceeded £2,000 to order the person responsible who was a member of a local authority to be disqualified from being a member of a local authority and to order rectification of the accounts.

69 Section 20(1) of the 1982 Act provides:

> "Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of the meeting) may recover that sum or amount for the benefit of that body; and if the auditor certifies under this section that any sum or amount is due from two or more persons, they shall be jointly and severally liable for that sum or amount."

70 Section 20(2)(b) of the 1982 Act provides that a person who is aggrieved by a decision of an auditor to certify under that section that a sum or amount is due from him may require the auditor to state in writing the reasons for his decision. Section 20(3) provides:

"Any such person who is aggrieved by such a decision may appeal against the decision to the court and—(a) in the case of a decision to certify that any sum or amount is due from any person, the court may confirm, vary or quash the decision and give any certificate which the auditor could have given; (b) in the case of a decision not to certify that any sum or amount is due from any person, the court may confirm the decision or quash it and give any certificate which the auditor could have given; and any certificate given under this subsection shall be treated for the purposes of subsection (1) above and the following provisions of this section as if it had been given by the auditor under subsection (1) above."

Section 20(4) provides for the disqualification of a member of a local authority if a certificate relates to a loss or deficiency caused by his wilful misconduct and the amount due from him exceeds £2,000.

The facts in outline

71 This narrative begins where that set out in paragraphs 4 to 18 of Lord Bingham's speech breaks off. Like him, I have taken much of it from the agreed statement of facts.

72 By letters dated 18 and 20 July 1989 Councillor Neale Coleman, an opposition member of the housing committee, and a number of other local government electors made objections to the auditor under section 17(3) of the 1982 Act and invited him to take action under sections 19 and 20 of the Act and to make a report in the public interest under section 15(3). 28 individuals were named or referred to in the objections as persons against whom the objectors invited the auditor to take action. They included the respondents Dame Shirley Porter and Mr Weeks. By letter dated 8 November 1989 Councillor Coleman made further submissions in support of the original objection and added a further objection. Following receipt of the objections the auditor embarked on an investigation, the main stages of which were as follows.

73 In October 1989 the auditor requested a formal response from the council to the initial objections. The council provided its formal response on 27 November 1989. On 5 December 1989 he asked the Council if it wished to supplement that formal response to deal with the matters raised in the letter of 8 November. On 1 May 1990 the council provided its supplementary response to the auditor. During the period from June to December 1990 he carried out a review of the documentation at City Hall and obtained preliminary legal advice on matters arising from the objection. The documentation was extensive but it was incomplete, and he asked the council to provide further documents. In December 1990 he commenced his programme of interviews. From January to April 1991 he visited council offices to inspect further documents made available by the council, requested further documents and continued his programme of interviews. He completed his initial round of interviews in November 1992. He reviewed the evidence which he had received by that date, obtained further legal advice and in January 1993 began a second round of interviews which lasted from January to July 1993. He found it necessary to conduct further interviews in September and October 1993.

74 On 29 September 1993, at the request of counsel and solicitors acting for Dame Shirley Porter the auditor issued a preliminary provisional

A indication of net expenditure and loss. He invited representations by 15 October 1993. Written submissions on this preliminary indication were made on 15 October 1993 on behalf of Dame Shirley Porter and on 27 October 1993 by Mr Weeks. On 13 January 1994 the auditor gave notice of his provisional findings to ten individuals and provided copies of them to the objectors and to the council. He invited those concerned to indicate B whether they wished him to hold an oral hearing. He made a public statement on the same date which representatives of the media were invited to attend. This statement attracted widespread publicity. Recordings of the auditor reading parts of the statement appeared on television news, and the statement was referred to and discussed in Parliament and the media. Three parties and the council, but not Dame Shirley Porter or Mr Weeks, then requested the auditor to hold an oral hearing and the auditor agreed to do so. C All parties were informed on 25 March 1994 that there would be an oral hearing starting on 17 October 1994.

75 The public statement by the auditor raised questions about his impartiality. Solicitors for Mr Phillips and Dame Shirley Porter applied to the Audit Commission on 29 March and 19 April 1994 to replace Mr Magill with a new auditor. The Audit Commission refused to do so. At a D preliminary meeting on June 1994 applications were made on behalf of Dame Shirley Porter and Mr Phillips that the auditor should disqualify himself from further consideration of the objections. On 7 October 1994 the auditor held a meeting to consider oral submissions on this matter. Written representations in support of the application were made on behalf of, among others, Mr Weeks. Further oral submissions were made on behalf of Dame Shirley Porter on 17 October 1994. The auditor decided that he E should not disqualify himself. He gave his reasons in writing on 18 October 1994.

76 The auditor held an audit hearing which sat for a total of 32 days between 19 October 1994 and 7 February 1995. He received further representations and evidence after the hearing. On 17 August 1995 he circulated a revised provisional calculation of net expenditure and loss. He invited representations on this calculation by 5 October 1995. He received F representations on it from the objectors. The parties were informed by him that notification of the arrangements for the issuing of his decision would be given on 21 March 1996. On 19 March 1996 the solicitors for Dame Shirley Porter wrote to the Audit Commission to request an investigation into the auditor's conduct. On 16 April 1996 the Audit Commission rejected her complaint. On 9 May 1996 the auditor issued his decision on the objections, G in which he issued certificates in the sum of £31·677m against Dame Shirley Porter and Mr Weeks and four others. They appealed to the Divisional Court. The appeal by one of the other four was stayed on the ground of ill health. The appeals by Dame Shirley Porter and Mr Weeks and the other three were heard between 1 October and 4 November 1997. On 19 December 1997 the Divisional Court dismissed their appeals but allowed the appeals by the three others. Their appeals to the Court of Appeal were H heard between 22 and 26 March 1999. On 30 April 1999, the Court of Appeal allowed the appeals by Dame Shirley Porter and Mr Weeks.

77 There are two key points in this history in regard to the respondent's argument about the fairness of the conduct of the proceedings by the auditor and the conduct of the Divisional Court when it dismissed their appeal. The

first relates to the auditor's public statement on 13 January 1994. It is said that his conduct on this occasion gave rise to the appearance of bias on his part which could only be cured in the Divisional Court by quashing his certificate. The second relates to delay. The auditor issued his report and the certificate of surcharge on 9 May 1996. The respondents say that this was 15 months after the conclusion of the audit hearing on 7 February 1995, almost seven years after the objection was made on 18 July 1989, nearly nine years after the decision of the housing committee of 8 July 1987 against which the objection was taken and exactly ten years after start of the events following the local government elections on 8 May 1986. They contend that there had been such excessive delay that for the Divisional Court to quash the decision was the only appropriate remedy.

The Human Rights Act 1998

78 The respondents' argument on unfairness was presented on the assumption that they were entitled under section 22(4) of the Human Rights Act 1998 to rely in these proceedings on an alleged infringement of their Convention rights by acts of the auditor and of the Divisional Court, all of which took place before the relevant sections of that Act were brought into force on 2 October 2000. It assumed that these are proceedings by or at the instance of Mr Magill as auditor, and that an auditor appointed by the Audit Commission under section 12 and 13 of the Local Government Finance Act 1982 was a public authority within the meaning of section 6(1) of the 1998 Act. It also assumed that section 22(4), which states that section 7(1)(b) applies to proceedings by or at the instigation of a public authority whenever the act in question took place, applies to an appeal in these proceedings.

79 Mr Howell did not challenge the proposition, which I would accept, that an auditor appointed by the Audit Commission to audit the accounts of a local authority is a public authority. But he submitted that the proceedings which were conducted by the auditor and by the Divisional Court in the appeal to that court under section 20(3) of the 1982 Act were proceedings by or at the instigation of the objectors and not the auditor. He also submitted, following observations which I made in *R v Lambert* [2001] 3 WLR 206, that the acts of the Divisional Court which were complained of were outside the scope of section 7(1)(b) of the 1998 Act as they were acts of a court. I would reject both of these arguments.

80 As to the first point, the function of the auditor under Part III of the 1982 Act is to audit the accounts which require to be audited. It is his duty to satisfy himself by examination of the accounts and otherwise that the requirements of the statute have been complied with, that proper practices have been observed and proper arrangements have been made to obtain value for money in the use of resources: section 15(1). He must also consider whether, in the public interest, he should make a report on any matter coming to his notice in the course of the audit in order that it may be considered by the body concerned or brought to the attention of the public: section 15(3). He has power under sections 19 and 20 to declare an item of account unlawful and to recover a loss incurred or deficiency caused by wilful misconduct irrespective of whether there has been any objection to the accounts. It is in that context that the right of any local government elector under section 17(3) to attend before the auditor and make objections as to any matter in respect of which he could take action under section 19 or 20,

A or as to any matter in respect of which he could make a report under section 15(3), must be seen. The essence of these proceedings, from start to finish, is that they are proceedings by the auditor.

81 As to the second point, it has now been held in *R v Kansal (No 2)* [2002] 2 AC 69 that section 7(1)(b) of the 1998 Act applies to acts of courts and tribunals in the same way as it applies to acts of other public authorities. There has been no suggestion that the acts of the Divisional Court which are
B complained of are acts to which section 6(2) of that Act applies. It has not been argued that, as the result of primary legislation, the court could not have acted differently or it was acting so as to give effect to primary legislation which could not be read or given effect in a way which was compatible with the respondents' Convention rights. It follows that the acts of the Divisional Court which are under challenge are in the same position in
C this respect as the acts of the auditor.

82 There remains however the question whether the benefit of retrospectivity under section 22(4) of the 1998 Act is available at the stage of an appeal. The hearing of this appeal took place before judgment was delivered in *R v Kansal (No 2)*. In that case it was held that section 22(4) does not apply to an appeal against a conviction which took place before
D 2 October 2000. One of the points which I made in my dissenting judgment was that I did not see how it would be possible to confine the decision in that case to criminal cases only: see para 48 of my judgment. But this point has yet to be decided in a civil appeal, and it is perhaps still open to argument. As your Lordships did not hear any argument on it, I would prefer to approach the respondents' submissions as to fairness on the assumption that they are entitled to rely on their Convention rights in this appeal irrespective
E of the fact that all the acts in question took place before 2 October 2000.

Whether the proceedings are civil or criminal

83 On the assumption that they were entitled in this appeal to rely on their Convention rights, the respondents submitted that in substance the proceedings under section 20 of the 1982 Act were in the nature of a
F criminal charge. This argument was considered and rejected by the auditor. It was also rejected by the Divisional Court, which held that English law treats the matter as one of civil not criminal liability (1997) 96 LGR 157, 171D. Schiemann LJ did not mention the question of classification when he was dealing in the Court of Appeal with the issues of fairness [2000] 2 WLR 1420, 1453–1463. But this question was addressed by Mr McMullen in the course of his argument in this House, and it is the
G subject of detailed submissions in his written case. The Strasbourg cases were reviewed by Lord Bingham of Cornhill in *McIntosh v Lord Advocate* [2001] 3 WLR 107, 114–119, where the issue was whether a person against whom an application had been made for a confiscation order was, by virtue of that application, charged with a criminal offence: see also *Phillips v United Kingdom* (2001) 11 BHRC 280.

H 84 For the purposes of the Convention the category into which the proceedings are placed by domestic law, while relevant, is not the only consideration. The court is required to look at the substance of the matter rather than its form, to look behind the appearances and to investigate the realities of the procedure: *Deweer v Belgium* (1980) 2 EHRR 439, 458, para 44. The nature of the offence and the nature and degree of severity of the

sanction must be taken into account also. As to the sanction, the question is whether, by reason of its nature and degree of severity, it amounts to a penalty in the sense of punishment: *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, 678–679, paras 82, 83; *Lutz v Germany* (1987) 10 EHRR 182, 197, para 54; *Demicoli v Malta* (1991) 14 EHRR 47, 62–63, para 34. For example, *Engel v The Netherlands* concerned proceedings in a military court for disciplinary offences for which one of the sanctions liable to be imposed as punishment was deprivation of liberty. In *Demicoli v Malta* too the applicant was at risk of imprisonment if the fine was not paid. In *AP, MP and TP v Switzerland* (1997) 26 EHRR 541, 559 para 42, the court said that it attached great weight to the domestic court's finding that the fine in question was penal in character and depended on the "guilt" of the offending taxpayer. In *DC, HS and AD v United Kingdom* [2000] BCC 710 the European Court held that proceedings for the disqualification of directors on the ground of unfitness under section 6 of the Company Directors Disqualification Act 1986 were inherently regulatory in character, and that for this reason they could not be said to involve the determination of a criminal charge within the meaning of article 6(1) of the Convention.

85 I consider that the nature of the proceedings under section 20 of the 1982 Act is compensatory and regulatory, not punitive. Section 20(1) provides that the amount certifiable by the auditor, where it appears to him that a loss has been incurred or deficiency caused by wilful misconduct, is the amount of the loss or deficiency and that both he and the body in question may recover that amount for the benefit of that body. The object of the procedure is to compensate the body concerned, and the measure of the compensation is the amount of the loss suffered. In the present case the amount certified was very large, but the nature of the proceedings does not alter depending on the amount certified. No fine is involved, nor does the section provide for a penalty by way of imprisonment. Section 20(4) provides for the respondents' disqualification from being members of a local authority. But this outcome is similar to that where a trustee is removed after being found to have been in serious breach of trust, or a person is disqualified from acting as a director of a company. In my opinion measures of the kind provided for by section 20, which apply to persons having a special status or responsibility and are compensatory and regulatory rather than penal in character, lie outside the criminal sphere for the purposes of article 6 of the Convention.

86 For these reasons I would hold that section 20 of the 1982 Act does not involve the making of a criminal charge within the meaning of article 6. But that does not mean that the respondents lack protection. They are entitled to all the protections afforded to them by article 6(1), the first sentence of which provides that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The independence and impartiality of the auditor

87 The protections which article 6(1) lays down are that, in the determination of his civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. As I shall explain later when dealing

A with delay, I consider that this sentence creates a number of rights which, although closely related, can and should be considered separately. The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached cannot be B answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see *Millar v Dickson* 2001 SLT 988, 994D–E per Lord Bingham of Cornhill and my own observations in that case, at p 1003C–F. Under this heading the question is whether the auditor lacked C the independence and impartiality which is required by article 6(1).

88 There is a close relationship between the concept of independence and that of impartiality. In *Findlay v United Kingdom* (1997) 24 EHRR 221, 244–245, para 73 the European Court said:

> "The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner D of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.
>
> "As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any E legitimate doubt in this respect.
>
> "The concepts of independence and objective impartiality are closely linked . . ."

In both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult, but also that it must not appear in the objective sense to lack these F essential qualities.

89 I shall leave over to the next heading the question whether the auditor's public statement on 13 January 1994 showed that he lacked the appearance of impartiality for the purposes of the article 6(1) Convention right. At this stage the matter for consideration is the respondents' complaint that the circumstances and nature of his appointment and the G investigation which he then conducted were such that the requirements of independence and impartiality in his case were not satisfied. At the heart of the argument is the multiplicity of roles which were being performed by the auditor. The respondents say that the procedure which he adopted on receipt of the objections violated their Convention right because he acted as investigator, prosecutor and judge in the investigation which he carried out. He conducted the investigation, took the decision whether there was a case H to answer, tried the case, assessed the loss and then appeared in the Divisional Court to defend his decision and his conduct.

90 The Divisional Court said 96 LGR 157, 168E–F that the 1982 Act imposes on the auditor the roles of investigator, prosecutor and judge which might be thought an almost impossible burden, and it referred to the

recommendation in para 223 of the Third Report of the Nolan Committee on Standards in Public Life: Standards of Conduct in Local Government in England, Scotland and Wales (1997) (Cm 3702–1), which has now been implemented for England and Wales by Part III of the Local Government Act 2000, that surcharging by an auditor be abolished and replaced by other remedies. At p 169G, the court said, after reviewing his conduct of the hearing, that it was not persuaded that the auditor's final conclusions could be impeached on the grounds of unfairness. But, at p 172E–F, it said that it appeared to it that the roles which the auditor played would not meet the requirements of independence and apparent impartiality demanded by the Convention.

91 In my opinion the conduct of the auditor requires to be looked at as a whole and in the context of the procedure which is laid down in the statute. Part III of the 1982 Act starts, as one would expect, by placing the responsibility for auditing the accounts on the auditor. It seeks to ensure his independence from the body whose accounts he is auditing by requiring in sections 12 and 13 that his appointment is to be by the Audit Commission and not by the body itself. His responsibilities include making reports under section 15 on any matter coming to his notice in the course of the audit and dealing with objections made by any local government elector under section 17. Where objections are made, it is his duty to consider under section 17(3) whether they relate to any matter in respect of which he could take action under section 19 (items contrary to law) or section 20 (wilful misconduct) or to any matter in respect of which he could make a report under section 15. The Act does not enable him to pass this responsibility to someone else. It is his duty, as the person in charge of the audit within the context of which the objections are made, to deal with them himself and, if they are well founded, to take such action as he is required to take on them by the statute. The auditing process, which is in his hands, is not complete until this has been done.

92 That being the structure of the procedure laid down by the statute, there is inevitably some force in the criticism that, where accusations of wilful misconduct are involved, the auditor is being required to act not only as an investigator but also as prosecutor and as judge. But this problem has been recognised and dealt with in section 20(3). It provides not only that any person aggrieved by his decision may appeal against the decision to the court but also that the court "may confirm, vary or quash the decision and give any certificate which the auditor could have given". The solution to the problem which section 20(3) provides is that of a complete rehearing by the Divisional Court. The court can exercise afresh all the powers of decision which were given to the auditor. In *Lloyd v McMahon* [1987] AC 625, 697F–G Lord Keith of Kinkel said that, while there might be extreme cases where it would be appropriate to quash the auditor's decision, the court has a discretion, where it considers that justice can properly be done by its own investigation of the merits, to follow that course.

93 In *Kingsley v United Kingdom* The Times, 9 January 2001 (Application No 35605/97), 7 November 2000, the European Court said in paragraph 51 that, even if an adjudicatory body determining disputes over "civil rights and obligations" does not comply with article 6(1), there is no breach of the article if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does

provide the guarantees of article 6(1); see also *Bryan v United Kingdom* (1995) 21 EHRR 342, 360–361, paras 44 and 46. The court went on to say this in *Kingsley v United Kingdom*, at para 58:

> "The court considers that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body. Thus where, as here, complaint is made of a lack of impartiality on the part of the decision-making body, the concept of 'full jurisdiction' involves that the reviewing court not only considers the complaint but has the ability to quash the impugned decision and to remit the case for a new decision by an impartial body."

The powers which the Divisional Court has been given by section 20(3) fully satisfy these requirements. Not only does it have power to quash the decision taken by the auditor. It has power to rehear the case, and to take a fresh decision itself in the exercise of the powers given to the auditor. In *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389, 1407C–D Lord Slynn of Hadley observed that the principle of judicial control did not go so far as to provide for a complete rehearing on the merits of the decision. In the case of the procedure governed by section 20(3) however a rehearing on the merits can be conducted, and that is what was done in this case.

94 In these circumstances it is not necessary to examine the various grounds on which the procedure adopted by the auditor was criticised. The issue at this stage is whether the Divisional Court satisfied the requirements of article 6(1) in regard to the scope of the jurisdiction which it was entitled to exercise. I would answer this question in the affirmative. There has been no suggestion that the proceedings in that court, which were conducted with conspicuous care and attention to detail, lacked the appearance of independence and impartiality. In my opinion those elements of the respondents' article 6(1) Convention rights were fully protected by the proceedings in the Divisional Court, having regard to the powers which that court was entitled to exercise.

Apparent bias

95 I turn now to the question whether the auditor's certificate should have been quashed on the ground of apparent bias. The respondents submit that the way in which the auditor conducted himself when he made his statement on 13 January 1994 indicated an appearance of bias on his part which affected all stages of his investigation both before and after that date. Both the article 6(1) Convention right to an independent and impartial tribunal and the respondents' rights to an unbiased judge at common law as it was understood before the coming into effect of the relevant provisions of the Human Rights Act 1998 are invoked under this heading.

96 As I have said, the statement which the auditor made on 13 January 1994 received considerable publicity on television and in the newspapers. The Divisional Court saw video recordings of the relevant item on the 1 p m and 9 p m BBC TV news. The following description of the event is given in its judgment 96 LGR 157, 173:

"a televised announcement was arranged at which the auditor himself appeared and, although he said that his views were provisional, he expressed them in florid language and supported them by reference to the thoroughness of the investigation which he claimed to have carried out. There was a further feature of the event which should have had no place in the middle of a quasi-judicial inquiry. A stack of ring binders on the desk at which the auditor sat bearing the name of his firm for the benefit of the cameras was, ostensibly, under the protection of a security guard: unless it was being implied that the persons under investigation might wish to steal the documents, it is not clear what was the purpose of this posturing."

97 In the reasons which he gave on 18 October 1994 for deciding not to disqualify himself the auditor said that he was mindful of the serious nature of the allegations made against the respondents, that he had been careful to give them a full opportunity to respond to these allegations and his provisional findings, that he retained an open mind and that he was not biased against any individual or the council. He went on to say:

"114. I am not biased. I have acted fairly and will continue to do so. I will exercise impartial, independent and objective judgment. I will reach a decision on the evidence and submissions before me. I will not reach any decision adverse to the council and/or to any respondent unless I am satisfied on the basis of the evidence that I am under a duty to do so. All parties will get a fair hearing from me.

115. In my consideration of the disqualification application, I have sought to apply the test formulated in *R v Gough* [1993] AC 646, namely 'whether, in all the circumstances of the case, there appeared to be a real danger of bias . . .'. In my view, a person having ascertained the relevant circumstances would not consider that I will regard unfairly any person's case with disfavour. It has been suggested that I will find it difficult to depart from my provisional findings and views because of the publicity given to these. I feel no such inhibition. Nor, in my view, is there any ground on which I should reasonably be thought to be so inhibited. I have always made it plain that before reaching any conclusion I will consider any representations made to me. In my view, that is a process which necessarily conveys to any reasonable person the point that my conclusions may not coincide with my provisional findings and views. My view is that no real danger of bias exists and nor is there any other basis on which I should disqualify myself."

98 The Divisional Court set out its conclusions on this issue in this way 96 LGR 157, 174:

"In the light of the material before us, including, in particular, the auditor's reasons for declining to recuse himself, we accept that, despite such inferences to the contrary as might have been drawn from the press conference, the auditor did have an open mind and was justified in continuing with the subsequent hearings. We note that he did not confirm his preliminary findings in respect of those who gave evidence at those hearings. The error of judgment which we find he made, in holding the press conference as he did, did not, in our view, demonstrate bias on his part. He was at pains to stress the provisional nature of his findings and it is pertinent that in his final decision he made no finding of wilful

misconduct against three people in relation to whom he had, provisionally, been minded so to find. In any event, as with the investigation, any possible unfairness to the appellants has been cured by the hearing before us."

99 The test for apparent bias which the auditor sought to apply to himself, and was applied in its turn by the Divisional Court, was that which was described in *R v Gough* [1993] AC 646 by Lord Goff of Chieveley where he said, at p 670:

"I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him . . ."

100 The "reasonable likelihood" and "real danger" tests which Lord Goff described in *R v Gough* have been criticised by the High Court of Australia on the ground that they tend to emphasise the court's view of the facts and to place inadequate emphasis on the public perception of the irregular incident: *Webb v The Queen* (1994) 181 CLR 41, 50, per Mason CJ and McHugh J. There is an uneasy tension between these tests and that which was adopted in Scotland by the High Court of Justiciary in *Bradford v McLeod* 1986 SLT 244. Following Eve J's reference in *Law v Chartered Institute of Patent Agents* [1919] 2 Ch 276 (which was not referred to in *R v Gough*), the High Court of Justiciary adopted a test which looked at the question whether there was suspicion of bias through the eyes of the reasonable man who was aware of the circumstances: see also *Millar v Dickson* 2001 SLT 988, 1002–1003. This approach, which has been described as "the reasonable apprehension of bias" test, is in line with that adopted in most common law jurisdictions. It is also in line with that which the Strasbourg court has adopted, which looks at the question whether there was a risk of bias objectively in the light of the circumstances which the court has identified: *Piersack v Belgium* (1982) 5 EHRR 169, 179–180, paras 30–31; *De Cubber v Belgium* (1984) 7 EHRR 236, 246, para 30; *Pullar v United Kingdom* (1996) 22 EHRR 391, 402–403, para 30. In *Hauschildt v Denmark* (1989) 12 EHRR 266, 279, para 48 the court also observed that, in considering whether there was a legitimate reason to fear that a judge lacks impartiality, the standpoint of the accused is important but not decisive: "What is decisive is whether this fear can be held objectively justified."

101 The English courts have been reluctant, for obvious reasons, to depart from the test which Lord Goff of Chieveley so carefully formulated in

R v Gough. In *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119, 136A–C Lord Browne-Wilkinson said that it was unnecessary in that case to determine whether it needed to be reviewed in the light of subsequent decisions in Canada, New Zealand and Australia. I said, at p 142F–G, that, although the tests in Scotland and England were described differently, their application was likely in practice to lead to results that were so similar as to be indistinguishable. The Court of Appeal, having examined the question whether the "real danger" test might lead to a different result from that which the informed observer would reach on the same facts, concluded in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, 477 that in the overwhelming majority of cases the application of the two tests would lead to the same outcome.

102 In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711A–B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At p 711B–C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726–727:

> "85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

103 I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

A 104 Turning to the facts, there are two points that need to be made at the outset. The first relates to the auditor's own assertion that he was not biased. The Divisional Court said, at p 174A–B, that it had had particular regard to his reasons for declining to recuse himself in reaching its conclusion that he had an open mind and was justified in continuing with the subsequent hearings. I would agree that the reasons that he gave were relevant, but an examination of them shows that they consisted largely of B assertions that he was unbiased. Looking at the matter from the standpoint of the fair-minded and informed observer, protestations of that kind are unlikely to be helpful. I think that Schiemann LJ adopted the right approach in the Court of Appeal when he said that he would give no weight to the auditor's reasons: ante, p 400C. The second point relates to the emphasis which the respondents place on how the auditor's conduct appeared from C the standpoint of the complainer. There is, as I have said, some support in the jurisprudence of the Strasbourg court for the proposition that the standpoint of the complainer is important. But in *Hauschildt v Denmark* 12 EHRR 266, 279, para 48 the court emphasised that what is decisive is whether any fears expressed by the complainer are objectively justified. The complainer's fears are clearly relevant at the initial stage when the court has to decide whether the complaint is one that should be investigated. But they D lose their importance once the stage is reached of looking at the matter objectively.

105 I think that it is plain, as the Divisional Court observed, at p 174B, that the auditor made an error of judgment when he decided to make his statement in public at a press conference. The main impression which this would have conveyed to the fair-minded observer was that the purpose of E this exercise was to attract publicity to himself, and perhaps also to his firm. It was an exercise in self-promotion in which he should not have indulged. But it is quite another matter to conclude from this that there was a real possibility that he was biased. Schiemann LJ said, at p 1457D–E, that there was room for a casual observer to form the view after the press conference that the auditor might be biased. Nevertheless he concluded, at p 1457H, having examined the facts more closely, that there was no real danger that F this was so. I would take the same view. The question is what the fair-minded and informed observer would have thought, and whether his conclusion would have been that there was real possibility of bias. The auditor's conduct must be seen in the context of the investigation which he was carrying out, which had generated a great deal of public interest. A statement as to his progress would not have been inappropriate. His error G was to make it at a press conference. This created the risk of unfair reporting, but there was nothing in the words he used to indicate that there was a real possibility that he was biased. He was at pains to point out to the press that his findings were provisional. There is no reason to doubt his word on this point, as his subsequent conduct demonstrates. I would hold, looking at the matter objectively, that a real possibility that he was biased has not been demonstrated.

H

Unreasonable delay

106 The respondents' argument under this heading is directed to their article 6(1) Convention right to the determination of their civil rights and obligations within a reasonable time. They contend that the auditor was

guilty of inordinate delay in breach of the article 6(1) requirement and that they were at an unfair disadvantage due to delay when they were giving evidence before the Divisional Court. They also submit, under reference to constitutional provisions considered by the Privy Council, that they had a right to a determination within a reasonable time at common law which did not require them to demonstrate actual prejudice: *Bell v Director of Public Prosecutions* [1985] AC 937; *Director of Public Prosecutions v Tokai* [1996] AC 856. The Divisional Court held, at p 169D–E, that the test at common law was whether delay had given rise to such prejudice that no fair trial could be held: *Tan v Cameron* [1992] 2 AC 205, 222–224, per Lord Mustill. In its judgment no such prejudice was shown, and in the Court of Appeal Schiemann LJ was of the same opinion: ante, p 401E–F. The respondents say that the approach taken by these courts was wrong in law, as there was no requirement to show actual prejudice. The nature of the common law right which they asserted in your Lordships' House appeared to me to be virtually indistinguishable in this respect from the right under article 6(1), so I do not need to dwell on this part of their argument. I shall deal with the issue of delay on the assumption that the test which they must satisfy is that which requires to be satisfied to demonstrate that there was a breach of the Convention right and that prejudice, while relevant if it exists, does not require to be demonstrated.

107 In their overall complaint about delay they have included the time which elapsed from the local government elections on 8 May 1986 and the decision of the housing committee on 8 July 1987. The period that has elapsed since the event in question may be a relevant factor when considering the question whether the delay was unreasonable. But they accept that the obligation under the Convention relates only to the conduct of the proceedings. Time usually begins to run in civil cases for the purposes of article 6(1) from the date when the proceedings in question are initiated: *Ausiello v Italy* (1996) 24 EHRR 568, 571, para 18. I would hold that time began to run in this case from the date when the objections which gave rise to the investigation were received by the auditor, and that it includes the stage of the appeal to the Divisional Court. The period under review can therefore be divided into four distinct periods: (a) that from the receipt of the original objection on 18 July 1989 to the issuing by the auditor of his provisional views on 13 January 1994; (b) that from 13 January 1994 to the end of the audit hearing on 7 February 1995; (c) that from 7 February 1995 to the issuing by the auditor of his decision and the certificates of surcharge on 9 May 1996; and (d) that from 9 May 1996 to the decision of the Divisional Court, which was given on 19 December 1997. No complaint is made about any delay after that date.

108 I would also hold that the right in article 6(1) to a determination within a reasonable time is an independent right, and that it is to be distinguished from the article 6(1) right to a fair trial. As I have already indicated, that seems to me to follow from the wording of the first sentence of the article which creates a number of rights which, although closely related, can and should be considered separately. This means that it is no answer to a complaint that one of these rights was breached that the other rights were not. To take a simple example, the fact that the hearing took place in public does not deprive the applicant of his right to a hearing before an independent and impartial tribunal established by law.

A 109 I would respectfully follow Lord Steyn's observation in *Darmalingum v The State* [2000] 1 WLR 2303 about the effect of section 10(1) of the Constitution of Mauritius when he said that the reasonable time requirement is a separate guarantee. It is not to be seen simply as part of the overriding right to a fair trial, nor does it require the person concerned to show that he has been prejudiced by the delay. In B *Flowers v The Queen* [2000] 1 WLR 2396 a differently constituted Board, following *Bell v Director of Public Prosecutions* [1985] AC 937, held that prejudice was one of four factors to be taken into account in considering the right to a fair hearing within a reasonable time in section 20(1) of the Constitution of Jamaica. In the context of article 6(1) of the Convention however the way this right was construed in *Darmalingum v The State* seems to me to be preferable. In *Crummock (Scotland) Ltd v HM Advocate* 2000 C SLT 677, 679A–B, Lord Weir, delivering the opinion of the High Court of Justiciary, said that under article 6(1) it was not necessary for an accused to show that prejudice has been, or is likely to be, caused, as a result of delay. The article 6(1) guarantee of a hearing within a reasonable time is not subject to any words of limitation, nor is this a case where other rights than those expressly stated are being read into the article as implied rights which D are capable of modification on grounds of proportionality: see *Brown v Stott* [2001] 2 WLR 817, 851B–E; *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800, para 90. The only question is whether, having regard to all the circumstances of the case, the time taken to determine the person's rights and obligations was unreasonable.

110 In *König v Federal Republic of Germany* (1978) 2 EHHR 170, 197, para 99 the European Court gave the following guidance as to the test to be E applied in civil proceedings on the question of delay:

> "The reasonableness of the duration of proceedings covered by article 6(1) of the Convention must be assessed in each case according to its circumstances. When inquiring into the reasonableness of the duration of criminal proceedings, the court has had regard, inter alia, to the F complexity of the case, to the applicant's conduct and to the manner in which the matter was dealt with by the administrative and judicial authorities. The court, like those appearing before it, considers that the same criteria must serve in the present case as the basis for its examination of the question whether the duration of the proceedings before the administrative courts exceeded the reasonable time stipulated by article 6(1)."

G

111 Applying this test to the facts, it will be convenient to examine separately the conduct of the auditor and that of the Divisional Court. I start with the Divisional Court. It seems to me that there is no basis whatever for the suggestion that there was an unreasonable delay at this stage. The auditor issued his certificate in May 1996. It was not until December 1996 that the respondents filed their evidence on the main issues. The accounting H evidence was not filed until April 1997. A procedural hearing was heard shortly afterwards in May 1997. The case proceeded to a hearing in the Divisional Court in October 1997, which lasted for 23 days. Judgment was given on 19 December 1997. I would conclude without any difficulty, having regard to the complexity of the issues and the volume of evidence that

had to be prepared and presented, that the proceedings in that court were concluded within a reasonable time.

112 As for the conduct of the investigation by the auditor, there is a much more extended timetable. A period of about $3\frac{1}{2}$ years elapsed between the receipt of the first objection in July 1989 and the issuing of the provisional findings in January 1994. A further period of about two years and five months then elapsed before he issued his decision and the certificates of surcharge. But this brief narrative has to be seen in the light of the nature of the exercise on which he was engaged. The Divisional Court, at p 161C–D, described his investigation as vast. It referred, at p 169D, to its mammoth nature, bearing in mind that the objections related to 28 individuals. I do not need to go over the details which are set out in the agreed statement of facts. I have already provided my own summary in an earlier part of this judgment, and some further details are given by the Divisional Court at pp 161–162 and 168.

113 In my opinion the most striking feature which emerges from all the facts relating to the conduct of the investigation by the auditor is that, far from causing delay by inaction, he was constantly in action. He was seeking out information wherever it could be found, often with considerable difficulty. He was interviewing and re-interviewing many witnesses, recovering and perusing thousands of documents, calculating amounts of loss and expenditure and then gathering all this information together into a decision which eventually extended to almost 2000 pages including the appendices. It has been suggested that his investigation was over-elaborate. There are comments to that effect in the Divisional Court's judgment, at p 161D. But the auditor had to form his own judgment on this matter. He had to take account of the importance of the exercise to all parties, including those who were at risk of being surcharged, and he was entitled to have regard to its obvious political sensitivity. I would attach particular significance to these factors and to the fact that it has not been suggested that the auditor caused delay at any stage by inactivity.

114 Applying the test described in *König v Federal Republic of Germany* 2 EHRR 170, 197, para 99 which directs attention to the complexity of the case, the applicant's conduct and the manner in which the matter was dealt with by the authorities, and leaving aside the question whether the respondents have shown that they were prejudiced, I would hold that the proceedings did not exceed the reasonable time requirement which article 6(1) lays down.

115 In view of the conclusion which I have reached I do not need to deal with the respondents' submissions about the remedy to which they were entitled if there had been undue delay. Schiemann LJ, said, at p 1460F, that it would not have been appropriate in that event to quash the auditor's certificate. He had in mind the remedy which was available in the Divisional Court to ensure that, despite the delay, there was a fair trial and the possibility instead of a remedy in damages. The appellant supported this approach. But these are difficult issues, and I would prefer to reserve my opinion on them.

The Divisional Court

116 The respondents submit that the Divisional Court made errors of law by applying the wrong tests to their arguments on apparent bias and

A delay. Their argument is that it dealt with the case as if their complaint was one of actual bias and with their complaint of delay on the basis that it was necessary to establish prejudice. It is true that the Divisional Court took particular account of the auditor's assertions that he was not biased and that, basing itself on the common law authorities, it had regard to the question whether the delay resulted in prejudice. But I do not think that, read as a whole, the judgment is vulnerable to such serious criticism that B their decision to uphold the certificates against Dame Shirley Porter and Mr Weeks should, as the respondents assert, have been set aside by the Court of Appeal on that ground alone. Mistakes of law of this kind, if they are made, do not in themselves amount to breaches of the article 6 Convention rights of the kind which must inevitably attract that remedy. They can be corrected on appeal. I have taken full account of the respondents' arguments C in my review of their case on unfairness and of their criticisms of this part of the Divisional Court's reasoning.

117 They also submit that the Divisional Court ought to have quashed the certificates on the ground that the injury done to her public reputation by reason of the auditor's conduct in making his statement at a press conference was so severe that to quash the certificate was the only possible remedy. D I would reject this argument also. The question which the Divisional Court had to address was whether the defects in the investigation conducted by the auditor were so prejudicial to the respondents that it should in its discretion quash the certificates or whether it should proceed to a rehearing on the merits and decide the issue on the evidence presented to the court: see *Lloyd v McMahon* [1987] AC 625, 716F–G per Lord Templeman. Various factors had to be taken into account in this case, including the inevitable E consequence of the passage of time on the recollection of witnesses to which the Divisional Court refers, at p 162D–E. But the fact that the press conference gave rise to adverse publicity, albeit that this was severe, would not of itself have justified quashing the certificates. There were other interests to be taken into account, namely those of the objectors and of the council and its electors. The respondents were given the opportunity, to F which they were entitled, to raise the issue in the context of their arguments on unfairness. In my opinion their rights were sufficiently protected by the way in which this issue was examined in that court and by the remedies that were available to them by way of appeal.

Conclusion on unfairness

G 118 For these reasons I would hold that the proceedings as a whole did not infringe the respondents' Convention rights and that there was no unfairness at common law on the ground either of apparent bias or of delay.

Quantum

119 The auditor included in the amount which he certified under section 20(1)(b) of the Local Government Finance Act 1982 as one of the H items of loss in consequence of the respondents' wilful misconduct a sum amounting to £15·476m for discounts on the sale of dwellings sold at a discount. He took as the measure of this loss the difference between the open market value of the dwellings with vacant possession, as estimated at the time of the sales by the council's valuers, Ellis & Co, for the purpose of

arriving at a discounted price, and the discounted prices at which they were actually disposed of. Most of the dwellings included in this item were not sold outright but were let on long leases granted in consideration of substantial premiums. For convenience however all the transactions were referred to as sales. The discount was 30% to purchasers who were not already tenants of the council. For existing tenants with the right to buy it was a variable amount, but it was always more than 30%.

120 As the Divisional Court said 96 LGR 157, 205B, the question whether this amount was properly certified was by far the most significant issue in terms of quantum. Two main challenges to the auditor's approach to it were advanced in that court. The first, which raised an issue of principle, was whether the auditor was right to use the open market value of the unoccupied dwellings as his starting point. The second was directed to the figures which he used for assessing their market value which, it was said, were unreliable. The Divisional Court upheld the auditors' approach on both points. It concluded, at p 207E, that the loss arising from the sales at a discount was correctly calculated at £15·476m.

121 The issue whether this amount was correctly calculated was raised again in the Court of Appeal. Robert Walker LJ said, ante, p 445D–F, that in his judgment the Divisional Court erred in its approach, as it should have accepted the submission that there was no loss if the discounted prices actually received by the council exceeded the value of the dwellings as tenanted social housing. His conclusion on this issue was rendered academic by the decision of the majority to allow the appeals and discharge the certificates. Kennedy LJ said, ante, p 371A, that he agreed with that part of the judgment of Robert Walker LJ which dealt with quantum, but Schiemann LJ said, ante, p 389F, that he preferred to express no opinion on the point. As your Lordships have decided to allow the appeal, the issue as to quantum is once again a live issue. The auditor submits that the amount which was found to have been correctly calculated by the Divisional Court should be included in the certificates.

122 It may be convenient for me to set out again the provisions of section 20(1) of the 1982 Act:

> "Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act—(a) that any person has failed to bring into account any sum which should have been so included and that the failure has not been sanctioned by the Secretary of State; or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that the sum or, as the case may be, the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the body in question (or, in the case of a parish meeting, the chairman of that meeting) may recover that sum or amount for the benefit of that body . . ."

123 The task of the auditor in this case was to certify the amount of the loss or deficiency caused by the wilful misconduct. The loss or deficiency which he identified as due to wilful misconduct fell into two distinct parts. The first part consisted of expenditure incurred in the preparation of papers for the purpose of discussing the promotion of the electoral advantage of the majority party. This part raised no issue of principle. It was simply a matter of arriving at an appropriate figure to restore to the council's

A account the amount of the expenditure. The auditor made a broad estimate under this heading of £5,000 which, when interest was added, amounted to £10,126. No appeal was taken against the calculation of this amount. By far the greater part of the loss which he identified fell into the second part. This was the result of the resolution of the housing committee on 8 July 1987 to extend the programme of designated sales of dwellings from the
B council's social housing stock. After agreed corrections in the Divisional Court, the total amount of this loss was £26·462m. The figure of £15·476m for losses resulting from sales of dwellings at a discount is included in this figure.

124 The auditor's approach, as explained by him in paragraph 43 of his report, was a simple one. He said that the sale of property such as housing accommodation at less than its market value involves a loss or
C deficiency to the authority which is equal to the difference between the market value of the asset and the proceeds of sale. In his view, the amount of this difference was the amount that should be certified as due from any person by whose wilful misconduct that loss or deficiency has been incurred. It is this approach that the respondents have challenged as being wrong in principle.

D **125** I agree that the sale of a dwelling which is unoccupied at less than its open market value with vacant possession can be regarded as producing a loss or deficiency for the purposes of section 20(1)(b) of the 1982 Act. This assumes that those who were responsible for the sale were under a duty to obtain a full price for it, measured by its value with vacant possession in the open market. But I do not think that this can be regarded as a universal rule. The proper starting point is to identify the act of wilful misconduct. The
E next step is to determine what items of loss, if any, were caused by it. In the case of the designated dwellings, the act of wilful misconduct for which the respondents must be held accountable was the promotion of the policy which the housing committee adopted on 8 July 1987. The effect of its resolution was to remove the designated dwellings from the council's social housing stock as they became vacant. What the council lost as a result of the
F adoption of the policy were 618 dwellings from its social housing stock. Its capacity to perform its obligation to house the homeless under Part III of the Housing Act 1985 was correspondingly reduced.

126 Nevertheless, when these dwellings became vacant they could have been sold with vacant possession on the open market. Robert Walker LJ said, ante, p 445D–F, that there was no loss to the council so long as the
G discounted prices actually received by it exceeded the value of the dwellings as tenanted social housing. They exceeded this value in all cases, so he was of the view that the auditor ought to have found that their sale did not result in any loss or deficiency. But I agree with Lord Bingham that the principle which underlies the statutory procedure is one of compensation. What the auditor is directed by section 20(1) to certify is the amount of the loss or deficiency, and it is for the benefit of the body that the amount certified is
H recoverable. The aim of the procedure is to put the body in the same position that it would have been in but for the wilful misconduct. Applying this approach, the loss to the council due to the sales for which it ought to be compensated was the difference between the full market price of the dwellings and the discounted prices which were received for them.

127 That however does not conclude the argument. This is because the auditor included in his calculation of this amount a sum amounting to £4·237m for extra homelessness costs. These costs were directly attributable to the removal of the designated dwellings from the social housing stock. Robert Walker LJ said, at p 1502D, that to include this figure in the amount of the loss or deficiency as well as a figure for loss on the sale of the dwellings at a discount would result in double counting. In his view it would be inconsistent with the auditor's decision to include an amount for homelessness costs due to the depletion of the council's social housing stock to assume that those dwellings would have been sold with vacant possession at their full value on the open market.

128 I think that there is considerable force in the point which Robert Walker LJ made on this issue in his careful judgment. It seems to me that these two items were arrived at by the auditor on two different and arguably inconsistent assumptions. On the one hand the figure of £15·476m representing the loss arising from sales at a discount assumes that the council would, but for the unlawful policy, have obtained full value for dwellings as they no longer required to be treated as part of the social housing stock when they were sold. On the other hand the figure of £4·237m for extra homelessness costs is based upon costs for which it is assumed the council should be compensated on the ground that the dwellings ought to have been retained for social housing purposes. The principle of compensation requires that the council should be fully compensated, but it does not permit the council to be overcompensated. An auditor who seeks to apply this principle must guard against the risk of double counting. The effect of doing so would be to penalise the person from whom the amount was due, which is not the object of the procedure. It would also enable the body to recover more than was needed to make good the loss or deficiency.

129 In my opinion however the point about double counting is not free from difficulty. The principles are clear enough, but they depend for their application on the facts. It seems to me that the point ought to have been raised when the facts about the extra costs of homelessness were being inquired into by the auditor or by the Divisional Court. That was not done, with the result that your Lordships do not have the findings of fact which would be needed to disturb the calculations made by the auditor on this issue. With some hesitation therefore I have come to the conclusion, in agreement with your Lordships, that it would not be right to hold that the auditor fell into the obvious trap of double counting and that the sum upheld by the Divisional Court should not be departed from.

Conclusion

130 I too would allow the auditor's appeal and restore his certificate in the sum upheld by the Divisional Court.

LORD HOBHOUSE OF WOODBOROUGH

131 My Lords, I agree that the appeal should be allowed and the judgment of the Divisional Court restored as proposed by my noble and learned friends, Lord Bingham of Cornhill and Lord Hope of Craighead and for the reasons which they have given. The question of quantum referred to in the penultimate section of Lord Bingham's speech gave me some anxiety but was effectively concluded by the limited way in which the arguments of

A the respondents were put. The respondents (no doubt for some good reason) did not deploy or support by evidence the arguments which might have displaced the valid primary measure of the council's capital account loss. I agree that what Robert Walker LJ said in his judgment, at p 1502, did not, on examination, suffice to displace the primary measure nor did it show that there had been any double counting.

B **LORD SCOTT OF FOSCOTE**

132 My Lords, this is a case about political corruption. The corruption was not money corruption. No one took a bribe. No one sought or received money for political favours. But there are other forms of corruption, often less easily detectable and therefore more insidious. Gerrymandering, the manipulation of constituency boundaries for party political advantage, is a C clear form of political corruption. So, too, would be any misuse of municipal powers, intended for use in the general public interest but used instead for party political advantage. Who can doubt that the selective use of municipal powers in order to obtain party political advantage represents political corruption? Political corruption, if unchecked, engenders cynicism about elections, about politicians and their motives and damages the reputation of democratic government. Like Viola's "worm i' the bud" it D feeds upon democratic institutions from within (Twelfth Night).

133 When detected and exposed it must be expected, or at least it must be hoped, that political corruption will receive its just deserts at the polls. Detection and exposure is, however, often difficult and, where it happens, is usually attributable to determined efforts by political opponents or by investigative journalists or by both in tandem. But, where local government E is concerned, there is an additional very important bulwark guarding against misconduct. The Local Government Finance Act 1982 (now repealed but in force until 11 September 1998) required the annual accounts of a local authority to be audited by an independent auditor appointed by the Audit Commission (sections 12 and 13). The auditor had to satisfy himself that the local authority's accounts were in order (section 15(1) and (2)) and, also, had to "consider whether, in the public interest, he should make a report on F any matter coming to his notice in the course of the audit in order that it may be considered by the [local authority] concerned or brought to the attention of the public . . .": section 15(3).

134 If, in the course of the audit, it came to the attention of the auditor that municipal powers had been used not in the general public interest but, selectively, for party political advantage, it was plainly right that the G political corruption in question should be exposed in a report under section 15(3).

135 Section 16 of the Act gave the auditor extensive powers to obtain documents and information for the purposes of the statutory functions. These included the power to require any officer or member of the local authority "to give him such information or explanation as he thinks necessary . . .": section 16(2). Any report made by the auditor under H section 15(3) became a public document open to inspection by any member of the public (section 18A).

136 The statutory provisions to which I have referred provided an institutional means whereby political corruption consisting of the use of municipal powers for party political advantage might be detected and

cauterized by public exposure. These provisions were repealed by the Audit Commission Act 1998 but replaced by provisions in Part II of that Act which are to much the same effect (see, in particular, section 8 of the 1998 Act).

137 In addition, however, where the misconduct in question had caused loss to the local authority, section 20 of the 1982 Act enabled the auditor to require those responsible to make good the loss. Section 20(1) provided:

> "(1) Where it appears to the auditor carrying out the audit of any accounts under this Part of this Act . . . (a) . . . or (b) that a loss has been incurred or deficiency caused by the wilful misconduct of any person, he shall certify that . . . the amount of the loss or the deficiency is due from that person and, subject to subsections (3) and (5) below, both he and the [local authority] in question . . . may recover that . . . amount for the benefit of that [local authority] . . ."

138 Subsection (3) permitted an appeal against the auditor's certificate to be made to the court. Subsection (4) applied where a certificate requiring payment of more than £2,000 had been made, or upheld, and disqualified the individual concerned from being a member of any local authority for a period of five years. And subsection (5) required payment of the certified sum to be made within fourteen days of the certificate becoming final.

139 The purpose of a section 20 certificate was compensatory, not penal. Its purpose was not to punish the wrongdoer but to require the quantified loss caused to the local authority by the "wilful misconduct" to be made good. There was no element of discretion. If the officer or member had been guilty of "wilful misconduct" as a result of which loss had been incurred it was the duty of the auditor to issue a section 20 certificate specifying the amount of the loss. Of course, it will not be every case of political corruption, or other misconduct, in local government that will lead to financial loss to the local authority concerned. But many will do so and, in those cases, the powers and duties of auditors under section 20 of the 1982 Act (and under section 19 as well, although nothing turns on that section in this case) constituted, in my opinion, powerful and valuable protection to the public.

140 Section 20 of the 1982 Act was replaced by section 18 of the 1998 Act which was to the same effect. But section 18 of the 1998 Act has been repealed by the Local Government Act 2000 and not replaced. The 2000 Act also substantially recast the investigation and report provisions that had been contained first in the 1982 Act and then in the 1998 Act. The institutional protection provided by statute against political corruption and other misconduct by members of local authorities is now confined to the investigation, report and publicity for which the 2000 Act and an amended version of section 17 of the 1998 Act (formerly section 19 of the 1982 Act) make provision. There is now no statutory provision directed to restitution or compensation for loss caused by any wrongdoing that the investigation and report may have exposed. Certificates such as those issued against and challenged by Dame Shirley Porter and Mr David Weeks in the present case cannot now be issued. Local authorities that want to recover from delinquent councillors the loss caused by the delinquency must now do so by means of legal remedies available under the general law. However, section 20 of the 1982 Act was in force at the time the events material to this

A case took place and the propriety of the auditor's certificates against Dame Shirley and Mr Weeks must be tested on that footing.

141 My Lords, I have had the advantage of reading in draft the opinion on this appeal of my noble and learned friend, Lord Bingham of Cornhill. As Lord Bingham has observed, the facts that have given rise to the appeal are set out at some length in the judgments of the Divisional Court and the Court
B of Appeal. Lord Bingham has highlighted some of the key events. I gratefully adopt and need not repeat those highlights.

142 The factual findings made by the auditor, Mr John Magill, and by the Divisional Court against Dame Shirley Porter and Mr David Weeks were findings that justify being described as findings of political corruption. Dame Shirley and Mr Weeks, having appealed unsuccessfully to the Divisional Court, appealed successfully to the Court of Appeal. Mr Magill
C has appealed to this House. For the purposes of this appeal the parties have prepared a statement of agreed facts and issues. The contents of the statement were agreed by Mr Howell on behalf of Mr Magill, by Mr McMullen on behalf of Dame Shirley and by Mr Cakebread of counsel on behalf of Mr Weeks. The contents of the statement, in my opinion, endorse the essential findings of the auditor and of the Divisional Court
D regarding the conduct of Dame Shirley and Mr Weeks and justify the description of that conduct as political corruption. Thus:

(1) As a consequence of local government elections in May 1986 reducing the Conservative majority from 26 to 4, Dame Shirley, the leader of the Conservatives on the Westminster Council, was determined that a greater majority should be achieved at the 1990 elections (paragraphs 9 and 10 of
E the statement).

(2) Eight marginal wards, the "key wards", were identified. The intention of Dame Shirley and Mr Weeks was to reduce the number of Labour voters and increase the number of Conservative voters in these key wards. The target was an overall increase of 2,200 Conservative supporters in these wards (paragraphs 13 to 15).

(3) This increase was to be brought about by selling council-owned
F residential properties in the eight key wards when they became vacant. It was believed that owner-occupiers were more likely to vote Conservative than were council tenants (paragraphs 16 and 28).

(4) The Director of Housing advised in May 1986 and again in March 1987 that if all council properties in the eight key wards were designated for selling, the council would not be able to meet its statutory housing
G obligations (paragraphs 18 and 29).

(5) Nonetheless, at a meeting on 24 March 1987, attended by Dame Shirley and Mr Weeks, it was decided to sell annually 250 properties in the eight key wards (paragraph 35).

(6) On 5 May 1987 Mr Sullivan met council officials in consultation. He was informed that the majority (Conservative) group wished to target sales in marginal wards for electoral advantage. He advised that this would not
H be lawful, that the designation of properties for sale had to be done for proper reasons and that, in identifying the properties to be sold, the same criteria had to be applied across the whole city (paragraph 40).

(7) The critical paragraph in the agreed statement of facts is paragraph 42. It reads:

"On the evening of 5 May 1987, the chairmen's group agreed to target designated sales city-wide in order to produce the agreed number of designated sales in marginal wards. The group decided to adopt the course . . . of increasing the number of designated sales so as to be able to achieve the policy objective of 250 sales per annum in the marginal wards."

143 That was the policy eventually carried into effect via the housing committee decision on 8 July 1987 (paragraph 58 of the statement). It led to the sale of 618 council properties (some were let on long leases for substantial premiums). It is clear that the policy was adopted by the chairmen's group, led by Dame Shirley and Mr Weeks, and was thereafter promoted by Dame Shirley and Mr Weeks, as well as by others, not in order to achieve sales city-wide but in order to achieve 250 sales per annum in the eight key wards. And those sales were for the purpose of replacing probable Labour voters by probable Conservative voters. The city-wide policy was no more than a cloak to give apparent legality to the sales in the eight key wards which leading counsel had rightly warned would be unlawful unless part of a city-wide policy adopted for a proper reason. The sales of the 618 properties involved the exercise of local government powers to sell council properties (see section 32, Housing Act 1985) not for the purpose for which those powers were granted but in order to increase the number of Conservative voters in marginal wards. It has not been in dispute before your Lordships that this purpose for selling is an unlawful purpose.

144 In the Court of Appeal Kennedy LJ commented on the political reality that many government decisions, whether at local government level or in central government, are taken with an eye to the electoral effect they may have. He said, ante, p 386D:

"Some of the submissions advanced on behalf of the auditor have been framed in such a way as to suggest that any councillor who allows the possibility of electoral advantage even to cross his mind before he decides upon a course of action is guilty of misconduct . . . In local, as in national, politics many if not most decisions carry an electoral price tag, and all politicians are aware of it."

Kennedy LJ was, of course, correct. But there is all the difference in the world between a policy adopted for naked political advantage but spuriously justified by reference to a purpose which, had it been the true purpose, would have been legitimate, and a policy adopted for a legitimate purpose and seen to carry with it significant political advantage. The agreed statement of facts places the policy adopted by the chairmen's group on 5 May 1987 fairly and squarely in the former category.

145 My Lords, there are three issues which arise on this appeal on which I wish to comment. The first is whether Dame Shirley and Mr Weeks were, for section 20 purposes, guilty of wilful misconduct. The second is whether, if they were, that misconduct was causative of loss to the council. The third is how such loss should be quantified. But, my Lords, the backcloth to each of these issues is that Dame Shirley and Mr Weeks stand convicted of political corruption. They stand so convicted on the basis of facts which are not now in dispute.

Wilful misconduct

146 It has been submitted on behalf of Dame Shirley and Mr Weeks that whether or not their conduct in promoting the policy of designated sales in the eight key wards was misconduct, it lacked the quality of being "wilful". This, it is said, is because, relying on advice which they believed had been given by Mr Sullivan, they did not realise that the policy was unlawful. In *Lloyd v McMahon* [1987] AC 625 Woolf LJ said that misconduct "would only be wilful if the councillors were doing something which they knew to be wrong or about which they were recklessly indifferent as to whether it was wrong or not" (p 674). It has been common ground before your Lordships that this is the correct test.

147 It is said that, in reliance on Mr England's note of what Mr Sullivan had said in consultation on 5 May 1987, Dame Shirley and Mr Weeks thought that it would be lawful for them to achieve their purpose of designating properties for sale in the eight key wards in order to achieve annual sales of 250 properties in those wards provided that there were similar designations of properties for sale city-wide. Mr England's note reads, so far as material, as follows:

> "Counsel advises that designated estates should be identified in marginal and non-marginal wards in order to protect the council. The group will, therefore, need to decide whether the 250 target applies across the city or whether in fact 250 sales in marginal wards are required in which case following counsel's advice, somewhere in the region of 300–350 properties will need to be sold across the city."

148 But Dame Shirley and Mr Weeks knew that a policy adopted for the purpose of electoral advantage in the key wards would be unlawful. And nothing in Mr England's note of what Mr Sullivan had said, or indeed in what Mr Sullivan had actually said, indicated that the adoption of the city-wide policy in order to achieve the unlawful electoral purpose in the eight key wards would be any less unlawful than the adoption for that purpose of a policy in respect of the eight key wards alone. As Lord Bingham has noted in paragraph 39 of his opinion, Mr Sullivan was never asked the critical question, namely, whether the designated sales policy would become lawful if, with the same objective, the designated sales policy were extended city-wide. I agree with Lord Bingham that no reason for doubting the clear findings, adverse to Dame Shirley and Mr Weeks, of the auditor and the Divisional Court has been shown.

Causation

149 Dame Shirley and Mr Weeks rely on the housing committee's decision of 8 July 1987 as breaking the chain of causation. The designated sales policy was implemented because the housing committee had resolved to adopt it. If the housing committee had not so resolved, the policy would not have been implemented. Neither Dame Shirley nor Mr Weeks was a member of the housing committee. Neither of them was present at the 8 July meeting. Mr McMullen submitted that a city-wide designated sales policy was a policy capable of being a lawful one. So it was. He submitted that the housing committee resolution that adopted the policy was capable of being a lawful resolution. I agree. He submitted that if a majority of members of the

committee voted in favour of the resolution for reasons that were lawful, then the resolution would have been lawful, notwithstanding that misconduct on the part of the leader of the council and her deputy had attended the formulation and promotion of the policy adopted by the resolution. Again, I agree.

150 It was argued on behalf of Mr Magill that even if the resolution were a lawful one, nonetheless the misconduct of Dame Shirley and Mr Weeks was not spent and could still be regarded, for section 20 purposes, as having "caused the loss". But for their misconduct, the designated sales policy would not have been formulated and placed before the housing committee for approval. I agree that, applying a "but for" test, it could be said that their misconduct had caused the loss. But I do not think that that is enough. If the housing committee resolution was a lawful one, then it was lawful for it to be implemented by the council. Its implementation was within the statutory powers of the council. This is not a case in which the council lacked power to carry out the property sales contemplated by the policy.

151 So, if the improper electoral advantage in the eight key wards, the purpose of the designated sales policy, had been made plain at the housing committee meeting and had been repudiated by a majority of those present who had then voted in favour of the policy for unimpeachable reasons, it would have been plain that the misconduct had become spent even if, without the misconduct, the policy would never have found its way to the committee. I find it difficult to follow why the case would be different if, without an explicit disclosure and repudiation of the policy, a lawful resolution adopting the policy were passed. I accept that a corrupt principal can attain his unlawful object via the medium of an innocent agent (see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 385), but I do not think a local authority committee can be treated as merely an agent for the leader of the council, no matter how influential he or she may be. I am, therefore, disposed to agree with Mr McMullen, and to disagree with the Divisional Court (see 96 LGR, 157, 181), that if the housing committee resolution could be shown to have been a lawful resolution, the causative effect of Dame Shirley's and Mr Weeks' misconduct would, for section 20 purposes, be spent.

152 There were twelve members of the housing committee. Seven of them voted in favour of the designated sales policy. Five voted against. Of the seven, two of them, Mr Hartley and Dr Dutt, were found guilty of misconduct by the auditor. Each, in the auditor's opinion, "took into account the electoral advantage of the Conservative party and sought to promote it in his voting". The auditor issued a section 20 certificate against Mr Hartley but Mr Hartley succeeded on appeal to the Divisional Court. In the view of the Divisional Court he was guilty of misconduct but not of wilful misconduct: see p 199. It follows, however, from the finding of misconduct that Mr Hartley's vote at the housing committee meeting was invalid.

153 As to Dr Dutt, he took his own life before the auditor made his final findings. The auditor, in his report, said:

> "My provisional findings and views were adverse to Dr Dutt . . . In letters to me Dr Dutt disputed my provisional findings and views. Shortly

A thereafter, he took his own life. I make no findings of personal liability of Dr Dutt": para 1903.

154 Mr McMullen has submitted that Dr Dutt must be treated as exonerated from misconduct. I do not agree. Dr Dutt was exonerated from wilful misconduct, but the provisional findings of misconduct were unchanged. In my opinion Dr Dutt's vote falls into the same state as that of
B Mr Hartley. It was invalid. As for the other five members of the committee who voted in favour of the resolution, they so voted because the resolution was Conservative party policy. They did not know that the purpose of the resolution was to obtain electoral advantage in the eight key wards. They did not know that that was the reason why the policy had been adopted. They may very well have supposed that the resolution reflected their party's
C general dislike of social housing and bias in favour of owner occupation. I do not think, in these circumstances, that their votes can be disregarded on the ground that they were invalid. But their votes were insufficient in number to carry the resolution. Five valid votes in favour of the resolution and five against would have produced a tie which, in theory, could have been resolved by the chairman's casting vote. But the chairman was Mr Hartley
D and any casting vote of his would, for the reasons already discussed, have been an invalid vote.

155 In my opinion, therefore, the resolution purportedly passed at the housing committee meeting was not a valid resolution, the wilful misconduct of Dame Shirley and Mr Weeks in promoting the policy purportedly adopted by the resolution was not spent and the chain of causation was not broken. In my opinion, their misconduct caused, for
E section 20 purposes, the 618 sales by the council that produced the loss.

Quantification of the loss

156 The issue is whether Robert Walker LJ's disagreement with the basis on which the Divisional Court had quantified the loss was correct.

157 The 618 designated properties were sold with vacant possession.
F They were sold by the council at a discount against their vacant possession market value. The council had power to sell at a discount. If the sales had been lawful, no complaint about the discount could have been made. The question is whether, the sales being unlawful, the amount of the discount represents an item of loss caused by the wilful misconduct. The rival arguments, as I understand them, are these.

G (1) The properties were, before being designated for sale and becoming vacant, occupied by council tenants. Their value so tenanted was a good deal less than their value with vacant possession. If, on becoming vacant, they had been re-let to those on the council's waiting list for social housing, their value so re-let would, similarly, have been a good deal less than their value with vacant possession. The amount of the discount at which the properties were sold may be taken, on a rough and ready footing, as
H representing the difference in value between the properties let as social housing and the properties with vacant possession. So, if the council recover the amount of the discount the council will be in a better financial position than it would have been if the unlawful designated sales policy had never been adopted. This argument, expressed by Robert Walker LJ more lucidly

than I have done, was concurred in by Kennedy LJ. It has been espoused by Mr McMullen and Mr Cakebread.

(2) The alternative argument proceeds like this. The council has a statutory housing obligation and a long list of people who need to be housed. The unlawful sales reduced the council's stock of social housing. In order to replenish its stock and restore the position to what it was before the sales took place, the council would have to purchase properties in the open market. It would have to pay vacant possession prices. Accordingly, the loss it suffered by reason of the misconduct included the discounts at which the properties were sold. This was the approach of the Divisional Court. It was supported by Mr Howell.

158 The answer to the question as to which approach is the right one does not, in my opinion, depend at all upon the manner in which the properties appeared in the council's accounts. The quantification of loss for section 20 purposes should, in my view, apply the same principles as are applicable to quantification of damages in tort. As a result of the wrongful acts of Dame Shirley and Mr Weeks the council suffered loss. What was that loss? It lost the properties that were sold, but it received the purchase price that was paid for them. Immediately before sale, the properties were vacant. They were sold with vacant possession but the council did not receive a vacant possession price. In my opinion, the discount represented a true loss suffered by the council. Interest on the discounted purchase price since its receipt and interest on the amount of the discount from the date of the sale ought, on the assumption that interest rates more or less reflect rates of inflation in property values, to enable the council to replace the sold housing stock. Thus, to treat the discounts as items of loss seems to me to produce a just result, in line with the intentions underlying section 20.

159 The problem, as it seems to me, with Robert Walker LJ's approach, is that it attributes no value to the benefit to the council of owning properties which are available to be used for social housing. The sale of the properties deprived the council of that benefit. The council can restore that benefit only by purchasing similar properties in the open market. The value of that benefit can be taken, again on a rough and ready basis, as being equivalent to the discounts.

160 To allow the council to recover the discounts as items of loss does not, in my opinion, involve any element of double counting. A separate item of loss allowed by the Divisional Court was £4·237m, representing extra costs of housing homeless people which the council had to incur as a result of its own stock of social housing having been depleted by the sales of the 618 properties. Robert Walker LJ thought that to allow the discounts to be recovered as well as the £4·237m would be inconsistent and involve double counting. I do not think so. The £4·237m covered the extra costs of homelessness over the period starting from the date on which the properties, on becoming vacant, were available for reletting and ending on the date of the auditor's certificate. Thereafter the loss of the 618 properties from the housing stock is covered by the capital sum received (or receivable) by the council (i e the discounted proceeds of sale plus the amount of the discounts) that enables it to replace the sold properties. There is no double counting.

A *Bias and unfairness*

161 There was a fourth issue raised by Dame Shirley and Mr Weeks. They submitted that the manner in which the auditor had gone about his task of fact finding was attended by at least the appearance of bias against them and that that feature of the case, coupled with the time it has taken for the case to come to finality, represented such a degree of unfairness as to
B infringe their right to a fair trial (see article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms). These submissions fail, in my opinion, for the reasons given by my noble and learned friend Lord Hope of Craighead. I want to add just one comment on the issue of unfairness.

162 One of the most striking features of the case is the enormous amount that under the auditor's certificates Dame Shirley and Mr Weeks
C were adjudged liable to pay. The amount, £31m-odd, seems enormous not because it does not accurately reflect the loss caused to the council by Dame Shirley's and Mr Weeks's misconduct but because it is so out of line with what most people would regard as a proportionate punishment for their misconduct. There is, I think, an almost instinctive feeling that the requirement that they pay the certified amount is unfair.

D 163 This instinctive feeling, however, overlooks the very important fact that the purpose of a section 20 certificate is to compensate the local authority for loss. The purpose is not one of punishment. Nor does the amount to be certified lie in the discretion of the certifying auditor. If wilful misconduct has been proved it is his duty to certify the full amount of the loss thereby caused. The size of the amount so certified can no more represent an article 6 unfairness than can the size of an award of damages for
E tort or breach of contract. Since, for the reasons given by Lord Hope, there was no procedural unfairness in the proceedings which have culminated in the appeal to this House, there is no further ECHR point that can be taken.

Conclusion

164 For the reasons given in this opinion in addition to those given by
F Lord Bingham, with which I am in full agreement, I would allow the appeal and restore the order of the Divisional Court.

Appeals allowed.
Order of Court of Appeal of 30 April 1999 set aside.
Order of Divisional Court of
G *19 December 1997, as amended, restored.*

Solicitors: Rowe & Maw; Nicholson Graham & Jones.

DECP

H

Alan Bates and Others v Post Office Limited

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
9 April 2019

Case No: HQ16X01238, HQ17X02637 and HQ17X04248

High Court of Justice Queens Bench Division

[2019] EWHC 871 (QB), 2019 WL 01546637

Before : The Honourable Mr Justice Fraser

Date: 9 April 2019

The Post Office Group Litigation

Judgment (No.4) "Recusal Application"

Hearing date: 3 April 2019

Representation

Patrick Green QC , Kathleen Donnelly , Henry Warwick , Ognjen Miletic and Reanne Mackenzie (instructed by Freeths LLP) for the Claimants (the Respondents to the application).
Lord Grabiner QC , David Cavender QC and Gideon Cohen (instructed by Womble Bond Dickinson LLP) for the Defendant (the Applicants).

Judgment

Mr Justice Fraser:

Introduction

1. These proceedings are being conducted pursuant to a Group Litigation Order ("GLO") made on 22 March 2017 by Senior Master Fontaine. There is one substantive judgment dealing with what the parties referred to as the "Common Issues" which is called Judgment (No.3) "Common Issues". This is at [2019] EWHC 606 (QB). Other judgments, which concern procedural rather than substantive issues, are at [2017] EWHC 2844 (QB) and [2018] EWHC 2698 (QB). These were numbered Judgment No.1, and Judgment No.2. It is the substance of Judgment No.3 "Common Issues" that is relevant to the application the subject matter of this judgment. There were 23 different Common Issues between the parties that were decided in Judgment No.3. The Post Office, the defendant in these proceedings, issued an application on Thursday 21 March 2019 that I recuse myself as the Managing Judge in the whole group litigation, and adjourn what is called the "Horizon Issues" trial, which commenced on 11 March 2019 and had been underway for two weeks when the recusal application was issued. That trial had almost reached the end of both sides' evidence of fact at that stage. The relief sought also included an adjournment of

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the Horizon Issues trial, but as I explain at [15] below, in reality it means abandonment of that trial so that it can be started again before another judge at some unspecified date in the future.

2. My first involvement with this case came after I was appointed the Managing Judge in April 2017. I issued Directions Order No.1 on 25 April 2017 which ordered the 1st Case Management Conference ("CMC") to take place before me on 19 October 2017, a date six months later. This was the first date possible due to paragraph 40 of the Group Litigation Order itself, which was made on 22 March 2017. That required a CMC to be held on "the first open date after 18 October 2017". 19 October 2017 was therefore the earliest date upon which such a CMC could take place before me. In the Introduction to Judgment No.3 at [2] to [43], I set out an extensive background to the Group Litigation, which I will not fully repeat here. In general terms, the litigation concerns claims by about 550 sub-post masters and mistresses (or "SPMs") who used to run branch Post Offices. The subject matter of the litigation is the Horizon computerised system ("Horizon"). Horizon is the computerised point of sale system which was adopted by the Post Office in 2000 and is used in all its branches. It also deals with individual SPMs branch accounts.

3. SPMs are men and women who run small retail businesses, in which branch Post Offices are located. They operate the branches, selling Post Office and other products (such as postal orders, postage stamps and so on) to members of the public, and the cash and stock in those branches belong to the Post Office. Stamps are in fact products that belong to the Royal Mail, but most readers of this judgment will be aware of what branch Post Offices are, and what they do. The Post Office also has a large number of what are called "clients", including (for example) Camelot for the National Lottery, the Bank of Ireland for banking products, the DVLA and other similar institutions. SPMs both sell, and provide services in respect of, these products too on behalf of the Post Office, and the Post Office has separate arrangements with its clients for these services to be provided to the public in branch Post Offices. The Post Office pays SPMs remuneration, but they are not employees of the Post Office. They are self-employed small businesspeople. A small number of branch Post Offices are run through limited companies. Prior to 2000, SPMs accounted to the Post Office using a paper-based system. Horizon was introduced in 2000, and in 2011 the Horizon system became an online system. In the litigation, the Horizon system from 2000 to 2011 is called "Legacy Horizon", and thereafter it is called "Horizon Online" or "HOL". The litigation concerns both Legacy Horizon and Horizon Online.

4. The claimants' case is that Horizon contained, or must have contained, a large number of software coding errors, bugs and defects, and as a result apparent shortfalls and discrepancies would, and did, appear in SPMs' branch accounts. The subject matter of the litigation is highly controversial, and none of the claimants' claims are admitted. The claimants allege that when financial, accounting and other shortfalls occurred in branch accounts, the Post Office did not investigate these fairly or properly; required claimants to make good the alleged shortfalls; excluded claimants from their own branches; suspended and/or terminated their appointments; and imposed undue and/or unreasonable pressure or influence upon them to resign, or otherwise end their contract with the Post Office. It is also claimed that the Post Office unfairly investigated them, prosecuted some of them for theft, false accounting and/or other criminal charges, and acted unreasonably so as to prevent them from recovering the value of their businesses. It is also the claimants' case that throughout the relevant period (which is from 2000 onwards) the Post Office has concealed material facts from them and misled them about the reliability of Horizon and the errors in, and generated by, Horizon. This concealment is said to have included the ability of the Post Office (but most particularly its IT provider Fujitsu) remotely to access and make changes to transactions, data and/or branch accounts on Horizon, without the knowledge of the particular SPMs in question. Claims are also made in the torts of deceit, malicious prosecution, duress and harassment. The Post Office strongly defends all these allegations, maintains that the Horizon system is what is called robust and can be relied upon, and maintains that in the great majority of cases the shortfalls and discrepancies that arose are explicable by carelessness or dishonesty on the part of SPMs and their staff. Defences raised by the Post Office include the burden of proof, false accounting, failure to maintain records, estoppel, accord and satisfaction, account stated, settlement agreements, res judicata, issue estoppel, abuse of process, limitation, reflective loss and set off. A counterclaim is made by the Post Office for the amounts of unrecovered shortfalls, damages for breach of contract, fraud and/or conversion, an order for reconstitution of any trust fund and/or compensation in equity, and restitution in respect of amounts by which the claimants have been unjustly enriched.

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5. The role of a Managing Judge in Group Litigation is to case manage the proceedings and try the issues. CPR Part 19 rules 19.10 to 19.15 set out the specific provisions relevant to Group Litigation. CPRPart 19 rule 19.12(1) where a judgment or order is made in a claim in relation to one or more GLO issues, such a judgment or order is binding upon the parties to all the other claims in the Group Litigation unless the court orders otherwise. Practice Direction 19B paragraph 8 states that the Managing Judge "will assume overall responsibility for the management of the claims and will generally hear the GLO issues." PD19B Paragraph 15.1 states that directions may be given for the trial of common issues and for the trial of individual issues. PD19B Paragraph 15.2 states "common issues and test claims will normally be tried at the management court".

6. In this litigation, the first group of common issues (which both the court and the parties have called the "Common Issues") relate to the contractual and agency relationship between the Post Office and SPMs. The litigation spans a long period of time, namely from 2000 until 2016. The Post Office changed the terms upon which SPMs contracted with it in 2011, when what was called the Standard Sub-Postmaster Contract (or "SPMC", which also existed in modified form from 2006 as the "Modified SPMC") was replaced with the National Transformation Contract or "NTC". The SPMC had existed from 1994, some years prior to the introduction of Horizon and when branch accounts were paper based. The Common Issues govern contractual and agency issues concerning the claimants, and arise under both the SPMC and the NTC contract forms.

7. The Common Issues trial took place between 7 November and 6 December 2018. Case management directions have been given for other rounds of the litigation going forwards, and the trial of a second round of substantive issues, called the "Horizon Issues", commenced on 11 March 2019. The Horizon Issues trial involves the computer-specific issues, and for these issues each party is calling an expert in computing or IT. There are 15 such computing issues. One is to what extent was it possible or likely for bugs, errors or defects in the Horizon system to have the potential to cause apparent or alleged discrepancies or shortfalls relating to SPMs' branch accounts or transactions? Another is whether the Post Office and/or Fujitsu was able to access transaction data recorded by Horizon remotely (which means not from within a branch). The IT experts have issued four joint statements agreeing certain points. They have each served two expert reports.

8. A third trial is to take place in November 2019, dealing with limitation issues and other general issues that have the potential to affect a great many claims in the group. For example, if the limitation defences raised by the Post Office succeed, any claimant who issued proceedings after the relevant date when their respective limitation periods expired will find their claim time-barred. A fourth trial is to take place in early 2020, in respect of other issues or claims which have not yet been finalised.

9. The intention in ordering the trial of groups of issues in this way is to provide the parties with resolution of as many issues as possible, that impact upon the claims of as many claimants as possible. There are not currently any orders in respect of fully trying any individual claims through to their conclusion in terms of any breach, causation and loss, nor as test claims, nor to any of the counterclaim issues, which allege breach of contract and breach of fiduciary duty. These may occur in round 4 in 2020. The litigation is very wide in scope. The financial sums in total in terms of branch losses alone are said to be approximately £18 million, but the wider claims are greater than that, including damages claims for the different causes of action to which I have referred, and there is no finalised figure for quantum of all the different claimants, and there is no currently pleaded figure for the counterclaim for obvious reasons.

10. The judgment in the Common Issues trial took some time to prepare. I had told the parties that, although knowledge of the result of the Common Issues trial was not absolutely necessary for the Horizon Issues trial, I would do my best to distribute that judgment before the Horizon Issues trial commenced. The draft judgment was distributed to the parties on 8 March 2019. On 11 March 2019 the Horizon Issues trial commenced, and I explained on Day 1 of that trial that I had continued refining the draft since its distribution, but that I had wanted the parties to know at least the answer to the Common Issues themselves prior to commencing the Horizon Issues trial. In the evening of 11 March 2019 I received a communication from Leading Counsel for the Post Office in the Common Issues trial (copied to Leading Counsel for the claimants) drawing my attention to comments in relation to the cross- examination of Mrs Stockdale which he considered to be unfair. These comments had

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already been changed by me in the draft judgment process of refinement between 8 and 11 March 2019, and so I did not require any observation from the claimants' counsel. Those comments did not appear in the handed down version of Judgment No.3.

11. The ongoing trial concerns what the parties referred to at the case management stage as the Horizon Issues. The case management of this litigation was intended to resolve the contractual issues (which affected all the claimants) and then the computer issues relating to the operation, functionality and reliability of the Horizon system (which also affected all the claimants) first. The parties needed time to prepare for these two trials, which took place in late 2018 (for the Common Issues) and into the spring of 2019 (for this one), in particular to perform disclosure, and prepare and serve evidence. This included the expert evidence for the Horizon Issues to which I have referred from the two IT experts, Mr Coyne for the claimants, and Dr Worden for the Post Office.

12. After oral opening submissions by both parties on 11 March 2019, the claimants' evidence of fact (8 witnesses) were cross-examined from 12 March 2019. One of the witnesses of fact called by the claimants and cross-examined by the Post Office was Mr Rolls, a former Fujitsu employee who has been referred to by the claimants "a Fujitsu whistle-blower". Some of the witnesses of fact called by the Post Office and cross-examined by the claimants are existing employees of Fujitsu, including the Chief Architect of Horizon on the Post Office account.

13. I had received lists of typographic and other corrections in respect of the draft of Judgment No.3 during the first week of the Horizon Issues trial, and I handed down Judgment No.3 "Common Issues" on the Friday at the end of that week, 15 March 2019.

14. The Post Office then called its witnesses of fact during the second week of the trial, namely that commencing 18 March 2019, and had called 8 of its witnesses by 21 March 2019. Mr Godeseth, the Chief Architect of Horizon on the Post Office account, who is currently employed by Fujitsu but prior to that had been employed by the Post Office, commenced his cross-examination on 20 March 2019, and at 1.00pm on 21 March 2019 was nearing the very end of his evidence. The only remaining Post Office witnesses of fact were due to finish that same day with Mr Parker (also of Fujitsu), with the possibility of another witness Mr Membery (also Fujitsu) potentially being heard on another date due to personal circumstances of ill health.

15. However, during court proceedings on the final day of evidence on 21 March 2019 during the morning, and unknown to me (as both my clerk and I were in the trial) the Post Office issued and served an application seeking to have me recuse myself as the Managing Judge from the Group Litigation entirely ("the recusal application"), as well as adjourning the Horizon Issues trial. This was not mentioned in court at any time during that morning. I learned of this at 1.55pm on 21 March 2019 just before I came back into court for the afternoon session. In reality, although the draft order used the word "adjourn", it seemed on the face of it that the application sought to have me abandon the Horizons Issues trial altogether, so that it could be started from the beginning with a different Managing Judge. The recusal application was served on the claimants' legal team at about the same time, although it was sent to the claimants' counsels' chambers.

16. This presented some immediate case management issues for the ongoing trial which had to be addressed in very short order. The recusal application had to be heard. However, Mr Godeseth was coming towards the very end of his cross-examination. To have stopped the trial immediately, in mid-cross examination, would have led to him not being able to talk to anyone about the case (including people with whom he works at Fujitsu, where he is the Chief Architect on the Post Office account) until after the hearing of the recusal application, the handing down of any reserved judgment, and completion of his evidence at an indeterminate date in the future (either before me, or another judge). It was also clear to me that the recusal application, relying as it did (at that stage) on the contents of a judgment in excess of 1100 paragraphs in length, could not be resolved within the next 24 hours or so. Accordingly, I gave Mr de Garr Robinson QC (Leading Counsel for the Post Office at the Horizon Issues trial) the opportunity to take instructions, and then I continued the trial that day, but only to finish Mr

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Godeseth's evidence. This took, including re- examination, a little less than one hour; I then adjourned the trial and did not require the Post Office immediately to call its next witness, Mr Parker.

17. Directions were necessary for the recusal application. The application was supported by a witness statement by Andrew Parsons, the partner at Womble Bond Dickinson LLP ("WBD") his 14th statement in the proceedings dated 21 March 2019. In fact, earlier that same day the Post Office had also served his 13th witness statement, dealing with an entirely different subject, which was also dated 21 March 2019 although this had not referred to the imminent recusal application. The 13th witness statement was handed up by the Post Office at 10.30 am in court, his 14th witness statement was not mentioned. His 14th statement identified at paragraphs 22 to 25 "findings, or observations" on matters within Judgment No.3 which it was said fell outside the scope of the Common Issues trial. At paragraph 24 his statement said: "These findings give the clear impression that the Judge has already formed a firm view on these matters. It is to be expected that this will prevent him from taking an impartial view on the same matters when they are revisited, at subsequent trials, with the benefit of full evidence and disclosure".

18. The 14th witness statement also said (at paragraph 25) that the judgment "contains a great deal of critical invective directed at Post Office" and that parts of the judgment "harshly criticise Post Office's witnesses on matters irrelevant to the Common Issues".

19. However, none of the findings, observations, and what were said to be critical invective and/or harsh criticisms were identified in that 14th witness statement. I considered that this identification was necessary for two reasons. Firstly, so that the actual passages could be clearly set out in advance of the hearing of the recusal application itself. Secondly, so that the claimants could take a considered view of the application, whether to oppose it, and whether to serve evidence of their own in response.

20. There was therefore the need for service of a further witness statement by the Post Office; consideration by the claimants of that further statement; provision for service of any evidence in response by the claimants; and then service of skeleton arguments by both parties. Even giving parties 24 or 48 hours for some of these steps, the soonest the recusal application could sensibly be listed was during the week commencing 1 April 2019. I therefore listed it for 3 April 2019. The trial should not, in my judgment, be continued until I had ruled on the recusal application.

21. I therefore made an order that required the Post Office to serve further evidence specifying which passages of the judgment were being referred to in paragraphs 24 and 25 of Mr Parsons' 14th witness statement, and therefore being relied upon to found the recusal application. A 15th statement was served on 26 March 2019, in which a number of passages were identified by Mr Parsons. However, at paragraph 4 of his 15th witness statement he said:

> "Post Office's application has been listed for a day. There is therefore a limit on the material that can be referred to in Court within the allotted time. The extracts below are the principal sections of the Judgment on which Post Office intends to rely at the application hearing but it is not an exhaustive list of all the points made in the Judgment that support th e P ost Offic e's appli cati on. P ost Office will also rel y in it s application, on the structure, tenor and subject-matter of the Judgment as a whole ".

(emphasis added)

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22. This led to a flurry of inter-solicitor correspondence, of which I became aware at a short hearing on 27 March 2019, listed after the claimants that same morning requested a short hearing to deal with further directions. The claimants took the view that they had to know with full particularity which passages of Judgment No.3 were being relied upon by the Post Office, firstly in order properly to decide whether to oppose the application, and secondly so that they could deal with these points in their own evidence if they did. Mr Green QC explained this at the short hearing, and also submitted that the passage that I have identified above gave the Post Office extraordinary latitude. Mr Cavender QC explained the Post Office's position. Essentially this was that counsel who would be making oral submissions on the application, Lord Grabiner QC, would or may wish to put some passages in context by relying upon other parts of the judgment, and the wording of paragraph 4 of the 15th witness statement of Mr Parsons was to allow him room for manoeuvre to do so.

23. By the time the parties attended before me at 12.15pm on 27 March 2019, WBD had already been told in a letter from Freeths dated 27 March 2019:

> "Accordingly, we will proceed on the basis that you will not be relying on any parts of the Judgment to which you have not expressly referred in Parsons 15".

The answer to this came in a letter of the same date from WBD to Freeths which said:

> "We have now responded fully to your letter of yesterday. There are no further paragraphs that we wish to identify in accordance with the Order".

This was also orally explained by Mr Cavender QC, and that hearing was transcribed.

24. I did not consider it necessary to make any further directions on the recusal application. Freeths had by the time of the short hearing before me notified WBD that the recusal application was opposed. In any case, any further submissions that the claimants wanted to make concerning any failure to notify passages in advance could be made during the actual recusal application itself. Further evidence from the Post Office in relation to Judgment No.3 was not likely to be particularly helpful, and the expenditure of costs on what could turn out to be satellite litigation could not be ignored. I deal with the matters relied upon by the Post Office in the recusal application at [71] below, after consideration of the law.

25. Later on the same day, 27 March 2019, the court received an agreed Consent Order, signed by both firms of solicitors, seeking to impose a stay on all the proceedings, including but not limited to the Horizon Issues trial, with the exception of the recusal application. I declined to make such an order and explained I would not countenance further orders in the litigation until after the recusal application had been determined.

26. Then on Friday 29 March 2019 both parties lodged written submissions in respect of the costs of the Common Issues trial, and the claimants sought release of the security of £3.9 million which I had ordered be provided by the claimants in September 2018. Oral submissions will be required in due course on both of those matters to deal with the costs of the Common Issues

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trial, which led to Judgment No.3. I will return to this subject again, but resolving costs in the Common Issues trial cannot be done until after the recusal application has been dealt with.

The legal test for apparent bias

27. The classic statement in respect of the legal test for apparent bias is not in dispute. It is whether:

> "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

This is taken from [103] of the speech of Lord Hope in *Porter v Magill [2002] 2 AC 357* .

28. The parties were agreed on the law, which each side summarised in their skeleton arguments. A large number of authorities were provided in an agreed bundle, and only a few of these were considered in the oral submissions. I will deal with some, but not all, of the 30 different cases provided. The single sentence at [27] above from *Porter v Magill* contains the essential statement of the law applicable on any application to a judge that they recuse themselves for apparent bias. Lord Grabiner made clear in his oral submissions that no case on actual bias was being advanced by the Post Office. I shall deal first with the authorities relied upon in the oral submissions, and then some of the others. The legal test is well known.

29. Bias includes giving the impression of having pre-judged any issue. In *Otkritie International Investment Management Ltd and others v Urumov [2014] EWCA Civ 1315* the trial judge had made certain findings against the defendant in relation to two separate matters, called the Sign-On Fraud and the Argentinian Warrants Fraud. The judge made numerous damaging findings about the defendant's fraudulent deception of his employer, and his conduct both of the interlocutory proceedings and of the trial. He found the defendant personally liable for US$23 million for the Sign-On Fraud and US$150 million for the Argentinian Warrants Fraud. The claimants applied to commit the defendant for contempt, and the defendant applied to the judge to recuse himself. Longmore LJ stated at [1] and [2]:

> "[1] It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see *Porter v Magill [2002] 2 AC 357* para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre- judged" the case .
>
> [2] This can give rise to potential difficulties in long running cases where a judge has been case-managing a case and has then to conduct the trial or in cases where a trial has occurred and the judge has then to consider consequential matters such as, in the present case, proceedings for contempt. It is obviously convenient for a single judge rather than different judges to deal with a complex case but the question can arise whether there comes a point where findings made by a judge pre-trial disqualify a judge from continuing with a case or findings made at trial disqualify a judge from hearing consequential matters. This is the question at the heart of this appeal."

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(emphasis added)

30. In that case, there were five different grounds relied upon by the defendant. The judge treated two of them as apparent bias, and three as assertions of actual bias. He dismissed the first two, but held that although the other three were "entirely groundless", that "with extreme reluctance" he should recuse himself. The Court of Appeal held that he was wrong to do so. At [13] Longmore LJ (with whom Moore- Bick and Laws LJJ agreed) stated:

> "There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive. "

(emphasis added)

31. Longmore LJ also stated the following, explaining why that case was different from an earlier one in which Andrew Smith J had recused himself from hearing an application to commit:

> "[30] The present case is different for two quite separate reasons. First as trial judge Eder J has considered an enormous number of issues and sub-issues between the parties. He has not focussed solely or mainly on the very issue that the judge will have to decide on the contempt application; the canvas of his judgment is infinitely broader. The focus of the contempt application will be much narrower and it is (in theory) quite possible that that narrow focus, coupled with the higher standard of proof required for the application, could produce a different result even if the evidence is essentially the same. In any event, the evidence may not be essentially the same.
>
> [31] Secondly, it is clear that Eder J feels no personal embarrassment or discomfort in considering the contempt application. Not only has he not said anything to indicate such embarrassment or discomfort; he has positively said that the fears expressed by Mr Urumov are groundless and that he would welcome his decision (which he reached with "extreme reluctance") being overturned. Since the reasons he gave for his decision are, in my view, defective, overturned it should be.
>
> [32] Usually this court will be astute to support judges exercising what I have called "this delicate jurisdiction" of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined . Of course, if the judge himself feels embarrassed to continue, he should not do so ; if he does not so feel, he should. "

(emphasis added)

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32. The point made by Longmore LJ in the passage above is directly applicable to Group Litigation. Such litigation is usually massive in scale, and will almost certainly never be heard in a single trial. Even if test cases are chosen, not all of those may proceed to judgment (individual claims can always be settled) and such litigation is likely to continue for a number of years. I should make it clear that I do not feel any personal embarrassment or discomfort in continuing with this litigation as Managing Judge. It is correct that I halted the Horizon Issues trial on the afternoon of 21 March 2019 and did not require the Post Office to call its next witness, Mr Parker. That was not done through any embarrassment, or fear of being compromised as the trial judge. It was done because it was necessary to hear the recusal application as soon as possible, and it could potentially have been misconstrued by the Post Office at least (if not the fair- minded observer), had I entirely ignored the fact that the recusal application had been issued, and ploughed on with the trial without hearing that application.

33. Earlier in the same judgment, Longmore LJ drew attention to the following, particularly in respect of long trials:

> "[18] In long trials where many applications have to be decided in the course of the hearing, a party may persuade himself that a judge is biased against him as a result of his rulings. In *Arab Monetary Fund v Hashim (No. 8) (1993) 5 Admin LR 348* , it was suggested that Chadwick J should not continue with the case. He refused to recuse himself and, on appeal, Sir Thomas Bingham MR posed the question whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible. He continued (pages 354-355):-
>
> > "…Most, if not all, of the cases in which this test has been discussed have been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in *Vakauta v Kelly (1988) 13 NSWLR 502, 513A* : "In considering the content of the apprehended bias principle the court must look to, inter alia, two things: what are the norms or standards relevant to the kind of case before it; and whether, on the facts, the requirements have been fulfilled."
>
> Sir Thomas Bingham MR also said this, at p 355:-
>
> > "In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the other. There are a number of possible explanations for this, the most obvious being that the successful party has shown greater judgment, determination and knowledge of the rules than its opponent. Mr Ross-Munro accepted, as we understood, that no inference of apparent bias could be drawn from the fact that most, or all interlocutory applications had been decided against Dr Hashim. We agree. He also disclaimed any attack on the correctness of Chadwick

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> J's interlocutory decisions. This we find puzzling. It must, we think, be hard to show consistent unfairness in the absence of consistent error."

(emphasis added)

34. It is important to note that the Master of the Rolls referred to the "reasonable and fair- minded person sitting in court and knowing all the relevant facts". Such an observer is not expected to consider a single element of complex litigation – such as isolated passages in a judgment – and ignore the whole picture. Mr Green for the claimants also drew my attention to what he described as the unique nature of this application, namely recusal of a Managing Judge in Group Litigation which he submitted would inevitably involve trying groups of issues. I do not consider that there is any different test for apparent bias of a Managing Judge in such litigation. In any event parties have sought to have judges managing group litigation recused before. The case of *A-B and others v British Coal Corporation [2006] EWCA Civ 172* (dealt with in more detail below at [49]) concerned potential recusal of a judge who was the approved judge in charge of group litigation. That is effectively the same as the position which I occupy as the Managing Judge.

35. In *Mengiste v Endowment Fund for the Rehabilitation of Tigray and others [2013] EWCA Civ 1003* the Court of Appeal heard an appeal by the claimants' solicitors. They had been made subject to a wasted costs order in favour of the defendants. Given the lex causa of the proceedings was the law of Ethiopia, the claimants had called an expert in Ethiopian law who was given the name (for the purposes of the proceedings) of Mr Jones; this was necessary for security reasons. Mr Jones' evidence was deployed upon a stay application in respect of jurisdiction, in which one of the issues was the fairness of legal proceedings in Ethiopia. The judge who heard that application took a dim view of Mr Jones' compliance with an expert's duties under CPR Part 35 . He was critical of him in his judgment on the stay application. A wasted costs application was mounted against the claimants' solicitors and the judge refused to recuse himself. He heard the application and made such an order against the solicitors.

36. The Court of Appeal considered the matter on appeal. The Post Office relies upon the comments at [59] and [63] in particular in the judgment of Arden LJ (as she then was). The Court of Appeal allowed the appeal against the wasted costs order on the grounds that the judge should have recused himself. It is not necessary to reproduce the whole of [59] which sets out the fact specific matters in both the judge's judgment on the stay application and the criticisms made of the claimants' solicitors, but two passages in particular should be identified:

> (i) *No necessity to make the findings:* the judge's criticisms were not in my judgment necessary to enable the judge to evaluate Mr Jones' evidence. The only issue that needed to be decided was whether Mr Jones' evidence should be accepted: the judge held that it should not be accepted because of its inherent inconsistencies and unreliability. The question why his reports contained inadmissible material or he performed poorly as a witness – which I accept were likely to increase costs – were primarily relevant when it came to costs. As it seems to me, the judge, in making criticisms against the solicitors over their explanation to Mr Jones about his duties was concerned to ward off an application for a wasted costs order against Mr Jones (see paragraph 39 of his recusal judgment, above paragraph 34). That was to anticipate an application that had not yet been made. Even if this were not the case, there was no need to make these criticisms without inserting an appropriate qualification that they were provisional views, or views made on the limited evidence available to

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him, thus being seen to leave the door open to the possibility that there might be another explanation. The fair-minded observer would ask rhetorically why that had not been done.

(ii) *Criticisms expressed in absolute terms* : The ju dge 's f ail ure to le ave the door ope n for the possibility of some explanation when he had not heard evidence or submissions from the appellant solicitors gives rise to an impression of bias because it suggests that no explanation will be considered . The impression of bias is further confirmed by the making of findings of this nature when it can be foreseen that an application for a costs order, with serious consequences for the solicitors, may result."

(emphasis added)

The judgment continued:

"[63] I do not consider that it is necessary for me to produce my own version of the judge's five principles. It was no doubt useful to try to formulate the principles but I do not consider that they are satisfactorily encapsulated in the judge's principles. The first principle does not call for comment. The second principle is that a judge who is doing no more than discharge his judicial function does not create an impression of bias, which is well established. What occurs in that situation is adjudication, not unsought findings. The third principle is in my judgment too narrow since there are circumstances where a judge's criticisms in his substantive judgment will cause him to be disqualified on the grounds of apparent bias from hearing a wasted costs application: *Re Freudiana* . To call those circumstances "exceptional" does not define them. When there is an issue of apparent bias, the test in *Porter v Magill* must be fearlessly applied by this court. The fourth and fifth principles overlook the possibility that mere criticism expressed in absolute terms may of itself be extreme and unbalanced because the impression to even the fair-minded observer that the door has not been left open for whatever explanation the party or non-party who has not yet had the chance of providing that explanation may have to say. These are immediate observations based on the facts of this case and should not be treated as comprehensive."

(emphasis added)

37. In *Stubbs v The Queen [2018] UKPC 30* , the Privy Council heard an appeal from the Court of Appeal in the Bahamas. A trial on charges of murder had taken place in 2007 against three defendants. That trial had to be aborted, but before it was, the judge made rulings on admissibility of evidence and also upon a submission of no case to answer. Another trial in 2013 led to convictions against all three defendants, who appealed. The Court of Appeal heard those appeals in 2015. However, by this stage, the judge who had conducted the aborted trial had been elevated to the Court of Appeal. The defendants invited him to recuse himself on the grounds of apparent bias and he refused. He was part of a court of three, who heard the appeal, which was dismissed.

38. In the course of allowing the appeal from that decision, the Privy Council (per Lord Lloyd-Jones) considered the issue of prior involvement by a judge in a case. At [13] he stated:

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> "It is obvious that that principle would be violated if a judge were to sit in an appellate capacity to determine the correctness of his own earlier decisions or on an appeal against a conviction in a trial by jury in which he had presided."

However he added at [14]:

> "In the present appeals, however, the issue does not arise in this stark form. The question for consideration is, rather, whether the involvement of the judge in an earlier stage of the proceedings should require him to recuse himself. Here, this issue appears in a novel form. Counsel were unable to refer us to any reported authority in any jurisdiction in which it had been argued that a judge who had presided at an earlier trial by jury which had been aborted should not sit on an appeal against a subsequent conviction of a defendant on the same charges in a later trial in which the judge played no part."

39. I consider that this type of prior involvement is some distance from that of a Managing Judge trying separate groups of issues in the same first-instance litigation. At [16] the following was stated:

> "[16] A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mi nd is closed in some respect r elevant to the decisi on which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case. (See generally, *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451* per Lord Bingham of Cornhill CJ at para 25; *Livesey v The New South Wales Bar Association (1983) 151 CLR 288* at p 299.) However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced."

(emphasis added)

40. The Privy Council then considered a number of different cases in which particular results had obtained. At [20] the following is stated:

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> "[20] In *Livesey v The New South Wales Bar Association (1983) 151 CLR 288* two members of the court hearing professional misconduct proceedings against a barrister had earlier sat in similar proceedings involving the fitness of another person to be admitted to the Bar. The same factual issue featured large in both sets of proceedings. The High Court of Australia held that the judges should have recused themselves from sitting in the second case because of the appearance of prejudgment.
>
> > "It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact. The consideration that the relevant question of fact may be conceded or that the relevant person may not be called as a witness if the particular judge sits would not, of course, avoid the appearance of bias. To the contrary, it would underline the need for the judge to refrain from sitting." (at p 300)"

41. The most relevant passage, in my judgment, is that at [23]:

> "[23] Mr Knox is correct in his submission that the fact that a judge has previously made a decision adverse to the interests of a litigant is not, of itself, sufficient to establish the appearance of bias. As Floyd LJ observed in *Zuma's Choice Pet Products Ltd v Azumi Ltd [2017] EWCA Civ 2133* (at paras 29, 30), the fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant. However, different considerations apply when the occasions for further rulings do not arise in the same proceedings, but in a separate appeal."

(emphasis added)

42. This passage is of direct relevance to the matters under consideration here. The Horizon Issues, and all the other groups of issues still to be determined in the whole of the Group Litigation, are the same proceedings as those that led to Judgment No.3. I therefore consider that this authority supports the general proposition that the fair- minded observer does not assume that simply because Judgment No.3 is (in part) unfavourable to the Post Office, this means that future issues in the litigation, including the Horizon Issues, will not be dealt with fairly.

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43. The authorities make clear the type of situation where recusal has been required. At [24] in *Stubbs* it is explained that:

> "In the present case, during the second trial of the appellants Isaacs J had made rulings on issues of mixed questions of fact and law or involving the exercise of judicial discretion. In particular, first he had ruled against a submission of no case to answer. In doing so he had necessarily concluded that there was sufficient evidence on which a reasonable jury properly directed could convict the appellants. Secondly, he had ruled that Scott's deposition should be admitted in evidence. In doing so he held that the statutory provision under which the application was made was not unconstitutional, that Scott's evidence was sufficiently reliable for it to be in the interests of justice to admit it and that, in the exercise of his discretion, it was fair to admit it. Thirdly, in a further exercise of judicial discretion, he permitted dock identifications of all three appellants. These were concluded rulings on intermediate issues of major significance in the proceedings".

These matters, on the facts of that case, meant that he should not have sat on the appeal, and the fact that there were three justices of appeal and not one did not make a difference to that.

44. The case of *Steadman-Byrne v Amjad [2007] EWCA Civ 625* concerned a personal injury action arising from a low-velocity collision between motor cars. The claimants gave their evidence and were cross-examined in the morning of one day trial. Upon conclusion of their evidence, and over the adjournment at 1.00pm, before the defendant's evidence had even been called, the district judge adjourned and invited counsel for the parties to his room. He then made clear that he believed the claimants as well as making other comments which are listed at [4] in the judgment of Sedley LJ. Some, if not all, of these comments are very remarkable. They are listed at (1) to (13) in that paragraph. What is equally remarkable is that this was done before the defendant had even given any evidence at all.

45. The stance taken by the appellant upon that appeal is summarised at [5] by Sedley LJ:

> "The appellant's case is that the judge, by saying what he said, went well beyond giving counsel an initial indication of his thinking and expressed firm views adverse to a defendant whose evidence he had not yet heard. When therefore in his judgment next day he found against the defendant, a reasonable observer knowing what we have recounted would infer that he might well have done so because of a prior prejudice in favour of the claimants and against the defendant."

46. The dicta at [10] deals with a situation where a judge lets the parties know his or her preliminary view before the end of a case:

> "The test of ostensible bias is not contentious. It is whether a fair-minded observer informed of all the relevant circumstances would have concluded that there was a real possibility that the judge was biased. Bias in the present context has to mean the premature formation of a concluded view adverse to one party. We put it in this way because it is well recognised not only that a judge may and commonly will begin forming views about the evidence as it goes along, but that he or she may legitimately give assistance to the parties by telling them what is presently in the judge's mind. This

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> may properly include, as it did for example in Jacob J's decision in *Hart v Relentless Records Ltd [2002] EWHC 1984 (Ch) §38* , letting the parties know before reaching the defence case that the judge did not think much of the claimant's evidence. What is not acceptable is for the judge to form, or to give the impression of having formed, a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it. The appellant says that is what has happened here."

(emphasis added)

I would draw particular attention to the phrase "premature formation of a concluded view adverse to one party". This passage was not specifically cited by Lord Grabiner, but I consider it an important one as the apparent bias test does not prevent a judge from expressing certain views "along the way", as it were. What a judge cannot and must not do is express views that demonstrate he or she has reached a concluded view on something prematurely. To use the expression from *Mengiste* , the door must be seen to be left open.

47. In *Re Q (Children) [2014] EWCA Civ 918* the judge in care proceedings expressed himself in terms which made clear he accepted the account given by the father and rejected the allegations made by the mother, even though the mother had not yet given evidence. The Court of Appeal allowed an appeal against an order made by the judge, stating that "the judge had strayed beyond the case management role by engaging in an analysis, which, by definition, could only have been one-sided, of the veracity of the evidence and the mother's general credibility" (taken from the summary of the case in *Stubbs*). This is similar to *Steadman-Byrne* , because the mother had not even given evidence, but was not made part of the way through the substantive trial, but at an earlier case management stage.

48. Another case relied upon in Lord Grabiner's oral submissions in making the application was *Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451* , a Court of Appeal judgment in a group of five cases all of which concerned the same issues. These cases also concerned the duty and extent of enquiry required of a judge, direct interest in the outcome of proceedings, automatic disqualification and waiver. It is a very well-known case on the subject, and almost all the authorities that follow it refer to it; as a matter of interest, Lord Lloyd Jones who gave the judgment of the Privy Council in *Stubbs* appeared in *Locabail* as amicus curiae. At [25] in the judgment of the Court of Appeal in *Locabail* , part of the general discussion and statement of principles before turning to the first of the five cases, the following is stated:

> "[25] It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend upon the facts, which may include the nature of the issue to be decided….
>
> The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case…..
>
> [26] ….It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should ."

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(emphasis added)

Paragraph [26] is in the context of matters emerging during a trial in respect of matters within the judge's knowledge in terms of a connection with the case or a party, and disclosures in respect of them. However, I consider that the sentence I have quoted applies generally. Aborting a hearing or trial is undesirable, but does not outweigh the fundamental principle. Also, prior adverse comment on a party or witness, or finding evidence of a party unreliable, would not ordinarily satisfy the apparent bias test.

49. In *A-B and others v British Coal Corporation [2006] EWCA Civ 172* the Court of Appeal heard a renewed application for permission to appeal from a judgment and order of Sir Michael Turner in respect of extremely large-scale group litigation which arose out of claims by coal-miners against British Coal. The claims were for compensation in respect of diseases which they had suffered as a result of their occupation. There were two substantial trials, the first dealing with liability on the part of British Coal, which was resolved in the claimants' favour. The second concerned contribution claims brought by British Coal against their contractors. That second judgment was called *Benyo* and concerned a Claims Handling Agreement ("CHA") set up between the claimants and British Coal to resolve their claims. Due to the very high number of claimants, a fast track offer procedure ("FTO") had been set up, after the issue of liability had been resolved, to deal with claimants who were suffering from more serious disabilities, and whose compensation was likely to be of a far higher level than other claimants.

50. However, the contractors raised concerns that the judge, who had been involved in the CHA generally and in approving the FTO, should be the tribunal to resolve the contribution proceedings against them. The contractors had chosen not to attend the hearings when the FTO was developed. The contribution proceedings were in respect of settlements reached under the FTO. The contractors sought to have the judge recuse himself. He refused. At [8] Rix LJ explained that "the single essential point" on the application was whether "the judge has in effect judicially compromised himself, for the purposes of the apparent bias test laid down in recent decisions culminating in *Porter v Magill [2002] 2 AC 357* and *Lawal v Northern Spirit [2004] 1 All ER 187* , because of his involvement in the development of the FTO process." He also summarised that point advanced by the claimants in [9] in this way:

> "In effect, I think [the contractors'] submission might be put in this way, that the judge has taken a certain ownership in the FTO process itself, which would permit a fair-minded and informed observer to conclude – I am glossing here the apparent bias test – 'that there was a real possibility… that the tribunal was biased'."

51. The contractors' application to appeal the decision of the judge not to recuse himself failed. Rix LJ observed at [12] that "the judge has, for some time now, been the approved judge in charge of this large-scale litigation" and at [13] "it was natural for a judge in charge of group litigation, who would be expected, I think, to have a proactive and not merely passive interest in the litigation with which he is charged as a judge, to assist parties before him in resolving difficulties that they had in working out settlements which they had in mind."

52. I would observe that the CPR generally requires proactivity from the judge in terms of case management. Group litigation in particular, requires the Managing Judge both to case manage and try the substantive issues. Guidance, assistance or proactivity can take different forms, and explaining (for example) in a judgment that witness statements should concentrate on proper evidence of fact and not contain argument advancing a party's case, could be seen as qualifying as all or any of these. I do not consider that a Managing Judge would disqualify themselves from further involvement in the litigation by

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doing so, and indeed were they to become so disqualified as a result, it would have a substantial and detrimental impact upon what any Managing Judge could do.

53. Rix LJ also stated at [15] a passage which I consider to be highly pertinent on this particular application by the Post Office:

> "[15] Among the matters which the fair-minded and well-informed observer would of course bear in mind, apart from those of which I have already made mention, are the factors that the judge had a responsibility to conduct the group litigation, that he was well into the conduct of that litigation and had great experience in it – and when I refer to that litigation I refer to both aspects of it, both the claim aspect and the contribution proceedings aspect of it….."

54. Auld LJ added further in two passages which I also consider to be highly relevant on this application:

> "[18] I agree that the appeal should be dismissed for the reasons given by Rix LJ and wish to add, for the sake of emphasis only, a few words. Where a judge is entrusted to manage and eventually try a group litigation, with all of the complexities and testing of the forensic process that it involves, he is expected to immerse himself closely in the machinery of efficient resolution of the issues raised, and also of other issues that may affect the litigation. Such judicial managerial involvement is of a piece with the new culture of proactive and innovative case management by the court introduced in the 1998 Civil Procedure Rules, having regard, in particular, to the overriding objective. The resultant greater familiarity of the judge with what is required and feasible for speedy and otherwise efficient disposal of a complex matter before him, including a greater professional intimacy with the parties and their concerns than hitherto was normal, may necessitate interchanges and rulings, sometimes indicative, which may, as the litigation develops, require revisiting by him. This may be interlocutory, or in rulings, or a judgment at trial. Judges involved in such an evolving process are expected, and do frequently, have occasion to reconsider their earlier case management directions or rulings, indicative or otherwise, and on occasion provisional expressions of view as to substantive issues which will fall for determination in the case.
>
> [19] To characterise too readily a judge's response in the course of his case- management work of keeping a case under continuous review as conduct at risk of being perceived as bias requiring him to recuse himself could subvert the proactive role now expected of him in group litigation such as this. His earlier decisions in that regard, right or wrong, are such that as a judge he should be expected to revisit them where necessary in an impartial frame of mind and change his mind if he considers it fair and just to do so. Simply because a judge has his capacity for fairness and impartiality tested in that way does not, in my view, bring him within the scope of risk of the test of bias which Mr Limb has prayed in aid as a ground for the judge to recuse himself in this case."

(emphasis added)

55. In *El Faraghy v El Faraghy [2007] EWCA Civ 1149* the Court of Appeal heard what was described by Ward LJ as a "singularly unsatisfactory, unfortunate and embarrassing matter." The judge had made unfortunate comments, which are set out extensively at [17], but one of the features that Ward LJ also considered to be unsatisfactory was explained at [19]:

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> "When I spoke at the beginning of this judgment about unsatisfactory features of the case, one of them to my mind is the length of delay the Family Division is having to endure in cases of this kind. That is no fault of the Clerk of the Rules nor of the judges assigned to the task of deciding these "big money" cases where millions of pounds are frequently involved. The trouble is that there are simply not enough judges to do this complicated work which takes second place to the children's cases."

56. The decision was to allow the appeal in the particular factual circumstances of that case, and at [31] Ward LJ stated:

> "I have given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fair-minded observer, a feature of whose character is not to show undue sensitivity. Making every allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable, and I unreservedly express my regret to the Sheikh that they were made: they were also quite unacceptable. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair-minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey."

Consideration of the remarks by the judge in that case will show how very different that scenario is to the one contained in Judgment No.3. The remarks included what were said to be jokes about flying carpets, Ramadan, shifting sands, Turkish Delight and fasting.

57. In *O'Neill (No.2) v Her Majesty's Advocate [2013] UKSC 36* , a Scottish criminal case, Lord Hope at [51] cited *JSC BTA Bank v Ablyazov* (dealt with in detail below) with approval, and also stated that the principles of apparent bias are well established, but the application of these principles is wholly fact sensitive.

58. Of the other cases cited but not dealt with orally, some can usefully be summarised. In *Lanes Group plc v Galliford Try Infrastructure Ltd [2011] EWCA Civ 1617* the Court of Appeal heard conjoined appeals in relation to three adjudications, all involving the same parties. The two questions in the appeals were whether the adjudicator had jurisdiction (not relevant to this recusal application) and whether the decision(s) were a nullity on the grounds of apparent bias. Adjudication is a particular form of dispute resolution introduced by the Housing Grants, Construction and Regeneration Act 1996 . Enforcement is by way of summary judgment in the Technology and Construction Court, and the first instance decisions had been made by Akenhead J and HHJ Waksman QC (as he then was) sitting as a Deputy High Court Judge.

59. Bias is dealt with at [44] to [62] in the judgment of Jackson LJ. The way the issue arose was because of a document sent out by the adjudicator to the parties entitled "Preliminary View and Findings of Fact". This set out what he said were his provisional conclusions. He had not received Lanes' response to the claim at that point. It was for this reason that HHJ Waksman QC refused to enforce his decision, even though it was held that the adjudicator had the necessary jurisdiction. At [55] to [57] Jackson LJ held that the material made it clear that the conclusions set out in the Preliminary View were provisional only. The adjudicator's decision was not tainted by apparent bias or apparent pre-determination and would be enforced. He stated:

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> "[56] There is nothing objectionable in a judge setting out his or her provisional view at an early stage of proceedings, so that the parties have an opportunity to correct any errors in the judge's thinking or to concentrate on matters which appear to be influencing the judge. Of course, it is unacceptable if the judge reaches a final decision before he is in possession of all relevant evidence and arguments which the parties wish to put before him. There is, however, a clear distinction between (a) reaching a final decision prematurely and (b) reaching a provisional view which is disclosed for the assistance of the parties.
>
> [57] In my view the fair-minded observer, with all the admirable qualities identified above, would have no difficulty in deciding this case. He would characterise the Preliminary View as a provisional view, disclosed for the assistance of the parties, not as a final determination reached before Mr Atkinson had considered Lanes' submissions and evidence."

60. It must be remembered that the exercise is a particular fact-sensitive one and will differ from case to case.

61. In *JSC BTA Bank v Mukhtar Ablyazov [2012] EWCA Civ 1551* the judge at first instance had been required to hear, prior to trial, an application to commit one of the parties for contempt of court. He had found a number of contempts proven, which led to Mr Ablyazov being sentenced by him to 22 months' imprisonment. Rix LJ stated the issue on appeal in the following terms at [1]:

> "The question raised is whether in doing so the judge put himself out of the running, so to speak, as the judge of the trial on the basis that, by reason of what is called pre- judgment, there would appear to the fair-minded and informed observer a real possibility of bias. This is the doctrine of apparent bias: see *Porter v Magill [2002] 2 AC 357* . No one is suggesting that the judge is actually biased."

62. The party affected, Mr Ablyazov, had until early 2009 been the chairman of the claimant bank, JSC BTA Bank, which was situated in Kazakhstan. The bank claimed in different sets of proceedings in the Commercial Court that he had defrauded the bank of US$5 billion by various means. The bank also sought and obtained worldwide freezing orders against him. It is the practice in complex cases in the Commercial Court for there to be continuity of a designated judge for both interlocutory matters and final trial. This is explained in paragraph D4 ("Designated judge") of the Admiralty and Commercial Courts Guide. Teare J was made the Designated Judge. This is similar to the role of Managing Judge in Group Litigation. Prior to the trial, the claimant applied to commit Mr Ablyazov on numerous grounds, but the judge limited the application to three, namely non-disclosure of assets, lying in cross-examination and dealing with assets. These arose as a result of the freezing orders. It was this that led to the sentence of 22 months' imprisonment.

63. The outcome of this is set out at [6] to [8] of the judgment of Rix LJ, with whom Toulson and Maurice Kay LJJ agreed:

> "[6] The judge gave three judgments in the committal application: one dealing with the alleged contempts of court, one dealing with sentence, and one dealing with the further consequences for the

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litigation as a whole, the so-called "unless" judgment. The contempt judgment was handed down on 16 February 2012 ([2012] EWHC 237 (Comm)) and sentence was dealt with by a further extempore judgment given that same day. The unless judgment was given on 29 February 2012 ([2012] EWHC 455 (Comm)).

[7] In his contempt judgment the judge concluded that over the relatively narrow range of matters investigated, Mr Ablyazov had failed to disclose assets, had lied to the court, and had dealt with his assets in breach of the freezing order: and that in defending the committal application had relied on false witnesses and forged documents. The judge said (at [80]):

> "…notwithstanding the clarity and firmness with which Mr Ablyazov gave much, though not all, of his evidence I concluded that I could place little weight on his denials and could only accept what he said if it was supported by reliable contemporary evidence."

[8] In his unless judgment the judge debarred Mr Ablyazov from defending the claims made against him in eight associated commercial court actions and struck out his defences in them *unless* within a stated period he both surrendered to custody and made proper disclosure of all his assets and dealings with them. The order that Mr Ablyazov surrender to custody had been made necessary by his failure to turn up for judgment on 16 February 2012 (although he had said through his counsel that he would). He became a fugitive and had disappeared. The stated period for surrender was until 9 March 2012, and for disclosure until 14 March 2012, save that the sanctions for non-compliance would not take effect until seven days after any dismissal of any appeal".

64. Mr Ablyazov appealed and his appeals failed, the notification of that being on 25 July 2012 with reasons that were reserved. Mr Ablyazov continued to participate in the proceedings. A pre-trial review that had been fixed originally for 13 June 2012 was adjourned with his consent and re-fixed for 2 October 2012. On 26-30 July 2012 the judge heard applications made by both the bank and Mr Ablyazov. The bank sought a declaration that Mr Ablyazov had acted in further default of the freezing order by dealing with his assets, and also sought an order that he reverse certain pledges he had made over valuable properties. Mr Ablyazov requested the court to grant permission retrospectively for such pledges, on the basis that even if made in breach of the letter of the freezing order, they were within its spirit. No suggestion was made that Mr Ablyazov intended to make an application that the judge should recuse himself. On 2 and 3 October 2012 the pre-trial review took place. A detailed timetable was discussed. Leading counsel attended on behalf of Mr Ablyazov. The judge was due to begin his pre-trial reading on 29 October. The recusal application was made only on 19 October 2012, which was before commencement of the trial.

65. The judge rejected the recusal application, both on the basis that Mr Ablyazov had waived his right by reason of his continuing participation, and also on the basis that there was no real possibility of any bias. The Court of Appeal judgment at [36] explained the submissions made on Mr Ablyazov's behalf on appeal regarding his failure to make an earlier application:

> "[36] In any event, Mr Béar [counsel for Mr Ablyazov] resisted the idea that there was any obligation on Mr Ablyazov to make an application for the judge to recuse himself in advance of the opening day of the trial itself. In his submission, the moment of truth for such an application, or what Mr

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> Béar described as the "watershed moment", did not arrive until that time. It would only have been different if the judge had expressly raised the question of whether or not the parties had any objection to him continuing as the designated judge of trial. Only that express raising of the issue, or the arrival of the day of trial, could require Mr Ablyazov to make his election. For the rest, it must be assumed, for that was a natural explanation for his silence, that Mr Ablyazov was still in the process of making up his mind whether to object or not."

66. The judgment also considered at [55], in some detail, the case of *Arab Monetary Fund v Hashim* , and the Court of Appeal's judgment in that case. This case was referred to in the passage of Longmore LJ quoted at [33] above:

> "[55] A case closer to the situation of our case was that of *Arab Monetary Fund v. Hashim* (CA, unreported, 28 April 1993) where the judgment of the court was given by Sir Thomas Bingham MR. The plaintiff Fund was seeking to recover $50 million which it alleged that its former director-general, Dr Hashim, had misappropriated from it. That action also began, as such actions generally do, with a world-wide freezing order. Hoffmann J became the designated judge. Dr Hashim complained to the Vice-Chancellor that in the course of interlocutory applications the judge had made up his mind against him. The Vice-Chancellor considered that there was no ground for that complaint at all, but as a matter of indulgence directed that while Hoffmann J should continue to hear interlocutory applications, a different judge would conduct the trial. Hoffmann J was then appointed to the Court of Appeal and Chadwick J took his place as designated judge. He conducted the pre-trial review and was subsequently 7 days into the trial when Dr Hashim drafted a letter to the Lord Chancellor to have him removed on the ground of apparent bias. However, the letter (which in being directed to the Lord Chancellor was misconceived) was never sent, apparently on legal advice. The trial continued for several more weeks, and then Dr Hashim applied to the judge to recuse himself on the ground of apparent bias. The opening weeks of the trial had been dogged by numerous further interlocutory applications, and Dr Hashim was concerned with the result of them. But he was also concerned with a remark which the judge had made in another case and which had been reported to him. Chadwick J refused to recuse himself, and his judgment was appealed.
>
> [56] This court refused to give permission to appeal, but considered the application in a full judgment. In the course of that judgment, Bingham MR said this:
>
> > "In accordance with the practice now adopted in cases of this magnitude, a judge was assigned to deal with the string of interlocutory applications which were expected before trial. Such an arrangement has the obvious benefit of avoiding the wasteful duplication of time and effort necessarily involved if a series of different judges has to master the pleadings, issues and previous history of a complex case. <u>But such an arrangement is intended to have an additional benefit: that the judge, being familiar with the case as it develops, will play a creative and directional role, concentrating attention on the issues which matter, discouraging unnecessary interlocutory diversions and highlighting the apparent strengths and weaknesses of the parties' respective cases</u> ."

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Bingham MR went on to say:

> "Would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible? Most, if not all, of the cases in which this test has been discussed have been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in *Vakauta v. Kelly (1988) 13 NSWLR 502* at 513A."

(emphasis added)

67. A passage at [70] is in my judgment highly notable. It deals with the position where a judge has to deal with applications for committal. However, I consider the principle is of wider application:

> " In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in *Ex parte Lewin* , approved in *Livesey*). He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being "influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case" (*AF (No 2)* at para [53]). I have also found assistance in this context in Lord Bingham's concept of the "objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments."

(emphasis added)

68. In that case Mr Ablyazov waited some time before making his application for recusal. The most relevant passages in respect of waiver are those at [77] to [93]. The Court of Appeal first considered *Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451* , the group of cases all of which concerned the same issue. One of the cases, called *Locabail* itself, concerned a disclosure by a deputy judge who was hearing a particular case. This is a part-time judicial post, occupied by practising barristers and solicitors. The deputy judge, who was a senior partner in a large firm of solicitors, learned in the course of the proceedings that his firm was acting in ancillary litigation. He disclosed this to the parties before him. Mrs Emmanuel, one of those parties, raised no objection until judgment was given against her. Her silence in the face of disclosure was held to be a waiver. Rix LJ at [78] said "Perhaps I should emphasise that that was silence added to participation in the proceedings."

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69. At [88] of *Ablyazov* Rix LJ said:

> "However, be that as it may, the question arises whether Mr Ablyazov's failure to request recusal at all times from the February judgments down to 19 October 2012, and in particular as late as the pre-trial review of 2 October 2012, while still participating in the proceedings, is consistent with a subsequent request for recusal based in essence on the February judgments."

70. The passage continued, analysing what Mr Ablyazov had done and how he had continued to behave in the litigation:

> "[89] ……. In the present case, there was no mere silence, but participation in proceedin gs befo re a judge whom it was known, on Mr Abl yaz ov's own case, had conducted himself in such a way as to give rise to the appearance of bias. Moreover, there was a dut y to spe ak, arising out of Mr A bl yaz ov's dut y to help t he court to further the overriding objective (CPR 1.3). It was contrary to that duty to allow the court and the other parties to waste time and resources in preparing for a trial which, if the judge of trial had to be replaced, could not start on the fixed date, but would have to be adjourned, in all probability into the following year with uncertainty as to when it could be re-fixed. The situation was similar to the familiar case where some disclosure is made to the parties by the judge, and there is no request to the judge to recuse himself. In the present case the disclosure, on Mr Ablyazov's own analysis, came at latest with the judge's three judgments of February 2012 in the committal proceedings. It may be asked, what more was required of the judge, by way of disclosure, in the light of Mr Ablyazov's own grounds for alleging apparent bias? It is unrealistic to suggest that the judge had to go on to ask whether there was any objection to him remaining the judge of trial.
>
> [90] Mr Béar submits that the watershed moment had not yet arrived, before the start of the trial itself. There is no authority to that effect. It may often happen, of course, that some disclosure is made at the start of a trial. But equally often, some disclosure is made in advance of trial, as soon as the judge realises from reading the papers that there is something which he considers needs to be disclosed. In the present case, however, the relevant disclosure, on Mr Ablyazov's own case, came at latest in the judge's February judgments. It was then for Mr Ablyazov to state his position."

(emphasis added)

71. A similar question could be posed in the instant case. The Post Office relies squarely upon the contents of Judgment No.3. That was provided to the Post Office in draft on 8 March 2019. The Post Office has different counsel teams acting on the Horizon Issues trial, and the Common Issues trial. There was not merely silence from the Post Office, but there was silence combined with active participation in the Horizon Issues trial. That active participation continued up to, and indeed during the day of, 21 March 2019 when the recusal application was issued.

72. A further passage in the authorities that deal with waiver occurs at [17] in *Steadman-Byrne v Amjad* .

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> " We would, however, stress that the time to draw the attention of a tribunal to a clear manifestation of bias on its part is ordinarily when it occurs. There is no reason why a judge to whom it is courteously pointed out that he or she may have overstepped the mark should not accept that it may be so and stand down. Equally, however, it is only in a clear case that an advocate can responsibly take this course and a judge accede to it, both because such applications have been known to be made opportunistically and because of the expense that a recusal will inevitably throw upon one or both parties, neither of whom will ordinarily be to blame for what has happened. The law of waiver is not simple, but appellate and reviewing courts tend not to look favourably on complaints of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome."

(emphasis added)

It might be thought that the Post Office had taken their chance on how the evidence of fact in the Horizon Issues trial unfolded by waiting until the last day of that evidence before issuing the recusal application.

73. There were two communications received from the Post Office after distribution to the parties on 8 March 2019 of the draft of Judgment No.3. One was a point in relation to the cross-examination of Mrs Stockdale, sent at 1426 hrs by e mail on 11 March 2019 (and received after court hours that day); the other was the list of typographical and other corrections, which also included submissions that the Post Office's case on (for example) Branch Trading Statements had not been accurately summarised in the draft. No submissions were received by the court inviting reconsideration or removal of, or drawing attention to, any of the passages relied upon in this recusal application on the basis that they risked, even arguably, giving rise to apparent bias.

74. I do not consider it is necessary individually to analyse the full text of all the authorities, particularly if they are referred to in other cases. The Post Office relied upon *Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451* and that is considered above and in *JSC BTA Bank v Mukhtar Ablyazov* . Locabail does however state at [25] that the answer will in most cases be obvious.

75. In *AWG Group Ltd v Morrison [2006] EWCA Civ 6* the judge who was about to hear a trial estimated to last six months realised, one week before the trial, that one of the witnesses was a long-standing family acquaintance. The defendants applied to the judge that he recuse himself. Instead of doing that, he acceded to the claimants' suggestion that they would not call the witness, but instead deal with the area dealt with in his evidence by calling other witnesses. In the course of upholding the defendants' appeal, the Court of Appeal dealt with the impact upon the organisation of the courts of the judge deciding to recuse himself. It was stated at [29] in the judgment of Mummery LJ that the judge's concerns about his prejudicial withdrawal from the trial and its effects upon the parties and the administration of justice were "totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge".

76. I entirely agree, and am of course in any event bound by that decision. Disruption to the administration of justice is irrelevant to the crucial question of the real possibility of bias. The situation in the Post Office litigation is, however, different to that of a judge realising, in pre-trial reading, that he is closely acquainted personally with an important witness. Firstly, this is not a question of the automatic disqualification of the judge on the grounds of personal involvement with a witness, whose association with the claimant during a corporate takeover was central. Secondly, the administration of justice here does not concern re-organisation and reallocation of another judge to hear a particular trial, even a trial intended to last for as long as

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six months. It concerns the Managing Judge of Group Litigation who has handed down Judgment No.3, as well as the Horizon Issues trial currently underway, and is based firmly on the actual content of Judgment No.3, and passages of it with which the Post Office is unhappy. That does not mean that the stage the proceedings have reached is determinative of the application. However, in a fact-sensitive inquiry, it cannot be ignored that the unheralded application came towards the very end of the Post Office having called almost all of its witnesses of fact in the Horizon Issues trial. Ward LJ said in *El Faraghy* at [32]:

> "It is an embarrassment to our administration of justice that recusal applications, once almost unheard of, are now so frequently coming to this Court in ways that do none of us any good. It is, however, right that they should. The procedure for doing so is, however, concerning. It is invidious for a judge to sit in judgment on his own conduct in a case like this but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal."

(emphasis added)

77. I took the view that I ought to hear the application, and the Post Office did not seek to have it heard at first instance by another judge. In my judgment, given the subject matter of the litigation and the fact that the application was made in the very middle of the ongoing Horizon Issues trial, there was no option but to hear it myself.

Particular Features of the Recusal Application

78. The fair-minded and informed observer would consider all the relevant facts. I consider that the Post Office in this recusal application overlooks a significant number of material facts, and instead, concentrates upon isolated passages and takes them out of context. There are three main areas in which this is done. I shall deal with each of them before considering the individual passages in the 15th witness statement of Mr Parsons. The recusal application also misconstrues the Common Issues as dealing solely with matters of contractual construction. That is not correct, as some of the Common Issues expressly deal with agency, and also the Branch Trading Statement, which is a feature of how SPMs account to the Post Office. This is not a criticism of Lord Grabiner, as he made it clear that he had come to this case relatively recently and had to be brought up to speed very quickly. However, in order properly to understand some of the passages upon which reliance is placed by the Post Office, it is necessary to consider the way in which the Common Issues trial was conducted by the Post Office.

79. The authorities make it clear that on an application such as this a wholly fact sensitive inquiry is required. Because the Post Office rely on so many passages, in what is a very long judgment in any event, this means that the judgment on this application is itself somewhat long. That is an unavoidable result of the Post Office's reliance on 109 separate passages in Judgment No.3.

Credit of witnesses

80. The first main area overlooked by the Post Office on this application is the way during the Common Issues trial (that led to Judgment No.3) that the Post Office chose to deal with the evidence, and in particular the credit, of each of the six Lead Claimants. Lord Grabiner submitted that the result of Judgment No.2 put the Post Office "in a quandary" and it did not want to allow the evidence of the six Lead Claimants to go unchallenged, and therefore it cross-examined upon it. Judgment No.2 concerned an application by the Post Office to strike out a great deal of the Lead Claimants' witness statements, issued shortly before the Common Issue trial. That application failed. The description of the position in which the Post Office found

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itself as "a quandary" may summarise the background thinking at the Post Office to the tactics adopted in the Common Issues trial, but it does not mean that material becomes irrelevant because the Post Office wishes matters had turned out differently.

81. I deal with this topic in more detail below when considering the separate passages relied upon by the Post Office, but the general point can be made when considering Mr Abdulla's evidence as an example. There were factual issues concerning his contract formation that had to be resolved. The Post Office expressly chose to cross- examine him on his accounting at his branch, the results of the audit performed at his branch that led to his suspension, the shortfalls that audit was said to show, and a suspension interview conducted by Mrs Ridge. It was expressly put to him that he was lying, that he had committed a criminal offence of false accounting, and had admitted that offence at the interview with Mrs Ridge. All of this was done by reference to contemporaneous documents, including the transcript of the suspension interview. It was expressly put to him that he made untrue declarations in order to mislead the Post Office. He was questioned about training and the Horizon user guides. At the end of his cross-examination, the following point was formally put to him:

> "Q: I have put to you that you have falsified your declaration to Post Office and you have done so deliberately. You have signed a Statement of Truth on your witness statement: the contents of that statement are true.
>
> What I am going to say his Lordship at the end of this trial is, as you are capable of falsifying your declaration on your accounts, you are just the sort of person who would falsify a declaration on a witness statement so you shouldn't be believed.
>
> A. That is not true."

82. There is nothing wrong in putting such a point to a witness, if that was the Post Office's case, which it was. Indeed, if that is a party's case, such points *must* be put to the witness on behalf of the Post Office. However, if there are factual issues about contractual formation, and the Post Office's case is that the witness is lying, by putting such points in issue, the trial judge has to resolve these. This is not going outside the Common Issues trial; it is part of the judicial function of resolving those issues. The cross-examination inextricably wove into the issue of the credit of Mr Abdulla, all of the matters which Lord Grabiner would now have me (or a fair-minded informed observer) conclude were *outside* the scope of the Common Issues trial, such as audit, suspension, termination, training and the Helpline.

83. I expressly at [269] in Judgment No.3 made it clear that I was making no criticism of Mr Cavender in putting such points. In the Post Office's written Closing Submissions, it was expressly said at paragraph 592 that Mr Abdulla had "lied frequently and brazenly". However, in his closing oral submissions, Mr Cavender said that I should make no findings as to credit. This was a confused position. I therefore gave the Post Office the opportunity to consider its position on this, and provide written submissions after the trial ended, clarifying what its submissions were. It did so, and this subject is dealt with at [21], [57] and [58] of Judgment No.3. At [58] to [60] I stated the following:

> "[58] That was a plainly confused position on the part of the Post Office. After a degree of exploration during oral closings, this confusion was not resolved. I therefore invited the Post Office to clarify their position on this after the hearing in writing. This was done, and the Post Office submitted that "the Court should refrain from making any findings of fact on matters going to issues outside the scope of the Common Issues trial, specifically matters going to issues of breach and causation."
>
> [59] I accept that the correct approach is not to make any findings on issues of breach, causation, or loss upon what were called Horizon Issues, which effectively deal with the operation and accuracy of the Horizon system, and whether it is robust and/or whether it had the propensity to generate errors and shortfalls.

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> [60] The Post Office is obviously concerned that findings of fact in this judgment may affect its prospects during any future trial on breach and causation. I will not be making any findings of fact in this judgment that go to contested facts that will be dealt with as part of breach or causation. However, that is not the same as saying that the court cannot and should not deal with the credit of witnesses where this has been so directly challenged by the Post Office."

84. The written clarification to which I referred from the Post Office withdrew two sentences of the Closing Submissions in respect of Mr Abdulla. These were in paragraph 592 of its written Closing Submissions. However, the final version of those submissions therefore looked like this, with the withdrawn sentences struck through:

> "592. The central fact about Mr Abdulla's evidence cannot be avoided: he lied frequently and brazenly. He began by denying that, as his interview records, his previous experience included tallying up figures. He then claimed that he read the first and second paragraphs of a letter, and then what appeared on its second page, but missed out the (from his perspective, damaging) third paragraph. He then said that a disclaimer meant that he would not have paid any real attention to a contract summary. He first claimed not to have read any of the transfer day documents, then admitted he did read the key document. He claimed that it was "definitely true" that Christine Adams and Christine Stephens were the same person, and that it was "not possible" that they were two people. He doesn't believe it was wrong to have told Post Office he had cash in the branch when he did not, and to have instead put an undated cheque in the till in case he was caught. Indeed, he says that he would falsify the accounts again. He said that he was given the impression in the interview held following the revelation of his wrongdoing that if he paid back the money he would be reinstated; that was untrue, as the transcript showed. He claimed to have called the Helpline very frequently, then, when the call logs were put to him, said that in fact he gave up and stopped calling. And he claimed to believe this was all a conspiracy to eject him from his branch."

85. It can be seen that this submission therefore retains:

1. The assertion that he lied frequently and brazenly;
2. Submissions upon the suspension interview, including that what he said was untrue and this was shown on the transcript;
3. Submissions upon his experience of the Helpline;
4. Submissions in respect of the call logs of the Helpline, that had been put to him.

86. This meant that Mr Abdulla's credit had to be considered by me. It was expressly put in issue by the Post Office. I consider that not only to be the correct approach, but to be the approach required by any trial judge who is asked to determine factual issues about contract formation when a Lead Claimant's credit has been subject to this kind of challenge. All of the Lead Claimants were subject to attack on credit, although obviously the facts were different between them. Two of them, Mr Abdulla and Mrs Stockdale, were expressly accused of criminal offences.

87. Lord Grabiner submitted that Judgment No.3 went too far in making findings as to credit, and used as an example [123] of Judgment No.3, when I stated the following in respect of Mr Bates:

> "I find that his evidence was careful, and he was an honest, thorough and reliable witness."

88. However, his submission glossed over two matters. Firstly, the summary of the attack on Mr Bates' credit at [121], which said:

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> "[121] In the Common Issues trial the Post Office cross-examined Mr Bates, and made submissions about the quality of his evidence, in robust terms, as it is entitled to do. No litigant is obliged to accept the factual evidence against it, and is entitled to test and challenge that evidence when it is in dispute, and that is what the Post Office did. Mr Bates' evidence that he did not receive a copy of the SPMC with the Letter of Appointment was described as implausible, and his assertion in this respect was said to be wholly unconvincing. Because he was a details man (he had once complained of a modest under-delivery of stamps) it was said he would surely have noticed the SPMC was not in the same envelope. He was subjected to a sustained attack. Other terms used by the Post Office to describe his evidence were risible, meaningless, nonsensical and weak. It was said he was giving evidence that was plainly wrong, but had convinced himself of the truth of his own account after years of campaigning."

89. These were the submissions in fact made by the Post Office based upon its cross- examination of Mr Bates. There were factual issues concerning contractual formation between Mr Bates and the Post Office, in particular which documents he had been sent, which had to be resolved to decide which contractual terms governed his relationship with the Post Office. Those factual issues could not be decided without deciding Mr Bates' credit as they partly relied upon what documents were sent to him prior to contract formation, and what he said he had actually received, which was expressly challenged.

90. The second point that is glossed over is that I expressly made it clear in Judgment No.3 that making a favourable finding in Judgment No.3 did not mean that everything a particular claimant may say in later evidence would be accepted. This was contained in [60] when I stated:

> "A finding, say, in Mr Bates' favour on issues of fact such as whether he received a copy of the SPMC has to be made one way or the other, as that affects the formation of contractual terms in his case. That is not however (if that finding is in Mr Bates' favour) to say that thereafter and for all time in these proceedings everything that Mr Bates says in evidence will as a result be accepted uncritically by the court on future other issues".

91. Finally, by cross-examining on matters such as audit, suspension and termination, the Post Office had put in issue what in fact had occurred, which meant that (as an example) Mr Green was entitled to cross-examine Mrs Ridge about Mr Abdulla's suspension interview. The Post Office on the recusal application portrayed this as cross-examination by the claimants on irrelevant material, which was then wrongly taken into account in Judgment No.3. I do not consider that analysis to be correct. It was directly relevant, and was made directly relevant by the fact it had been used by the Post Office in its own cross-examination earlier in the trial. What occurred at the suspension interview was put expressly in issue by the Post Office itself.

92. *Phipson on Evidence* (2013) 18th ed. Sweet & Maxwell states at 1-03 that "the two key objectives of the rules of evidence are fairness and ascertaining the truth through accurate fact finding". I do not consider that it would be correct or fair for Mr Cavender to have been allowed to cross-examine Mr Abdulla in the way he did, using the material that he did, yet to have prevented Mr Green from cross-examining Mrs Ridge on the same interview, or the facts underlying that interview. In any event, no objection was taken at the time by the Post Office to Mr Green's cross-examination, nor do I consider it sensibly could have been.

Extent of findings

93. In many places in Judgment No.3, not simply the passages I have quoted at [83] above in this judgment, I made it clear expressly that I was not making any findings as to breach, causation or loss, nor was I making any findings on the Horizon

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Issues. This point was made several times, including at [35], [62], [168], [193], [270], [328], [361], [480], [518] and [1113] of Judgment No.3.

94. I consider those points – or rather, the same point, made multiple times – are entirely clear and unambiguous. Lord Grabiner was rather dismissive of this. He referred to this as a "mantra" in respect of which he said:

> "That form of words, in my respectful submission, would appear to the fair-minded observer to be aimed at pre-empting the substantive criticisms that I have been making throughout. It is just a mantra which would not convince the observer that your Lordship had not prejudged the issues which still fall to be tried by your Lordship."

95. I do not accept that submission. It suggests some remarkably convoluted thinking on the part of the court, including an awareness in advance that an application to recuse for apparent bias might be made, and a conscious attempt to head that off, but doing so in terms which "would not convince the observer" that I had not prejudged the issues, in respect of which I was expressly stating that I was *not* making findings. It also suggests convoluted thinking on the part of the fair-minded observer.

96. I consider that the fair-minded and informed observer would take those statements in Judgment No.3 at their face value, and correctly conclude that I was not making findings on breach, causation, loss or the Horizon Issues. It should also be noted that the Post Office had expressly invited me in its submissions not to make findings going to breach and causation, an invitation that I expressly adopted. I consider the submission at [94] above that this was merely "a mantra" – by which term Lord Grabiner seemed to mean meaningless repetition, rather than a chant – mischaracterises what was clearly stated in Judgment No.3.

The National Federation of Sub Postmasters or Nfsp

97. Part F of the judgment dealt with the relationship between the Post Office and the NFSP. Mr Beal was in charge of relations between the NFSP and the Post Office.

98. Included within this subject was the evidence of Mr Beal, whom Lord Grabiner said I had unfairly criticised in terms of his subjective belief concerning the contractual effect of the NTC, the contract form which replaced the earlier SPMC. He also submitted that the NFSP had not been represented before me and that it was effectively unfair to have criticised that body in those circumstances.

99. Each of these submissions are wholly out of context and pay no attention either to the evidence submitted by the Post Office itself in the Common Issues trial, or to the way that the NFSP formed part of the Post Office's own case on the Common Issues.

100. Mr Beal had expressly given evidence in his witness statement concerning his subjective belief about the terms of the NTC. The NTC came about as part of the Network Transformation or NT Programme. At paragraph 33 of his witness statement Mr Beal had said:

> "Post Office changed the suite of standard contracts for the purpose of the NT programme. Despite the changes, the core principles of the agent being responsible for running the branch, employing assistants, completing the accounts and liability for losses remained the same ."

(emphasis added)

101. I rejected this evidence. Lord Grabiner's submission is essentially that it was unfair criticism of Mr Beal not to have accepted his evidence. I do not consider that submission to be correct. I deal with the two different sets of terms in the SPMC and NTC at [230] below, but on their plain terms, the liability of a SPM for losses are not the same in the two contracts, and

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I do not accept that they can sensibly be said to be the same. The SPMC expressly requires fault on the part of the SPM, and the NTC expressly and obviously does not. It uses far wider words and expressly states that a SPM is liable for "any loss of or damage to, any Post Office Cash and Stock (however this occurs…..)".

102. Lord Grabiner was very clear about Mr Beal's evidence. I asked him about Mr Beal's witness statement and the passage dealing with it which I reproduce at [100] above. He submitted the following:

> "LORD GRABINER: My response to that is first of all it obviously was in the witness statement but it was irrelevant to the matters in the trial.
>
> MR JUSTICE FRASER: Understood.
>
> LORD GRABINER: And whatever came out of the cross-examination was similarly irrelevant."

103. There are three points that arise out of this. Firstly, this was the Post Office's own evidence which Lord Grabiner now submits was irrelevant to the Common Issues trial. This was not the stance of the Post Office when it called this evidence. Secondly, Mr Beal's subjective understanding of the meaning of the loss provisions in the NTC is irrelevant in law for the purposes of construing the terms. However, he was called to give evidence of a number of matters, including this. The Post Office called this evidence on his subjective understanding and I rejected it. This is part of what a trial judge is entitled to do. Thirdly, it was also relevant because Mr Beal gave evidence on the Post Office's relationship with the NFSP. That was part of why he was called as a witness too. The fact that I disbelieved him on paragraph 33 of his witness statement was not irrelevant to my analysis of the weight to be given to his other evidence, for example where he said at paragraph 44 that "the NFSP…..is an independent members' organisation supporting Subpostmasters" and at paragraph 45 "The NFSP is independent of Post Office". Both of these passages were in his evidence in chief. He gave positive evidence of the independence of the NFSP.

104. The independence of the NFSP was part of the Post Office's express case on the Common Issues, as well as in the litigation generally. The relevance of both is identified at [575] in Judgment No.3, which states (at [575](2)):

> "2. The Post Office's case is that there is what it called an "interpretative spectrum" of contracts, ranging from sophisticated contracts which have been carefully negotiated and/or professionally drafted at one end, to more informal contracts at the other. The Post Office submits that the SPMC and the NTC are at the "more sophisticated" end of that spectrum. So far as negotiation of the terms is concerned, the Post Office relies upon the fact that the negotiation of the terms of the NTC was done between the Post Office and the NFSP, as though they were parties in a commercial bargaining position at arm's len gth from on e another. "

(emphasis added)

105. The bargaining position of the respective parties was a directly relevant issue to some of the Common Issues. The role of the NFSP was integral to that on the Post Office's own case, which was that the NFSP was independent of it.

106. Further, the NFSP was expressly relied upon in the Post Office's written Closing Submissions concerning the imposition of implied terms at paragraph 345. The Post Office submitted:

> "345. Neither of those tests [ie for implied terms] is met as regards changes made with the agreement of the NFSP, a body tasked with protecting the interests of SPMs. The contract it self provides a n ex press "control mechanism " (namel y, the nee d to obtain approval from the NFSP) , and this precludes any implied restriction. In *Mid Essex Hospital Services NHS Trust v Compass Group UK*

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> *and Ireland [2013] B.L.R.265* at para. 139, Lewison LJ stated as follows: "Where the contract itself expressly provides the control mechanism, especially where the control mechanism is an objective test, there is no warrant for implying a different one"
>
> 346. I t is an objective test whether or not the NFSP has granted its approval for a change, and there is nothing incoherent (whether practically or commercially) in the parties agreeing to such a control mechanism, to the exclusion of any implied restriction. If the parties had been asked at the time of contracting whether changes agreed by the NFSP were subject to any additional restriction, they would not have replied with a terse "of course" but with confusion as to wh y an y furthe r restriction would be necessary. The NFSP could be expected to block any highly controversial change, leaving it to Post Office to decide whether or not to impose the change or any similar change without the benefit of agreement (in which circumstance the implied restriction will apply)."

(emphasis added)

107. I consider that it is unarguable, given these submissions made by the Post Office on the Common Issues themselves, that consideration of the independence of the NFSP, or lack of it, was centrally included within resolution of the Common Issues. It was expressly part of the Post Office's own case. The Lead Claimants' case was that the NFSP was not independent. This was an issue that had to be resolved.

The Post Office's case on the Common Issues

108. The parties could not agree on the factual matrix within which the contractual terms fell to be construed. Findings were therefore necessary in this respect. The case for the Post Office is best summarised at Paragraph 76 of the Generic Defence which pleaded the following in terms of the factual matrix. These paragraphs state as follows:

> **"B.1 Factual Matrix**
>
> 76. Post Office asserts that the following matters are important aspects of factual matrix against which the various Subpostmaster Contracts relied on by the Claimants should be construed.
>
> (1) Subpostmasters typically stood to benefit from the relationship with Post Office in at least two respects: first; by obtaining remuneration in accordance with their Subpostmaster Contracts and, second, as a result of offering Post Office services in the Subpostmasters' premises, by enjoying increased footfall and revenue for the retail business that Subpostmasters typically operated alongside the Post Office business.
>
> (2) Subpostmasters contracted with Post Office on a business to business basis and in the expectation of profiting from the business relationship as noted above.
>
> (3) Subpostmasters were under no obligation and no pressure to contract with Post Office on the terms that it offered or at all.
>
> (4) Post Office was unable to monitor at first hand the transactions undertaken in branches on its behalf, in relation to which it was liable to Post Office clients. These transactions and the manner in which they were carried out were the responsibility of the relevant Subpostmasters.
>
> (5) Post Office was unable to monitor at first hand the custody and use of its property (principally, cash and stock) in branches. Again, these matters were the responsibility of the relevant Subpostmasters.

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(6) Post Office relies on the accurate reporting by Subpostmasters of accounts, transactions and the cash and stock held at the branch. Should Subpostmasters not accurately report these things, it would be impossible or alternatively excessively difficult to determine (i) if a shortfall has occurred, (ii) when it occurred and/or (iii) why it occurred. See further paragraphs 68 and 69 above.

(7) Given the nature of Post Office's business and the variety of transactions and processes required for the operation of a Post Office branch, it would be impracticable for all of the parties' rights and obligations to be set out in a single contractual document. It was to be expected that Post Office would rely upon manuals and other documents containing instructions."

(emphasis added)

109. Paragraph 93 of the Generic Defence stated

"93. Post Office notes that the Claimants' case set out in paragraph 55 applies only to Section 12, Clause 12 of the SPMC. More generally, as regards shortfalls disclosed in a S ubpost master's accou nts, P ost Office not es the following principles , each of which applies to Subpostmasters:

(1) Where a Subpostmaster asserts that he or she is not responsible or liable for a shortfall, the legal and/or evidential burden of proof is on him or her to establish the factual basis for such assertion, in that:

(a) In the absence of evidence from a Subpostmaster to suggest that a shortfall arose from losses for which he or she was responsible, it is appropriate to infer and/or presume that the shortfall arose from losses for which he or she was responsible. Such an inference and/or presumption is appropriate because (1) branches are under the management of Subpostmasters or their Assistants, (2) losses do not arise in the ordinary course of things without fault or error on the part of Subpostmasters or their Assistants and (3) it would not be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon.

(b) Subpostmasters bear the legal burden of proving that a shortfall did not result from losses for which they were responsible. This is because (1) the truth of the matter lies peculiarly within the knowledge of Subpostmasters as the persons with responsibility for branch operations and the conduct of transactions in branches, (2) it would be unjust for Post Office to be required to prove allegations relating to matters that fall peculiarly within the knowledge of Subpostmasters and/or (3) where a person is subject to a fiduciary obligation as regards his or her dealing with assets, the burden is on that person to establish the justification for his or her dealings.

(2) Where an agent renders an account to his or her principal, he is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account that he should be permitted to correct.

(3) Where an agent deliberately renders a false account to his or her principal, in relation to the matters covered by the account the Court should make all presumptions of fact against that Subpostmaster as are consistent with the other facts as proven or admitted."

(emphasis added)

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110. These passages of the pleading were directly relevant to Common Issues 12 and 13 dealing with SPMs and agency. It can be seen in particular in respect of paragraph 93(1)(b) of the Generic Defence above, that matters the subject of that plea, cannot sensibly be said not to be relevant to the Common Issues. Further, in respect of Common Issues 8 (dealing with liability for losses under the SPMC) and 9 (liability for losses under the NTC), the Post Office expressly submitted in its written Closing Submissions that:

> "Issues 8 and 9 concern the proper approach to responsibility for losses. They should be considered against the factual background of how accounting works in a Post Office branch , as described by Angela Van Den Bogerd at paras 73 to 82 and 126 to 140 of her witness statement."

(emphasis added)

111. Finally in terms of this, in the Post Office written Opening Submissions for the Common Issues trial, paragraphs 17 onwards stated that the:

> "17. … "Post Office does not have a day-to-day presence in the branches. It relies on SPMs to accurately conduct and record transactions and to take proper conduct of Post Office's cash and stock. Post Office is exposed to the full range of frauds (both determined schemes and those instances of false accounting which begin as relatively innocent attempts to make the numbers work). It is also exposed to SPMs' error, and to fraud or errors by assistants (whom only the employing SPM is in a position to supervise).
>
> 18. This reliance provides crucial context for three important aspects of the parties' relationship.
>
> 19. First ……
>
> 20. Second ……
>
> 21. Third , and most importantly, SPMs act as Post Office's agents when transacting Post Office business, with all the ordinary obligations and liabilities that agency entails. Ultimately, Post Office cannot (and does not seek to) supervise or prescribe in detail everything that SPMs do in operating the agency business, but the basic fact is that SPMs are transacting Post Office business on its behalf. As with a more straightforward commission-based agency, SPMs are generally remunerated by reference to the number and value of Post Office transactions they carry out. The express and implied terms of the SPMC and the NTC need to be viewed through the prism of an expressly created agency relationship, and so the express contractual terms sit atop the body of law regulating the duties of agents to their principals. The common law principles of agency are important background to the contracts. And any implied terms need to be considered (and shown to be necessary) against that agency background ."

(emphasis added)

112. It is therefore undoubtedly the case that "the factual background of how accounting works in a Post Office branch" and how the agency relationship operated, was squarely within consideration of the Common Issues trial, even on the Post Office's own case. I consider that the fair-minded and informed observer would know and take account of this.

Analysis of the grounds relied upon in the recusal application

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113. I will now turn to the separate passages in the judgment relied upon by Lord Grabiner in the recusal application. I will take their categorisation, in terms of the headings under which I have grouped them, from Mr Parsons' evidence in support of the application. Lord Grabiner used different terms to describe them, and he did not use the phrase "critical invective". He also grouped some of them together in different categories. However, I consider that the most convenient way to deal with each passage is to use Mr Parsons' categories. By this exercise I will still be considering each passage, both in terms of its categorisation by Mr Parsons in his evidence in support, and also by Lord Grabiner.

114. Lord Grabiner did not refer to every single one of the passages identified in Mr Parsons' evidence for the application. I do not criticise him for this, as only one day was set aside for the hearing. I will however deal with all of the passages in Mr Parsons' evidence whether they were the subject of oral submissions or not. Lord Grabiner also dealt with some passages that are not in Mr Parsons' evidence. I shall deal with them separately at the end of this analysis; they are [954], [121] and parts of [569].

115. The grounds relied upon contained in the 15th witness statement of Mr Parsons identified passages of Judgment No.3 under each of three different categories of complaint. The passages identified were very numerous. I have reproduced the headings as they appeared. For section 1 it referred to "my fourteenth witness statement"; sections 2 and 3 referred to "Parsons 14". They both refer to the same document. They are as follows:

> "Section 1: the specific findings of fact referred to in paragraph 24 of my fourteenth witness statement."

There were 61 separate paragraphs identified. They are:

20; 104; 105; 106; 115; 141; 142; 165; 172; 193; 208; 217; 218; 219; 222; 223; 246; 247; 248; 249; 263; 264; 274; 297; 302; 303; 309; 310; 311; 327; 328; 346; 352; 357; 402; 403; 437; 462; 479; 480; 492; 514; 515; 516; 517; 541; 543; 556; 557; 558; 569; 567; 723; 806; 819; 824; 852; 955; 1115; 1116; 1118.

> "Section 2: the critical invective referred to in paragraph 25 of Parsons 14".

There were 34 of these. They are:

21; 28; 30; 34; 36; 117; 120; 123; 295; 368; 369; 370; 393; 394; 476; 483; 519; 520; 521; 522; 523; 532; 560; 561; 576; 577; 589; 595; 596; 723; 724; 1059; 1111; 1120.

> "Section 3: Criticism of Post Office witnesses referred to in paragraph 25 of Parsons 14".

There were only 13 of these. They are:

375; 400; 408; 416; 418; 441; 425; 451; 458; 544; 545; 546; 547.

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116. I shall deal with each different category or section in turn. Given this application is made in the middle of an on-going trial, there is not the great luxury of time available to provide an extensively detailed commentary upon each and every one of the 110 different paragraphs in Judgment No.3 that are subject to criticism. Nor do I consider, on an application of this nature and bearing in mind the authorities and the correct test, that such a detailed commentary is either required or desirable. However, each passage can be placed in context, and I consider that a fair-minded and informed observer would consider that context. The recusal application takes the passages out of context. It is also necessary to identify the reasons why the decision on the recusal application has been reached. As a general comment before embarking upon the context however, I wish to make the following particular observations.

117. The Post Office attempted to strike out a very considerable amount of the claimants' evidence before the Common Issues trial. I heard that application on 10 October 2018 and produced a written judgment on it, Judgment (No.2) at [2018] EWHC 2698 (QB). That judgment was handed down on 17 October 2018. It contains detailed reasons why the application failed. Some of Mr Parsons' 15th witness statement goes back to the background to that application, and even earlier than it, and my comments in earlier case management hearings when I said the amount of evidence necessary to resolve the Common Issues trial would be narrow. I remain of the view that a great amount of the evidence of fact could and should have been agreed. However, it was not agreed. There were six Lead Claimants, and every one of them had contested issues of fact relevant to contract formation. My ruling on the strike out application meant that evidence (for example) concerning training was not inadmissible for the reasons explained in that judgment. Both parties led such evidence in any event in their witness statements. Had I struck out the claimants' evidence on training, the trial would only have heard evidence from the Post Office on training. There was no appeal from my decision on the strike out application or on Judgment No.2, which was handed down three weeks before the commencement of the Common Issues trial. Although I do not consider that what occurred prior to Judgment No.2, or even whether Judgment No.2 was correct or not (even though it was not appealed), is of the utmost relevance to the recusal application, even if it is, the fair-minded and informed observer would take account of everything that occurred in the proceedings, not mere extracts.

118. The listing of the multiple paragraphs in the 15th witness statement of Mr Parsons takes single passages from Judgment No.3 in the significant majority of cases, and relies upon them entirely out of context. One example will suffice. Paragraph 955 is said to be part of Category 1, "specific findings of fact", which are said by Mr Parsons to "give the clear impression that the Judge has already formed a firm view on these matters" as set out in paragraph 24 of his 14th statement. However, that paragraph when read as a whole actually states:

> "955. I have certain (non-binding) observations on the evidence that was given before me by both sides in the Common Issues trial in terms of training. A great effort was made by the Post Office to explain in detail how the training was structured and what its content included. Some evidence was given by the Lead Claimants of their experiences of the training, which the Post Office initially sought to strike out of their witness statements. That attempt failed, and once it was admitted as evidence, however, the court then at least had both sides of the story. This painted a very different picture to that presented by the Post Office witnesses."

(emphasis added)

119. I do not understand how observations by a Managing Judge which are expressly said to be just that – observations – and which are also expressly said *not* to be binding, can be said to lead to an impression that I have a clear view on the training provided, and have made prejudgments on matters not yet tried.

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120. Secondly, on the morning of 21 March itself, at 10.30am the Post Office handed up the 13th witness statement of Mr Parsons, which dealt with the factually incorrect statement made both to the court by the Post Office's Leading Counsel (on instruction from WBD), and to the claimants in a letter from WBD. This statement was necessary because the court had been told that Royal Mail plc had been asked by the Post Office for copies of the annual Ernst & Young ("E&Y") Audit Reports for the years 2000 to 2011, but Royal Mail plc was reluctant to produce them without a court order. The claimants had sought disclosure of these, because the 2011 E&Y Audit Report contained statements relating to Horizon and its fitness for purpose that the claimants considered supportive of their case.

121. It turned out that neither of these points were true. The Royal Mail had not been asked for these important documents; nor had the Royal Mail been reluctant to produce them without an order from the court. As soon as Leading Counsel for the Post Office discovered this, he corrected his statement immediately and wrote a letter to the court explaining the situation. This occurred on 15 March 2019, a non-sitting day. I had already made an order on 14 March 2019 for a hearing of a third-party disclosure application against the Royal Mail (based on what was said to be the "reluctance" of Royal Mail to produce these documents). This hearing turned out not to be necessary, because once asked for them, the Royal Mail was content to produce them. The reason that they had not been produced prior to that was very simple – the Post Office's solicitors had not asked the Royal Mail for them, even though they had told Freeths, and had also told the court (through their Leading Counsel) that they had.

122. This provision of directly inaccurate information to the court was something which Mr Parsons explained was a mistake, and I should record that as soon as Mr de Garr Robinson himself found out the true situation, he had immediately written to the court, explained that his instructions had been factually incorrect, and apologised. However, I had ordered a witness statement to be produced explaining the full situation, and it was this that was Mr Parsons' 13th witness statement, handed up at 10.30am. At 11.24 on the same morning that Mr Parsons provided his witness statement of explanation about this (so less than one hour after Mr Parsons' 13th statement) the recusal application supported by Mr Parson's 14th statement was served on the court by e mail. There was no mention of it in open court at all from anyone, until I raised it at 2.00pm that day, immediately after it had come to my notice. Nor was it mentioned at all in Mr Parsons' 13th witness statement.

123. I deal below in *Waiver* with the legal consequences, if any, of the Post Office waiting nearly two calendar weeks from receiving the draft Judgment No.3 on 8 March 2019 to issuing its recusal application on 21 March 2019. However, regardless of that period and its legal effect, I do not understand how the 13th witness statement of Mr Parsons could be dated and served on 21 March 2019 and not refer to the subject matter of a detailed statement, his 14th, dealing with such an unusual situation that was going to be served later the same morning. Even though the 13th witness statement was made about a very different subject, the imminent application could have been identified within it, or at the very least mentioned. Recusal applications, particularly made in the middle of lengthy trials, are not entirely routine. They ought not to be kept up one's sleeve. I consider that the pending recusal application should have been brought to the court's attention very much sooner than it was.

124. Thirdly, I have dealt above with the Post Office's position at the end of the Common Issues trial concerning findings as to credit of the Lead Claimants, and how it was somewhat contradictory. I explained this in Judgment No.3 in two paragraphs in particular:

> "[57]. Finally, before turning to the individual witnesses, the Post Office adopted a curious position on the credit of some witnesses. There were issues of fact between some of the Lead Claimants and the Post Office on matters that went to the Common Issues. For example, for Mr Bates it was in issue whether he actually received a copy of the SPMC before he took over the branch. For Mr Abdulla, the sequence of buttons and commands which would be pressed by him as a SPM at the end of a Trading Period to generate a Branch Trading Statement was also the subject of contested facts. Although the Post Office made submissions as to these witnesses' credit – for example Mr Abdulla was said to

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> have "lied frequently and brazenly" (in paragraph 592 of the Post Office's Closing Submissions) and some of his evidence was said to be "new and obviously untrue" (paragraph 593) the Post Office in Closing Submissions initially invited me not to make findings on credit.
>
> [58]. That was plainly a confused position on the part of the Post Office. After a degree of exploration during oral closings, this confusion was not resolved. I therefore invited the Post Office to clarify their position on this after the hearing in writing. This was done, and the Post Office submitted that "the Court should refrain from making any findings of fact on matters going to issues outside the scope of the Common Issues trial, specifically matters going to issues of breach and causation."

125. The Post Office therefore expressly submitted to me that I should refrain from making findings of fact in the way explained. I expressly gave the Post Office the opportunity to consider, and clarify, its position on this, even after oral closing submissions had been delivered. They did so, served written clarification (which I referred to in [58] of Judgment No.3) and I adopted their wording, and added further wording of my own, to make clear the approach that I was taking to not making findings on matters yet to be tried. I stated in many places in Judgment No.3 that I was not making findings going to matters of breach, causation and loss, or to the Horizon Issues. This was the course the Post Office itself had asked me to adopt.

126. I made clear in the paragraphs in Judgment No.3 immediately following [57] and [58] which I have repeated above, that this was the approach that I was adopting in Judgment No.3. These paragraphs are not referred to at all in the 15th witness statement of Mr Parsons, and indeed he completely ignores them. The full context can be obtained by continuing on to consider [59] to [62] of Judgment No.3, which state:

> "59. I accept that the correct approach is not to make any findings on issues of breach, causation, or loss upon what were called Horizon Issues, which effectively deal with the operation and accuracy of the Horizon system, and whether it is robust and/or whether it had the propensity to generate errors and shortfalls .
>
> 60. The Post Office is obviously concerned that findings of fact in this judgment may affect its prospects during any future trial on breach and causation. I will not be making any findings of fact in this judgment that go to contested facts that will be dealt with as part of breach or causation. However, that is not the same as saying that the court cannot and should not deal with the credit of witnesses where this has been so directly challenged by the Post Office. A finding, say, in Mr Bates' favour on issues of fact such as whether he received a copy of the SPMC has to be made one way or the other, as that affects the formation of contractual terms in his case. That is not however (if that find ing is in M r Bates ' favour) to say that thereafter and for all time in these proceedings everything that Mr Bates says in evidence will as a result be accepted uncritically by the court on future other issues . All a court can do is weigh up the evidence before it, observe it being tested against the other side's evidence and the documents that are put to a witness, and come to a conclusion.
>
> 61. The Post Office also invited me specifically " Not [to] take account of evidence which, while it may go to the witness's credibility, risks trespassing on a future trial or trials" (emphasis in original).
>
> 62. I do not consider that it is the right approach wholly to ignore evidence just because of such a risk. In my judgment the correct approach is to consider the evidence that was led by all the parties in the Common Issues trial, but not to make findings on matters that are more properly to be dealt with in later trials, such as the operation and efficacy of the Horizon system, breach, causation and loss. Some of the Common Issues are pure questions of construction. Some require an understanding of the Horizon and Post Office accounting process, such as Common Issue 13. Some, so far as they

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> concern individual Lead Claimants such as Mr Bates, include issues of fact such as to whether he actually received a full copy of the SPMC. Where such issues of fact arise, I will deal with them. I will make no findings going to breach or causation, as they are not part of the Common Issues ."

(emphasis added).

127. This approach – not to make any findings on breach, causation or loss, including the Horizon Issues – was repeated multiple times throughout the judgment.

128. At [35] I said: "I have made it clear that I will make no findings concerning breach, causation or loss in this judgment, as these are for later rounds of the litigation."

129. At [62] I said: "In my judgment the correct approach is to consider the evidence that was led by all the parties in the Common Issues trial, but not to make findings on matters that are more properly to be dealt with in later trials, such as the operation and efficacy of the Horizon system, breach, causation and loss."

130. At [168] I said: "Mrs Stubbs was then audited on 8 June 2010 for a closing audit by someone who said she was being suspended. As she put it, she was locked out of her own post office. I will not dwell upon the effect on Mrs Stubbs, which was profound. These will fall to be considered during the future trials on breach, causation and any loss. She sold her branch Post Office."

131. At [193] I said: "I do however make those comments without making findings on anything to do with breach, causation or loss."

132. At [270] I said: "I make it clear that I make no findings in relation to the issues to be dealt with in later trials, namely Horizon Issues, breach, causation and loss. It should therefore be clear that I make no findings on whether he [Mr Abdulla] falsified his accounts to the Post Office at the time, and if so, how, because that is not an issue before me in this trial."

133. At [328] I said: "Whether she [Mrs Stockdale] was right to act as she did at the time regarding her accounts is a matter for another trial. As with the other Lead Claimants, I am making no findings in respect of breach, causation or loss."

134. At [361] I said: "As with the other Lead Claimants, I make no findings concerning breach, causation or loss. Also, and again this applies to all six of the Lead Claimants, my acceptance of their evidence does not mean that all or any future evidence on all the other issues will automatically be accepted uncritically."

135. At [480] I said: "I make no findings on any matters connected with breach, causation or loss."

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136. At [518] I said: "It must be understood with crystal clarity that I am not making findings on these substantive and serious issues in this judgment. Whether the Post Office was guilty of acting in the ways complained of by the Claimants can only be resolved later in these proceedings after other trials."

137. Finally, in the Conclusion and Summary section, I repeated the same point, again, and said at [1113]:

> "This judgment does not contain any findings as to breach, causation or loss, and therefore it remains to be decided in future judgments whether the Post Office has behaved in the way in which Claimants allege…."

138. I consider those passages of Judgment No.3 to be extremely clear and wholly unambiguous. I also consider that the passages upon which the Post Office wishes to rely in the recusal application should be read subject to them, and also in their proper context. I do not consider that the description of them as a "mantra" by Lord Grabiner should diminish or dilute their status, or mean that they should be read in a way contrary to their clear words.

139. I now turn to the separate categories relied upon in the 15th witness statement of Mr Parsons.

Section 1: findings of fact

140. I will deal with these in groups.

> **Passages that deal with the Lead Claimants' evidence of fact.**
>
> [20] This is a factual summary of the claimants' case.
>
> *Mr Bates*
>
> [104] to [115] This is part of the summary of Mr Bates' evidence, which runs from [70]. However, the four passages relied upon by the Post Office entirely ignore [116] and [117] which states the following:
>
> > "[116] This shortfall occurred in the early days of Horizon, December 2000. Between that date and March 2002 therefore, it had been brought to the Post Office's attention by at least one SPM (Mr Bates) and potentially others (on the Claimants' case) that there were shortfalls and discrepancies being thrown up by Horizon that the SPMs in question could not properly investigate. The Post Office's response, eventually, at least so far as Mr Bates was concerned, was to write off the amount

> that could not be explained in this instance only, but to say that this was effectively a one-off solution and move on as though nothing was amiss.
>
> [117] The full subsequent trial of Mr Bates' claim will show what, if any, consideration was given at the Post Office internally not only to this shortfall, but others (if there were others) in the period December 2000 to March 2002. If the Post Office did in reality do what Mr Bates suggests they did – namely bury their heads in the sand, press on regardless, and chase numerous SPMs for shortfalls and discrepancies caused by the Horizon system – then that would be behaviour of an extraordinary kind, and given the criminal implications for some SPMs, may be extraordinarily serious. On the other hand, Mr Bates' shortf all in December 2000 may, upon investigation by the Post Office, have been put down to early difficulties by SPMs in operating or understanding the new system and writing off the amount may have been decided upon as a pragmatic solution in the circumstances. I make no findings either way at this stage of the proceedings in this judgment. "

(emphasis added)

Mrs Stubbs

[141] to [172] This is part of a summary of Mrs Stubbs' evidence, which begins at [126]. There were issues of fact relating to contract formation as she took over as SPM following the death of her husband. She gave evidence about what documents she was (or was not) given, and what she had (or had not) signed, and what happened on a visit to her branch by Mr Woolbridge (a Post Office employee who did not give evidence before me) the day after her husband died (he had been the SPM before her). Her credit was attacked by the Post Office and in order to resolve and make relevant findings as to her contractual relations with the Post Office, it was necessary to resolve these. I expressly state in the middle of [172] the following:

> "I make it quite clear that I do not speculate on any of that. Nor is it possible to know what the outcome of the trial of the Horizon Issues will be later this year."

141. Given the issues of fact concerning Mrs Stubbs' contract formation, I do not consider any judge could properly make findings about whether she received the SPMC, knew of its contents, and/or ever signed certain documents, what took place at her meeting with Mr Woolbridge (who was not called), and its legal effect in her case, without making findings as to her reliability. I did this at the end of [172]:

> "I accept her account of contract formation and the fact she never received, nor did she have any knowledge of, the SPMC."

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Mr Sabir

142. The next group of paragraphs are [193] to [223]. These are part of the summary of Mr Sabir's evidence which begins at [174]. His evidence about training is accurately summarised, and he was robustly cross-examined about it.

143. To obtain the full meaning of [193] one has to consider the passage that states:

> "…..Mr Sabir's evidence on this, which I accept, matches the other evidence from other Lead Claimants about in-branch training. Whatever the intentions of those who designed such training, which one supposes was to supplement and build on the classroom training, in practice for these Lead Claimants it was rather different . It is characterised by the trainers observing rather than training, and also by early departures from the branch itself by the trainers. I do however make those comments without making findings on anything to do with breach, causation or loss."

144. The Post Office, so far as the Lead Claimants who contracted on the SPMC contract form, explained its case in Opening Submissions that a SPM's liability for losses was contained in Section 12, paragraph 12 of the SPMC which states:

> "The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants."

145. However, the first letters sent to the Lead Claimants by the Post Office. once shortfalls began to appear, did not refer to negligence, carelessness or error, or the terms of the SPMC. They contained text as set out in [221], namely as follows:

> "[221] …… "A letter of 10 January 2010 told him that "you are contractually obliged to make good any losses incurred during your term of office for up to six years after your last day of service (Limitations Act 1980)". The period under the Limitation Act is correct. The claim that he had to make good " any losses incurred during your term of office" is simply wrong in fact and law, and does not even represent the Post Office's own case on liability in the Common Issues trial for losses in the SPMC. The letter before action of 1 March 2010 stated that "under the contract for services you are responsible for all losses occurring as a result of the acts or omissions of yourself or your assistants."

The quotations from the Post Office's own documents are accurate.

146. The comments in Judgment No.3 at [222] are in relation to the Post Office misstating in official correspondence (including in a letter before action) the scope of Mr Sabir's contractual liability for losses, even on the basis of the Post Office's own case. Each party's legal submissions on the scope of responsibility for losses were fully argued before me, and Mr Sabir's evidence included these letters. I consider it is open to any trial judge to make a comment of this nature without demonstrating there is a real possibility that future issues in future trials are being prejudged.

147. Mr Sabir's credit, findings of which are contained at [223], was roundly attacked by the Post Office in his evidence. This was done both in cross-examination and in closing submissions. At paragraph 589 of the written Closing Submissions,

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> the Post Office submitted that "Mr Sabir's evidence……d id not stand up . His apparently weak grasp of English in oral evidence (which was notable for its variability) should not be confused with a lack of intelligence. It was implausible that , as a commercial man making a significant investment (in conjunction with a partner) who was expecting a contract, he would not have asked for a copy…… His evidence that he thought the *'standard'* term contract in fact contained his obligations to do certain things at the branch in his first 6 months as SPM was not credible ".

(emphasis added)

148. In the light of that, Judgment No.3 would not only be potentially open to criticism, but deficient, had it *not* made findings as to Mr Sabir's credit. I consider such findings were required in order to resolve the issues of fact.

Mr Abdulla

149. The next group of paragraphs is [246] to [274] dealing with Mr Abdulla. Mr Abdulla was cross-examined on the basis that he had committed a criminal offence and he was given the necessary warning against self-incrimination under the Civil Evidence Act 1968. The summary of his evidence begins at [225] and runs to [273].

150. Mr Abdulla gave evidence about what his training included. I summarised this at [246] but made no findings as to the content of his training. The complaint about [247] ignores the sentence that states "Mr Abdulla's experience of the in-branch training was far from satisfactory, from his point of view." Mr Abdulla did give evidence that he was shocked at what he called "inadequate support" from the Helpline as set out in [248], said he could rarely get through and thought the operators were reading off a script. He gave evidence that he could not resolve the shortfalls he experienced through the Helpline, as set out at [249]. He was cross-examined by the Post Office on his suspension and termination, and on his experience of the Helpline.

151. No documents were produced and put to Mr Abdulla to demonstrate that further investigations had been made with Camelot leading to his summary termination, as identified at [264], even though the letter at [263] from the Post Office told him that investigations had been completed. However, no findings were being made in respect of breach, causation or loss, so this cannot be (and was not) elevated to a binding finding as to that issue in any event. No estoppel operates to prevent the Post Office from unearthing such documents or other evidence of any investigation(s), and putting them to Mr Abdulla at any future trial dealing with breach, causation and loss, or from leading any other evidence, or making any other submissions, when breach, causation and loss are dealt with in a future trial.

152. At [269] I explained the following:

> "[269] The Post Office's case was put very squarely that he was lying, the submission being that he "lied frequently and brazenly" and that some of his evidence was "new and obviously untrue". He was challenged as having falsified his statement of truth of his witness statement in the same way as he had falsified the accounts he had submitted to the Post Office. I make no criticism of the way that Mr Cavender put this to Mr Abdulla, as it is an inherent part of the Post Office's case that Horizon is what is called "robust", that shortfalls experienced by Mr Abdulla were not caused by Horizon, and SPMs who had discrepancies in their branch accounts were either extraordinarily careless and/or they and/or their assistants were probably stealing or losing the money. The necessary points were put to Mr Abdulla entirely correctly and Mr Cavender was professionally bound to do this.
>
> [270] However, I do not accept the challenge mounted by the Post Office to the content of Mr Abdulla's witness evidence before me. I do not find that he was lying, or that his evidence was untrue. However, his evidence must be viewed in the light of someone who acted as he did with the undated cheque and the potential misstatement of damaged bank notes. Horizon issues, and the TCs concerning the lottery, were not the only issues uncovered on the audit of his branch. He was, also, so convinced that extremely subjective, that he was not an entirely satisfactory witness. On matters concerned with his contracting with the Post Office, what he received by way of documents, how the Horizon system was operated and his experience of how it worked, I find his evidence reliable and I accept it. In fact, he was vindicated in terms of the Branch Trading Statement by the contents of Appendices 3 and 4. On factual matters concerning what occurred when the audit happened, how his suspension and termination occurred and were dealt with by the Post Office, I accept his evidence.

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> So far as the actual substantive issues that were uncovered in the audit that led to his termination, namely the shortfalls, misstatement of mutilated notes and the undated cheque, express findings will have to wait until a later trial. There may be more to come so far as Mr Abdulla is concerned, as he had (potentially, as I make no findings on this) incorrectly entered the amount of damaged banknotes in the branch. His accounts were however prepared in the way he explained; that is, regardless of his view concerning any of the Transaction Corrections, he had no option but to "Accept Now" to reach the point of preparing or returning a Branch Trading Statement in order to open the next day. I make it clear that I make no findings in relation to the issues to be dealt with in later trials, namely Horizon Issues, breach, causation and loss. It should therefore be clear that I make no findings on whether he falsified his accounts to the Post Office at the time, and if so, how, because that is not an issue before me in this trial ."

(emphasis added)

153. The final passage in this section that is criticised on the recusal application in respect of Mr Abdulla is that at [274]. It must be read, at the very least, together with [273]. That recounts that Mr Abdulla's evidence was that when he phoned the Helpline about shortfalls he was told he should pay them and wait for a Transaction Correction or TC to be issued in his favour. At [274] I accepted that was what he was told by the Helpline. Quite apart from the fact that other Lead Claimants gave similar evidence, if a witness says they were told something, a judge is entitled to believe, or disbelieve, them. The fact that Mr Abdulla was told that, does not resolve the Horizon Issues in the claimants' favour, nor does it lead to any findings on breach, causation or loss. Such findings were in any case expressly stated to be for another trial.

Mrs Stockdale

154. The next group of paragraphs is [297] to [328] dealing with Mrs Stockdale. The summary of her evidence started at [276]. She was a serving SPM when proceedings were issued against the Post Office in April 2016, in which she was included as a claimant.

155. The passages relied upon by the Post Office to justify recusal, namely [297], [302] and [303] accurately reflect the evidence she gave. I will not identify her evidence specifically in the transcript of Day 4, 13 November 2018, although they do appear there, but if I am wrong there is a conventional route for a dissatisfied litigant to challenge findings of fact.

156. Mrs Stockdale gave evidence that she could not identify what product had caused her loss, which is what is recounted in Judgment No.3 in [309] and [310]. She explained that Mr Longbottom could not do so either, and had referred the matter to the Horizon Technical Desk. Mr Longbottom was called by the Post Office and gave evidence, but process of transfer audits generally. His evidence is summarised at [481] to [488]. Mrs Stockdale felt she had no option but to agree to pay back the shortfalls, and this is recounted in [310]. The statements in Judgment No.3 at [310] should also be read with [563] to [568]. However, [565] makes clear that the starting point of the analysis is:

> " The Horizon system would show that there was a discrepancy at the branch, which so far as the SPM was concerned would have arisen through unexplained shortfalls and discrepancies."

It is also the case that the Post Office itself had relied, in paragraph 76(4), (5) and (6) of its Generic Defence under the heading "Factual Matrix", upon shortfalls and relative knowledge of how these might occur.

157. I had to deal with this point at [40] of Judgment No.2 on the earlier strike out application. I stated in that judgment:

> "[40] To quote selectively from the above [ie the pleadings], the defendant's case is that a sub-postmaster who has settled an account "is bound by that account unless and to the extent that he discharges the burden of demonstrating that there are mistakes in the account". A different way of

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> expressing what may be the same point is that "Sub- postmasters who allege that they are not liable for any losses disclosed in their branch accounts bear the burden of proving that such losses were not caused by "any negligence, any carelessness, or any error on their part". Given that the defendant expressly pleads as part of the factual matrix the matters at paragraph 76(4), (5) and (6) in particular, I do not see how it can be said that the evidence challenged in the witness statements going to each individual Lead Claimant's personal experience of having shortfalls identified, then their attempts to work out what had happened and how it had happened, can be said not to be relevant, or that it will never be sufficiently helpful to make it right to allow the Lead Claimants to adduce such evidence. The defendant's own pleading relies upon its interpretation or account of these events as part of the factual matrix, and does so expressly. Yet further, at paragraph 93(1)(a) of the Generic Defence, the defendant pleads that a certain inference or presumption arises "in the absence of evidence from a Subpostmaster to suggest that a shortfall arose from losses for which he or she was responsible". Given a considerable amount of the evidence challenged goes to establishing that there was such evidence, and hence the inference or presumption should not be applied to the resolution of the Common Issues, it is hard to see how such evidence can be said not to be of any relevance."

(emphasis added)

158. Further, the starting point for the passage relied upon by the Post Office as justifying recusal in [156] above is "the Horizon system". If the Post Office's case on the utility and robustness of the Horizon system is accepted, this means that the Post Office (and the court) would be able to rely upon the system as demonstrating, prima facie, that there was a shortfall. The phrase "so far as the SPM was concerned" makes it clear that the statement is one of the claimants' subjective point of view. Further, the analysis of what Mr Green called "the debt trap" makes it perfectly clear that no findings are being made in Judgment No.3 in respect of this situation:

> "[567] The whole of this litigation is aimed at resolving the disputes involved between the different SPMs and the Post Office."

159. The circularity of the position in which Mrs Stockdale found herself, and the justnessor otherwise of "the debt trap", will not be resolved until the end of the litigation generally, and findings of breach, causation and loss in Mrs Stockdale's claim.

160. Her decision, recounted in [311], to introduce a "robust paper recording system" was a summary of her evidence. On 16 September 2016 her appointment as an SPM was terminated, and that letter stated "….we have taken into account that you did not call the NBSC reporting the Losses" which is reproduced at [323] of Judgment No.3. The documents produced at the trial showed that she *had* contacted the NSBC (another term for the Helpline) and had also contacted the Post Office, as the Helpline call logs (which are Post Office documents) were disclosed and these evidenced her calls. The passage at [327] should be read in context generally, but with [323] in particular.

161. Finally, the passage complained of at [328] should be read in conjunction with the last half of the paragraph, which states:

> "Whether she was right to act as she did at the time regarding her accounts is a matter for another trial. As with the other Lead Claimants, I am making no findings in respect of breach, causation or loss."

Mrs Dar

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162. The next group of paragraphs concerning specific findings of fact is [346] to [357] which concern Mrs Dar.

163. The part to which objection is taken in [346] is "Mrs Dar considered the training inadequate." However, Mrs Dar's evidence was that she *did* find the training inadequate. Similarly, [352] and [357] recount the evidence she gave to the court. The way these paragraphs are relied upon by the Post Office in the recusal application do not take account of the evidence given at the Common Issues trial.

Passages that deal with the Post Office's evidence of fact

164. There are fewer of these by comparison with those dealing with the Lead Claimants' evidence of fact, but there are still a significant number.

165. Unlike the situation concerning the Lead Claimants' evidence, which the Post Office had expressly attempted to have struck out, the contents of the Post Office's witness statements were voluntarily adduced in evidence by the Post Office.

Mr Breeden

166. Both [402] and [403] concern the right of appeal under the SPMC form of contract. Mr Breeden gave written evidence (quoted in [402]) about what the Appeals Manager would do under the SPMC. He also gave written evidence that there was no such appeal process in the NTC; indeed, he specifically highlighted this as a difference between the two contract forms. Mr Green, when cross-examining Mrs Ridge, explored with her whether such an appeal under the SPMC was a review or a re- hearing. The relevant passages in the evidence of each witness about this – Mr Breeden's witness statement, and Mrs Ridge's cross-examination – were quoted in Judgment No.3 at [402]. The comments that followed at [403] highlighted the difference between two of the Post Office's own witnesses on this point. Their evidence was different about whether any appeal was a review or a rehearing.

167. If a party – here, the Post Office – calls two witnesses who give evidence on the same point (appeals under the SPMC), and that evidence is different between the two witnesses, then comment upon this difference is justified, in my judgment, by the trial judge hearing that evidence. Sometimes such comment might be unfavourable to the party calling the witnesses; sometimes it might be favourable; sometimes it might be neutral. Given the evidence had been called by the Post Office, I do not see how it can sensibly be later argued by that same party that the evidence it had itself voluntarily adduced was irrelevant, or should not have been considered by the judge who heard it. A party might regret calling certain witnesses, or certain evidence, after a judgment is produced, but that is a different matter. It was the Post Office that called these witnesses to give their evidence. Further, Mr Breeden's witness statement expressly said that the reputation of the Post Office would be something of which account would be taken by the Appeals Manager. I passed comment upon that evidence at [403], as I consider a trial judge is entitled to do.

Mrs Van Den Bogerd

168. The passage relied upon at [437] has to be read in conjunction with [434] to [436], which replicate Mrs Van Den Bogerd's evidence.

Mrs Dickinson

169. [462] also accurately summarises this witness' evidence (as well as that of Mrs Van Den Bogerd at [431]). These two passages must be read together. Further, the passage relied upon by the Post Office in terms of recusal, [462], is immediately followed by a statement making it clear that no findings are being made on wider or subsequent issues in unambiguous terms:

> "Whether this is justified will only be resolved after further trials, and this judgment does not contain findings on breach, loss or causation."

This is a clear example of single sentences, or groups of sentences, within Judgment No.3 being extracted and relied upon out of context by the Post Office in the recusal application.

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Mrs Ridge

170. The passage at [479] deals with Mr Abdulla's interview or meeting after he had been suspended. The transcript of that demonstrates that he raised the subject of a Lottery TC (or more than one TC) for £1,092. A Post Office document available in the trial, but not available to Mrs Ridge at that suspension interview which she conducted, showed that there were indeed a number of different entries relating to the Lottery, all for £1,092. The trial bundle reference of the document, an Excel spreadsheet, was {E4/92/1}, and its title is "96007 TC Data". Mrs Ridge accepted that the information in that Post Office document would have been useful to her, and that the number of different entries all for £1,092 "was a bit odd". The actual questions and answers from her cross examination on Day 10, 22 November 2018 are as follows:

> "Q: Being fair to you, Mrs Ridge, trying to do your job, would that information [have been] pretty helpful to you?
>
> A. It would have done.
>
> Q. But you didn't have it, did you? A. No.
>
> Q. And nor did Mr Abdulla. So you weren't able to look at this and say, well, actually, this is a bit odd because they are accepting that an error has been made on £1,092, and so it's a bit strange there are three previous ones.
>
> A. It would have been a bit odd."

171. The statement at [480] that Mr Abdulla's hearing proceeded on incomplete information is entirely correct in fact, both on the documents not available at the time, the documents available at the trial, and also on Mrs Ridge's evidence. Even if it were not correct in fact, the remedy available (if a party does not agree with a factual finding) is not recusal of the judge who has made the statement.

Mr Webb

172. Mr Webb did Mr Sabir's transfer audit. The passage relied upon by the Post Office in this application is at [492] where the judgment states "it is clear that there was a recognition by at least some within the Post Office that 'day one training on site' was worthless." However, that is in relation to a Post Office document with the title "Field Team Feedback Appendix B" dated November 2011 which was put to Mr Webb in his cross-examination. At {F3/125/19} the following passage appears in the Post Office's document. A more full extract of the text in that internal Post Office document is:

> "Completing the transfer and then expecting the branch to open in the afternoon is a very optimistic expectation. In all but a handful of cases the money transfer for the business does not take place until at least 2pm on the day of the transfer and it is quite often later than that. Once the money has transferred the incoming is then pulled in all directions. trying to learn from the outgoing what all the keys open and close, learning the locking up process, how the tills work. dealing with stock takers, removal men, agreeing meter readings, putting beds together so the children have somewhere to sleep that night. numerous phone calls from the bakery/ milk/ newspaper supplier wanting to set up accounts etc etc. The last thing they want to do serve in the PO. So you either get the staff running the branch, which is OK as you can get them coached in minimum sales standards (if required) but this could obviously be completed later in the week. However as the on-site FSA you want the new Sub-postmaster and it is very rare to see him/her. If a single person branch you get a very harassed person who wants/needs to be elsewhere and he/she takes nothing in. No matter how much you stress on the pre-transfer telephone call what the expectation is in my experience it does not happen successfully very often. I feel we should go back to lunchtime transfers and leave the PO closed pm. As branches are generally busier mornings that afternoons anyway less customers would

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> inconvenienced. Branches where there are staff or the Sub wants to could still open after the transfer once the money has gone through and it would make better use of FSA time as we would not need to attend until lunchtime in all but the busiest branches where it may be beneficial to go a bit earlier. We would not to sit around for at least half a day and sometimes considerably more awaiting the transfer of funds. I am of course aware that there would be an additional cost of one day on site training if it was decided to stick to the same delivery package as at present. but this would in my opinion be justified as the value of day one on site in terms of training is generally worthless. "

(emphasis added)

173. The word "worthless" for "day one" training is expressly used in the actual internal Post Office document put to Mr Webb. Actually, the exact phrase is "generally worthless". Judgment No.3 simply reproduced the word "worthless" from one of the Post Office's own internal documents. I do not consider there is an appreciable difference between the two expressions, "generally worthless" on the one hand, and "worthless" on the other. I also do not understand how reproducing the same word used in the Post Office's own internal document can be relied upon by the Post Office in this recusal application. This is an example of the pitfall of considering a single passage of Judgment No.3, deciding it is critical of the Post Office, and using it to justify a recusal application, without taking into account either its context, or the evidence that unfolded in the Common Issues trial. The fair-minded and informed observer would be assumed to be precisely that – informed.

Mr Carpenter

174. [514] to [517] of Judgment No.3 concern Mr Carpenter's evidence. He had performed an audit on Mrs Stockdale's branch, after the litigation was commenced and Mrs Stockdale was a claimant. These four paragraphs track the evidence on this point.

175. The Post Office, through its solicitors WBD, had refused to disclose any documents that went to the decision to audit Mrs Stockdale's branch after the litigation had commenced. Given any company or natural person in this jurisdiction is permitted to bring their disputes to court for resolution (with the exception of parties to binding arbitration agreements governed by the Arbitration Act 1996) I found that approach worthy of some scrutiny, for the reasons explained in the judgment. Further, WBD had, in refusing to disclose the documents, stated that the relevance of such documents was not accepted. Given the issues in the litigation, and given Mrs Stockdale was expressly accused of a criminal offence on the basis of the result of the audit itself, I expressed certain views in Judgment No.3, which I need not repeat here.

176. I consider guidance is to be expected from the Managing Judge on matters such as contested disclosure, providing that guidance does not indicate that there is a settled point of view on the substantive issues, or indeed on future interlocutory applications. I do not consider that the fair-minded and informed observer would conclude that any future matters would be prejudged on the basis of these passages.

Miscellaneous points

177. There are then an assorted number of paragraphs relied upon by the Post Office that are not linked by any particular topic, but are assorted passages from throughout Judgment No.3, including comments upon the evidence. They are the following: 541; 543; 556; 557; 558; 569; 567; 723; 806; 819; 824; 852; 955.

178. None of them contain any findings on the Horizon Issues, breach, causation or loss. One of them, [569], contains my findings of fact to set out the Factual Matrix within which the contract terms have to be construed. I may have been wrong in reaching certain factual conclusions, which might be said on any application to appeal Judgment No.3 not to have been open to me, but I do not consider that to be a ground of recusal. Further and in any event, the so-called Category 2 facts contended for by the claimants were identified to the Post Office in terms considerably before the Common Issues trial even commenced. No submissions were made by the Post Office that if I found any of the contended for facts in the schedule to be made out, this would run the risk of apparent bias. These facts were contained in a detailed and lengthy schedule because the claimants had been seeking to have a great many facts agreed. They were contended for by the Lead Claimants and I do not consider that making findings of fact sought by one party to litigation disqualifies me from further involvement in the case on the grounds of apparent bias.

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179. I have set out above how [955] is preceded by a statement that the judgment was making " certain (non-binding) observations on the evidence that was given before me by both sides in the Common Issues trial in terms of training." [955] in any event was part of reaching the conclusion at [957], which was that SPMs could not be expected to train their assistants to a higher level than that to which they themselves had been trained. This was part of the answer to one of the Common Issues itself, namely Common Issue 23.

Conclusion passages

180. There are three of these, and they are in the final section of Judgment No.3, namely "Conclusions and Summary". They are those numbered [1115], [1116] and [1118]. They are preceded by [1112] – which needs to be fully considered on this application – that states:

> "This judgment does not contain any findings as to breach, causation or loss, and therefore it remains to be decided in future judgments whether the Post Office has behaved in the way in which Claimants allege….."

181. The part of [1115] relied upon by the Post Office is the part that states "Internal documents obtained in this litigation show that some personnel within the Post Office believed at the time that at least some of these [ie discrepancies and losses] were caused by Horizon." It is difficult to see how that passage can justify this application, however, given that is exactly what some of the internal documents do say. One example of this will suffice.

182. On 1 November 2000 an internal e mail from Frank Manning to Sue Locke (both of the Post Office) timed at 14:39 stated: "We talked about this case when I was in St. Albans last month & it is still on-going. I visited there today & was too scared to accept a cup of tea in case the Horizon system crashed cos the electricity supply is still a live (excuse the pun) issue. The balances are a mess (in pre Horizon times - the Postmistress virtually achieved a clean balance every week) & I've got the RNM going in there next Wednesday to see what actually happens on the ground but I worry that something like 25 re-boots in one day is having an effect overall. Need your best offices to get this case to a proper solution - she keeps getting promises of attention - but nothing is actually being done now to clear up the problem. **It is Horizon related** - the problems have only arisen since install & the postmistress is now barking & rightly so in my view. Help please." (the bold emphasis **"It is Horizon related"** is present in the original) In the answer sent from Sue Locke back to Frank Manning on 2 November 2000 at 09:24 she asked:

> "Frank - As discussed when you visited, can you confirm that the office have had an independent electrician visit it and that the problems are due to the electrics input by Horizon?"

The answer to this was from Mr Manning in an e mail of 12:58 on the same day and he stated:

> "Answer is YES to both points."

183. These are internal documents from the Post Office. Ms Locke and Mr Manning are properly described as Post Office employees. [1115] is an accurate summary, and also makes it clear that it is a matter of the subjective belief of the author of the e mails, and not a finding that the problems were Horizon related. That will depend upon the outcome of the Horizon Issues trial. These specific e mails were deployed in oral opening by the Lead Claimants, cross-examined upon, and I consider the conclusion I expressed (which said that "some personnel" at the Post Office believed that "some" of the losses were Horizon

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related) is a conclusion open to me on the evidence. It made no binding findings in relation to any matters to be dealt with at later trials. I do not consider that the fair-minded and informed observer would conclude there was a real possibility of bias as a result.

184. Another way of testing this is to consider the following position. Could the claimants, at any subsequent trial(s), rely upon that passage of Judgment No3 as demonstrating that the court had already made a binding prior finding to the effect that it was Horizon that had caused the discrepancies and losses? I do not consider that they could. Equally, would the fair-minded and informed observer concentrate upon that passage and determine that any of the remaining issues in the litigation would not be fairly judged in subsequent trials? Again, I do not consider that they would, or could, on the actual wording of the passages themselves.

185. The passage within [1116] correctly summarises the evidence of Mrs Van Den Bogerd which is set out at [431].

186. Finally, the summary of the so-called "ping fix" contained in [1118] is a summary of Mrs Van Den Bogerd's evidence which is set out in more detail at [426], [427] and [428]. The document from which the figures were taken in [1118] is, again, an internal document created by the Post Office, is entitled "TC Volume Summary" and its trial bundle reference was {G/54/1}.

187. Accordingly therefore, I consider that the passages relied upon in this section of Mr Parson's 15th statement, when read in context of Judgment No.3 as a whole, and in particular the evidence adduced at the trial by both parties, together with the internal Post Office documents, do not justify the statement in his 14th or 15th witness statements that a fair-minded and informed observer would conclude that there was a real possibility that a formed view had been made, that binding findings had been made on breach, causation, loss or the Horizon Issues themselves, and/or that any remaining issues had been prejudged. The words of Judgment No.3 state directly to the contrary.

Section 2: so-called" critical invective"

188. There are not so many of these as in Section 1, but there were a considerable number identified by the Post Office nonetheless. 12 of these were not amplified by Lord Grabiner in his oral submissions, and he did not use the phrase "critical invective". Regardless of that, I will deal with each passage identified by Mr Parsons.

189. I will deal with them in groups. The word "attack" was used extensively in the Post Office's written skeleton for the recusal application, to describe findings in Judgment No.3 that were made in respect of its witnesses. That skeleton also (in paragraph 47) states that Judgment No.3 involves speculation "as to terrible things that [the] Post Office might have done". A list of what are said to be speculations then follows, including the motivation at the Post Office for the change in terms of the NTC, and destruction or failure to preserve evidence, and failure to produce documents that are adverse to it.

190. However, these submissions by the Post Office ignore some salient features. The first is that Judgment No.3 does not state or find that all of these things have happened, and in many cases expressly states that no findings are being made. I do not consider that demonstrates a closed mind, or that an act of prejudgment has occurred. Further, some of the matters identified in paragraph 47 of the Post Office's skeleton argument for the recusal application have in fact been done. The term "terrible" is a word used by the Post Office in paragraph 47; it is the Post Office's choice of word. Opposed disclosure applications have been necessary in respect of the Post Office. Some physical evidence is no longer available, and has been discarded. This is not in dispute. Whether the word "destroyed" is correct, physical evidence no longer exists that once did. Mr de Garr Robinson QC for the Post Office explained the following when making his oral opening submissions for the Horizon Issues trial. There is no Legacy Horizon equipment still available for consideration by the experts, or for use in the litigation, as it has been discarded, and the Post Office is aware of this:

> " The system – there is no Legacy Horizon system still in operation that people can go and check, that people are still operating. People are working off their recollections and off design documents that are now very elderly and that problem has been compounded by the fact that when Mr Roll made his witness statement in 2016 – it was provided in September last year – the things that he said in that witness statement were quite hard to follow and we will see how hard they were to follow when he gives evidence later on this week."

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(emphasis added)

191. Whether the failure to retain an operating system amounts to "destruction" or not, and the effect of that (if any) regardless of which precise term is used, has not yet been decided, and indeed may never need to be decided. Mr Godeseth was cross-examined about this during the Horizon Issues trial on Day 8 in the context of requests from an expert witness some years ago who was acting for a defendant SPM in a particular set of criminal proceedings. The Horizon Issues trial is ongoing, the expert evidence has not been heard, and no closing submissions have been received. There is no dispute on this concerning Legacy Horizon; it is no longer available.

192. There is a far more detailed analysis within Judgment No.3 of the position regarding disclosure and documents than making assertions in a blanket fashion of "terrible" things. Judgment No.3 makes a finding that accepts Mrs Stubbs' evidence that she had been told by the SPM who took over her branch that an instruction was given to destroy her records. All this relates to is what Mrs Stubbs was told; there is no finding that the records were in fact destroyed. Her records may yet be produced, nor has any evidence yet been given by any Post Office witnesses about what happened to the records in her branch after she was suspended. All these matters will be explored in later trials.

193. I do not accept that making findings on a witness' reliability, or rejecting their evidence, amounts to "an attack". It is a judgment or a finding on the evidence, or upon the witness. The fair-minded and informed observer would be aware that if the evidence of a particular witness is not reliable or is rejected, the trial judge is entitled (if not required) to say why.

The Post Office's position on credit and Introduction

194. The passages numbered [21] to [36] come from the Introduction in Judgment No.3. [21] is an accurate summary of the Post Office's position on credit. Mr Cavender QC made written submissions in the Common Issues trial that attacked the credit of the Lead Claimants. I have dealt with Mr Sabir at [147] above. The written closing submissions of the Post Office in respect of Mr Abdulla stated (at paragraph 592):

> "The central fact about Mr Abdulla's evidence cannot be avoided: he lied frequently and brazenly". That submission has been identified already in this judgment when detailing the attack on the credit by the Post Office of the Lead Claimants.

Initially in cross-examination the following question was put to Mr Abdulla, before he had been given the warning against self-incrimination.

> "Q: "This is misuse of Post Office funds and false accounting". So that was what was being alleged against you."

Before Mr Abdulla could answer, I stopped the proceedings so that the warning could be read to him; indeed, it was practically 1.00pm on that day (Day 4, 13 November 2018) in any event, so I also explained to Mr Abdulla that he should re-read that part of his witness statement. It was expressly put to him in cross-examination that he had falsified his accounts, which is a criminal offence. This was a lengthy piece of cross- examination – and that statement should not be taken as being in the least critical of Mr Cavender, as Mr Abdulla would not always let him finish, and questions sometimes had to be put more than once – but ended with the following summary:

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"Q: You knew your declarations were untrue.

A. No.

Q. And you knew you were misleading Post Office? A. No, I don't agree.

Q. And you did so deliberately?

A. No."

195. Mrs Stockdale was similarly challenged, albeit on different facts. She too was given the warning under the Civil Evidence Act 1968 .

"Q: So you were deliberately mis-declaring items of stock or cash?

A. I wasn't doing it deliberately, no.

Q. To cover that up, no?

A. I wasn't doing it deliberately, no."

196. This passage was followed later with:

"Q: So unpacking that, do I take it that you had been mis-stating your accounts in order to hide those discrepancies? Because you say you had settled them when in fact you had not.

A. I don't want to answer that question.

Q. So would it be right that when, during that period, you certified under the following words:

> "I certify the content of this balancing and trading statement is an accurate reflection of the cash and stock at this branch."

That when you signed that in fact it was untrue? A. I never signed it.

Q. Who did sign it?

A. No one."

197. However, notwithstanding the issues of fact concerning contract formation with these witnesses, and the above passages, in oral closing submissions Mr Cavender invited me not to make findings on their credibility. This seemed to me to be rather a confused position. I therefore gave the Post Office the opportunity to consider the matter carefully and give me further written submissions on how they sought to have me approach this subject. This they did, and I have identified above what the Post Office's post-hearing submission was in this respect. I do not consider that describing this as a one-way approach, or confused, qualifies as "critical invective". Given the way that these witnesses were cross-examined and the nature of the written closing submissions, giving the Post Office the chance further to reflect and clarify its position in writing after the trial could potentially be seen as generous.

198. Stating that there are a number of potential reasons why a party might make submissions of the type identified in [28] is neither critical, nor is it invective. That passage identified that there might be a number of reasons why a litigant sought to caution the court against "personal sympathy", even though it ought to be well known that judges do not rely upon, nor are they influenced by, personal sympathy in any event.

199. So far as [34] is concerned, the Post Office sought to strike out in excess of 160 paragraphs of the claimants' evidence in total, which led to Judgment No.2. These paragraphs concerned (for example) training and the operation of the Helpline, even though these very subjects formed part of its own evidence in chief in numerous witness statements. Relevant passages in the evidence of the Post Office's own witnesses were identified in the counter schedule to Mr Hartley's 4th witness statement on that application.

200. In any event, I have already made certain observations of the Post Office's approach to relevance of evidence in Judgment No.2, in arguably critical terms, which has not been referred to at all by the Post Office on this recusal application. These criticisms came over six months ago. At [14] of Judgment No.2 I said:

> "[14] The background situation that has led to this application suggests, sadly, that this counter-productive approach lurks in the background to this application. The defendant first made complaint – or raised concerns – about the scope of the claimants' evidence about one year ago in October 2017. Given the statements themselves were only served in August 2018, that shows considerable, if not almost supernatural, foresight on the part of the defendant. There have been various proxy wars about the claimants' witness statements in the period from October 2017 onwards, even though no such statements were in existence. Indeed, notwithstanding the high number of interlocutory appearances before me, it was a rare hearing when the subject was *not* mentioned. Given there were no witness statements available to be considered on the majority of these occasions (and indeed not at all prior to the short notice hearing on 11 September 2018), this was a highly unusual situation."

201. At [26] of Judgment No.2 I said:

> "[26] The application by the defendant to strike out this evidence appears to be an attempt to hollow out the Lead Claimants' case to the very barest of bones (to mix metaphors), <u>if not beyond, and to keep evidence with which the defendant does not agree from being aired at all</u> ."

(emphasis added)

202. At [32] of Judgment No.2 I said:

> "[32] When one considers the purpose of this Group Litigation, attempting to strike out such evidence now on the grounds of lack of relevance at this stage of the proceedings to the Common

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> Issues seems to me to be rather puzzling. Mr Green QC relied very heavily that this was Group Litigation and what may not be of primary and direct relevance to one Lead Claimant could very well be of considerable relevance to a large number of the others. I accept that submission. He also submitted in his written skeleton that the application "appears to be an attempt by Post Office to secure an advantage at the Common Issues Trial by selectively tailoring the evidence which the Court is to consider." I accept that submission too; the application certainly gives that appearance."

203. There is nothing in Judgment No.3 that deals with the Post Office's approach to relevance that has not been stated already in publicly available judgments, and which has passed entirely without demur. The criticism in Judgment No.2 would not lead to the fair-minded and informed observer concluding I had pre-judged the Common Issues, or any other issues yet to be tried at that stage. I do not consider that any criticism in Judgment No.3 would do the same for the rest of the litigation.

204. So far as [36] of Judgment No.3 is concerned, this should be read in conjunction with Part F of the Judgment which runs from [574] to [598], the passages concerning the refusal by the Post Office to disclose documents relating to the audit performed upon Mrs Stockdale at [520] to [525], my analysis of Mrs Van Den Bogerd's evidence at [409] to [441], and my summary at [545].

Mr Bates

205. The passage in [117] identified by the Post Office and relied upon in its recusal application ignores the word "If", and also the final sentence, "I make no findings either way at this stage of the proceedings in this judgment".

206. So far as [120] is concerned, complaint is made regarding my comments about redactions. However, the names *were* redacted. There have been more redactions than one would usually expect in these proceedings, and this is a live issue even during the Horizon Issues trial. However, that is not going to be determinative of the substantive issues in the case. Mr de Garr Robinson QC was, when the Horizon Issues trial was stopped due to this application, in the middle of a review of redactions that I had asked him to perform. This was in addition to another redaction review already at that time being performed. At the end of Day 5, during the cross-examination of Mrs Van Den Bogerd in the Horizon Issues trial, various documents that had been partially redacted were put to her by Mr Green. I asked Mr de Garr Robinson QC for the Post Office to conduct a review of redactions of nine of these documents. Of the three that Mr de Garr Robinson had been able to review by the next morning (the exercise was still underway when the recusal application was received) one of the three had its redactions removed and these were then put to Mrs Van Den Bogerd the next morning.

207. I consider that it is part of the function of a Managing Judge in Group Litigation – indeed, any judge in any litigation – to provide guidance and encouragement to all litigants to observe the correct procedural approach. Doing so does not count as critical invective. It is not necessary to consider this subject here in any great detail, but redactions are only properly justified on the basis of privilege. This statement should not be taken as pre-judging any contested applications that might be made in the future, on this (or indeed on any) subject.

208. The passages complained of at [123] are not critical invective, and I do not consider that a fair-minded and informed observer would conclude that they are, or that there was a real possibility of bias as a result.

Mrs Stockdale

209. The passage relied upon by the Post Office is [295]. This relates to the time when replacement of IT equipment may have taken place. As a result of that replacement, a recording of an important interview is not available. There were issues of fact about what was said at that interview. Litigants have a duty to preserve records, which includes recordings of interviews. The observations are not critical invective. Mrs Stockdale was suspended after the litigation commenced.

Mr Beal

210. The passages relied upon by the Post Office are [368] to [370]. The position of the NFSP was relevant for two reasons. These are identified in Section F at [575] at the beginning of that entire section dealing with the relationship between the Post Office and the NFSP. This runs to the beginning of Section G at [600]. The Post Office sought to rely upon the involvement of the NFSP both to bolster its case, and also as it was relevant to what the Post Office termed the interpretive spectrum of contracts. The NFSP is specifically referred to in the NTC itself. This contract expressly states:

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> "The National Federation of Subpostmasters (the NFSP) is an independent members' organisation supporting operators of Post Office branches across the UK and is solely acknowledged by Post Office Limited as a represented body of operators."

Making findings of lack of independence is not critical invective. I have explained the context of the NFSP to the Post Office's case generally both on negotiation of terms, and implied terms, above.

Mrs Rimmer

211. The two passages relied upon are [393] and [394]. I commented at [394] upon the content of her witness statement that was not evidence at all, merely arguing the case.

212. In 2017 the Commercial Court established the Witness Statement Working Group, which was subsequently expanded to cover the Business and Property Courts. In 2018 it carried out an extensive survey on witness statements in general in civil litigation. All Specialist Bar Associations, Specialist Solicitors Associations and the London Litigation Solicitors' Association were invited to take part, as well as all the judges. It was widely advertised and is widely known about across the High Court, not just the Business and Property Courts. Over 900 responses were received. This Group Litigation is in the Queen's Bench Division, not the Business and Property Courts, but it would be surprising if at least some of those acting for each of the parties are not either members of specialist associations, practice in the Business and Property Courts for at least some of the time, or were otherwise unaware of the survey.

213. One specific question posed in the survey was "to what extent are each of the following a reason witness statements do not currently fulfil their purpose?", followed by reasons for someone answering the survey to identify. The reasons included "they stray into legal argument"; "they fail to reflect the witnesses' own evidence"; and "the existing rules are not followed". As long ago as the 1996 Final Woolf Report on Civil Litigation Reform (which led to the CPR) paragraph 59(d) on page 130 recommended that a witness statement be in a witness' own words. The CPR makes clear at CPR 32.4.5 that a witness statement should be in a witness' own words. CPR Part 32.4 requires that a witness statement should contain evidence that the person would be allowed to give orally. These are matters of public knowledge and I consider that a fair-minded and informed observer would know of them.

214. The passages in Mrs Rimmer's evidence that are quoted in [393] would not be permissible orally. Her statement about what would be "a reasonable expectation" is inadmissible for at least two reasons. Firstly, it is argument. Secondly, in so far as it is not argument, it is her opinion.

215. I do not consider that the fair-minded and informed observer would conclude that the comments made in [394] are critical invective. No findings were made and I specifically identified two things. Firstly, the point was not put to the witness about whether she wrote her statement herself, and I did not criticise her for it. Secondly, it should not have been in her statement. Neither of those statements are objectionable and I consider they reflect the approach required by the CPR for witness statements. If no comment were permitted by judges when witness statements contained irrelevant comment or argument, or otherwise did not comply with the rules, then litigants would come never to observe the rules. There are many trials still to come in this group litigation, and guidance on observing the rules for witness statements will, if followed, save time and cost in the litigation generally.

Mrs Ridge

216. Two passages are relied upon by the Post Office and they both appear in [476]. The first relates to the impression her witness statement sought to give, which is that she relied upon certain documents when upon cross-examination it was clear she did not. Her witness statement concentrated upon documents from Mr Trotter's interview with Mrs Dar in 2013, which took place 7 years later. It was expressly stated that findings were made in respect of the second passage, and it did appear as though that part of her statement had been written by her. Certainly, the evidence contained in it was somewhat different from her evidence as it emerged in cross-examination.

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217. This paragraph does not contain critical invective.

Mr Longbottom

218. The passage complained of deals with the fact that Mr Longbottom, a Post Office auditor, who was called as a witness by the Post Office, had a document put to him concerning an attempt he had made to discover the reason for shortfalls/ discrepancies. This showed that he asked within the Post Office for certain internal documents to be provided to him, so that he could try and get to the bottom of these shortfalls. The Post Office declined and/or failed and/or refused to provide him with the documents he had requested. I could not, when drafting Judgment No.3, nor can I now, think of a reason why the Post Office would refuse to give its own auditor documents he had specifically requested, and which he considered he needed. Internal suppression of material is one potential explanation – certainly no explanation at all has been proffered by the Post Office – but I made it clear that I was making no findings.

Mrs Stockdale and disclosure

219. This concerns paragraphs [519] to [523]. This subject is adequately explained in the passage in Judgment No.3 that runs from [514] onwards, and also [318] to [327].

220. My concerns were based upon all the evidence before me, which included evidence from the Post Office's own witness who performed the audit itself. I do not consider that expressing those concerns amounts to critical invective. The Post Office had it in its own power to dispel any concerns quite readily, well before the trial, by disclosing the documents that Freeths had sought in the summer of 2016. It chose not to do so. I do not consider that such observations upon that are "critical invective" or something unfair, and particularly so in the absence of the documents and/or an explanation. In any case, the reason why the Post Office decided to audit Mrs Stockdale is not going to be dispositive of any of the Horizon Issues, or indeed on her claim, unless a great many other issues are resolved in her (and the claimants') favour in any event.

Mr Trotter

221. The same comments concerning Mr Trotter and [532] apply as made above at [212] to [215] of this judgment. It is not critical invective to identify differences between the evidence in chief of a witness, contained in their written witness statement, and how that evidence emerges after it has been tested and explored in cross-examination.

The Post Office's approach to documents

222. I do not consider that the criticism of the Post Office's approach to documents at [560] to [561] in Judgment No.3 can properly be described as critical invective. A large number of interlocutory hearings have been necessary in this litigation, and a significant amount of time has been required to deal with contested disclosure from the Post Office. There are other examples that could be given but it is unnecessary to do so.

223. The amount of unnecessary time and legal cost spent on contested disclosure could (and in my judgment should) be dramatically reduced. This litigation has a very long way to run before it reaches its final conclusion, whatever that may turn out to be, but it will reach that point more closely aligned with the overriding objective if a proper approach is taken to disclosure. I consider that the role of Managing Judge includes attempting to keep the parties to a close observance of the CPR in order to comply with the overriding objective.

The National Federation of Sub-Postmasters ("Nfsp")

224. The passages between [576] and [596] relate to the relationship between the Post Office and the NFSP, which Part F of Judgment No.3 considers in some detail. The passage relied upon at [577] by the Post Office in this application is comment upon a contemporaneous document passing between the Post Office and the NFSP. It is part properly independent of the Post Office. It is not critical invective.

225. The changing of the text on the NFSP website during the trial, in terms that potentially assisted the Post Office's case, was something that the claimants identified during the trial. [589] to [596] analyses this in detail and correctly summarises the events. The findings at [596] might not be correct in fact (in the sense that it is open to the Post Office to seek to appeal them) but these are not critical invective. The Post Office could, had it wished, have sought to provide an explanation, or

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even call someone from the NFSP to deal with this (although permission to do so would have been required). It sought to do none of those things during the Common Issues trial.

Relational Contracts

226. The passages relied upon by the Post Office at [723] and [724] are part of a rather longer section of Judgment No.3 that deals with whether the contracts between the Post Office and SPMs are what are called relational contracts. This is Part J, Relational Contracts which runs from [702] to [768].

227. The two passages relied upon by the Post Office in this application should be read in context. The passage immediately preceding is at [722] which states:

> "[722] It follows that I therefore do not consider that what the Claimants refer to as "the imbalance of power" has any effect upon whether the contracts are relational ones. This appears to me to be equivalent to sayi n g "the contr act terms are unfair; please re-balan ce them b y findin g the y a re r elat ional contracts". That is the wrong approach. The Claimants, in different ways and in respect of different Common Issues, drew regular attention to what was identified as a dramatic imbalance of power between the parties. These features are that the Post Office decides the terms upon which SPMs contract, having had those terms drafted for themselves by their legal advisers (subject only to the nominal involvement of the NFSP). They impose their draconian effect upon SPMs, and behave with impunity and oppressively, as demonstrated (it is said) by their behaviour towards the Lead Claimants."

(emphasis added)

228. This is followed by [724] which expressly states that the complaints of imbalance of power are not relevant:

> "[724] There is no doubt that the Post Office is in an extraordinarily powerful position compared to each and every one of its SPMs. It appears to wield that power with a degree of impunity. However, I do not consider any of the complaints of imbalance of power are relevant to the determination of the correct categorisation of the contractual relationship, and whether the contracts are relational ones. Onerous and unusual terms, incorporation thereof and considerations of the applicability of the Unfair Contract Terms Act 1977 are dealt with separately, but I repeat that it is the circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, that is what decides whether a contract is relational or not. This plainly must be considered at the time of contracting ."

(emphasis added)

229. Taking isolated sentences out of context is not, in my judgment, the correct approach on any application such as this seeking recusal. I do not consider that the passages relied upon are critical invective, whether taken out of context or not. I also made itclear that the claimants' complaints of "imbalance of power" were not relevant, in my judgment, to whether the contracts are relational. Sometimes first instance judges decide a point against a party, but there is always the possibility that such a finding might be overturned at appellate level. Here, Judgment No.3 dismissed the imbalance of power argument relied upon by the claimants, but could not sensibly avoid making observations on the factual arguments that underpinned it. Otherwise, if (for example) the Court of Appeal were to decide I was wrong on imbalance of power, and that the points were relevant (contrary to my finding) there would be no factual expression in Judgment No.3 that could be applied or considered by the Court of Appeal, if their Lord and Lady Justices were so minded. This is entirely conventional in a first- instance judgment.

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Extent of liability under the Ntc

230. The Post Office changed the contract terms under which SPMs contract with it under something called the Network Transformation Programme. The new contract, known as the NTC, has a very different clause dealing with a SPM's liability for losses compared to its predecessor, the SPMC. The SPMC had expressly included and referred to fault by a SPM:

> "The Subpostmaster is responsible for all losses caused through his own negligence, carelessness or error, and also for losses of all kinds caused by his Assistants…."

The equivalent term in the replacement NTC contract did not, and used far wider words:

> "The Operator shall be fully liable for any loss of or damage to, any Post Office Cash and Stock (however this occurs and whether it occurs as a result of any negligence by the Operator, its Personnel or otherwise, or as a result of any breach of the Agreement by the Operator) except for losses arising from the criminal act of a third party (other than Personnel) which the Operator could not have prevented or mitigated by following [the Post Office's] security procedures or by taking reasonable care."

231. This change from the SPMC to the NTC occurred in 2011. Horizon was introduced in 2000, and the claimants' case is that the problems with the Horizon system in terms of discrepancies and shortfalls commenced shortly after that. Mr Beal, a senior witness for the Post Office, told me the Post Office's intention in drafting the NTC was to replicate the fault-based liability of a SPM contained in the SPMC. I rejected that evidence. The passage at [1059] is not critical invective.

Conclusions

232. The passages at [1111] and [1112] are relied upon by the Post Office in this application. These are expressly stated as being the claimants' subjective point of view. This is entirely clear from the words "So far as these Claimants…..are concerned" and "the SPMs who are Claimants do not trust it very far". Given the range of causes of action being advanced by the claimants against the Post Office, including deceit, malicious prosecution, duress, harassment and concealment of material facts, a summary that states that the claimants do not trust the Post Office is an accurate and succinct statement of the claimants' case.

233. The passage at [1120] is a summary of the finding of lack on independence on the part of the NFSP, explained in detail in Part F of Judgment No.3 and based upon the evidence and documents dealt with in the trial.

234. None of the passages relied upon can, in my judgment, properly be described as being critical invective, and I do not consider that the fair-minded and informed observer would consider they were either, or that any of them would justify that observer reaching the conclusion that there was a real possibility that the tribunal was biased against the Post Office.

Section 3: Criticism of the P ost Office's witnesses

235. There are far fewer of these. I shall deal with them in turn, although some passages concern the same witness (for example Mr Beal is the subject of both [375] and [544]).

Mr Beal

236. This passage is [375]. Mr Beal did indeed give his evidence in this way. He was not asked in cross-examination how he had prepared for giving his evidence, but he did, in my judgment, behave in the way I identified in this passage. Simply

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because I did not find him persuasive, and also found his evidence was not consistent with professionally drafted legal documents such as the GFA, does not lend support to the Post Office's recusal application.

Mr Breeden

237. The passages relied upon are those at [400] and [408]. The statement made at [400] in relation to what he said was the difference (or lack of any difference) between the terms of the SPMC and the NTC is the sort of finding that a trial judge is permitted to make. As a single example, the two terms at [230] above in the two different contract forms make clear the difference on that one part alone.

238. So far as [408] is concerned, that again (as with Mr Beal) was the approach he adopted in giving his evidence. The senior personnel at the Post Office gave the impression that I explained in Judgment No.3.

Mrs Van Den Bogerd

239. The passages relied upon at [416], [418], [441] and [425] all relate to this witness. The statements upon which the Post Office rely in this application are all part of the assessment of her as a witness. In particular, the final sentence of [418], when she gave certain evidence about Mr Abdulla's case, and was then taken to her own witness statement for the Horizon Issues trial, which she had signed just a few days before, was extensively explored in her cross-examination.

Mr Dance

240. The passage at [451] relates to Mr Dance. He was cross-examined by Ms Donnelly. The sentence complained of is part of my assessment of him as a witness.

Mrs Dickinson

241. The passage at [458] concerns Mrs Dickinson. Enron was a major worldwide fraud scandal in the United States. Mrs Dickinson is a fraud specialist. She was asked about this in cross-examination and said "I'm not familiar with the Enron case". I rejected that evidence, as I believe a trial judge is entitled to do.

Conclusion passages on the Post Office's evidence

242. The passage at [544] relied upon by the Post Office in this application related to the overall conclusions in Judgment No.3 on the Post Office's witnesses generally. I found two particular exceptions to my general statement concerning their genuine belief. One was Mr Beal's evidence about the effect of the NTC and the SPMC. The other was Mrs Van Den Bogerd and her actual knowledge when cross-examined about Mr Abdulla's case. Both of these were fully explained and were findings on the evidence that the Post Office adduced in the Common Issues trial.

243. The passages at [545] to [547] are observations on the subjective belief of the Post Office witnesses. Two important points arise. Firstly, these were based on the extensive evidence and cross-examination, which lasted a period of six days just for the Post Office witnesses. That is a period of approximately 30 hours in total of cross- examination. A single day of transcript is over 200 pages, which means that approximately 1,200 pages of transcript were considered just to assess that cross- examination, in addition to the written witness statements themselves of the 14 witnesses, and all of the documents that were put to them. On Day 8 the only witness cross-examined was Mrs Van Den Bogerd, and there were 47 separate documents put to her (ignoring passages in the pleadings). The Post Office approach in its evidence for this recusal application is to pick single sentences or passages and either consider them out of context, and also to ignore the trial process that led to those statements being made in Judgment No.3.

244. Secondly, the subjective belief of the senior Post Office witnesses is not directly relevant to the findings to be made on the Horizon Issues in any event. These will be made after extensive expert evidence in the field of IT. Each expert has served two lengthy expert reports, four joint expert agreements have been reached, and although this evidence is yet to be tested by either side, it involves detailed analysis of the Horizon system (both Legacy and Horizon Online) together with consideration of software issues, PEAKS and KELS. Some software bugs are agreed; others are not. The subjective belief of a Post Office witness of fact such as Mrs Van Den Bogerd, who believes dishonesty or carelessness is the explanation for shortfalls and discrepancies in the majority of cases, is not relevant to the findings to be made on the detailed Horizon Issues, or (for that matter) on the numerous other issues yet to be tried on breach, causation, loss and the counterclaims. Her subjective belief was however relevant to the content of her evidence on the Common Issues trial.

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245. Finally, on this section, it is the role of any trial judge to weigh and consider the evidence, assess the reliability of witnesses, and make findings. Each of the Post Office's witnesses were considered separately. Not all of them were criticised. Not all of the claimants' evidence was accepted either. Simply because certain comments were made about the manner and content of the evidence of some witnesses in the Common Issues trial does not mean that a particular witness will, or will not, have their evidence rejected, or accepted, in future trials, whether they are claimants or witnesses for the Post Office. I consider that a fair-minded and informed observer would reach this conclusion upon reading Judgment No.3.

Section 4: Passages not contained in the evidence of Mr Parsons

246. There were some passages relied upon by Lord Grabiner that were not specifically identified by Mr Parsons, namely [954], parts of [569] and [121]. [954] goes to the adequacy of training, and should be read together with [955]. As I have said above at No.3 that SPMs could not train their assistants to a higher level to that which they themselves had been trained. This was part of the answer to Common Issue 23. That was one of the issues expressly agreed to be dealt with in the Common Issues trial.

247. Further, Lord Grabiner went rather wider in respect of the long paragraph of Judgment No.3 that deals with findings as to factual matrix, than did Mr Parsons in his two witness statements in support. This paragraph is [569]. Lord Grabiner specifically identified the following as demonstrating that the fair-minded and informed observer would conclude that apparent bias was made out. The sub- paragraphs were (35), (40), (42), (50), (51), (59) and (70).

248. This is an optimistic list by the Post Office, because some of these facts were not even in issue as at the end of the Common Issues trial, and before Judgment No.3 was produced. That amounts that had been disputed by phoning the Helpline were treated as debts owed by the SPMs was accepted by Post Office witnesses. This emerged once the meaning of "settled centrally" was finally discerned. This came partly from an internal Post Office document dated 14 November 2008 called "TC/Debt Recovery Review". One question posed in that document was "what does settle centrally mean?". The answer in the same internal Post Office document was given as follows "Legal: "Settle centrally" signified acceptance of debt liability".

249. This was also accepted by Mrs Van Den Bogerd in her cross-examination. This point is relevant both to (35) and (40) in [569], and Mrs Stubbs' evidence (which I accepted) was that she was told no further action would be taken, yet she still received a written demand, a copy of that demand being deployed in court. The other passages are objections that the Post Office has to the findings of fact; the complaint in this application seems to be that the findings should not have been made. This is different to stating that the test for apparent bias is made out.

250. Finally, on the factual matrix, the Post Office entirely ignores a number of other facts which are contrary to the recusal application, such as the following three sub- paragraphs of the very same paragraph which expressly state:

> "42. It is a matter for the Horizon Issues trial whether it would be right to infer or presume that a shortfall and loss was caused instead by a bug or error in Horizon."

And:

> "72. Some Subpostmasters and assistants may act dishonestly in the conduct of their branches, including in defrauding the Post Office."

And also:

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> "79. Whether losses in branches arise in the ordinary course of things without fault or error on the part of Subpostmasters or their assistants can only be determined after the Horizon Issues trial. This is dependent upon the answers to the Horizon Issues, as the Horizon system is used by SPMs in "the ordinary course of things".

[121] is simply a summary of certain matters pertaining to Mr Bates.

Section 5: Other matters relied upon by the Post Office in submissions

251. Other matters have been advanced by the Post Office in its submissions on the recusal application, that go outside Judgment No.3 itself.

252. Some of these relate not only to the earlier Judgment No.2, which dealt with the Post Office's application to strike out large parts of the Lead Claimants' evidence in chief, but also to case management matters even prior to that, going back to my first involvement in the Group Litigation in 2017.

253. It is said in the Post Office's skeleton argument that at the Common Issues trial Mr Green QC for the Lead Claimants cross-examined the Post Office's witnesses "by reference to the irrelevant materials". There is no identification of such "irrelevant materials", so it is difficult comprehensively to consider that submission, but I have no recollection of objections being taken (routinely or at all) during the cross- examination of the Post Office's witnesses by the Post Office's counsel. I have also dealt above, in my general observations, how the Post Office cross-examined the six Lead Claimants, as well as the way that the Post Office both pleaded its case on the Common Issues, and made written submissions, and what they contained. Lord Grabiner, certainly in respect of Mr Beal's evidence, submitted that paragraph 33 of his own witness statement was irrelevant. I do not accept that, but given it formed part of the Post Office evidence adduced at the trial, Mr Green was entitled to cross- examine upon it.

254. There was some expressed concern during the Common Issues trial as to relevance, but it did not come from objections by the Post Office. When Mr Beal was being cross-examined about the GFA (the funding agreement between the Post Office and the NFSP) concern was expressed on this subject, but that concern came from the court, and wholly in the absence of any objection from the Post Office's Leading Counsel, whether on the basis of relevance or otherwise. I told Mr Green that he had to keep the issues in mind. The actual exchange was:

> "MR JUSTICE FRASER: Mr Green, do bear in mind what – you have to remember what the actual issues are in this case.
>
> MR GREEN: My Lord, I have them well in mind.
>
> MR JUSTICE FRASER: I am being fairly tolerant at the moment.
>
> MR GREEN: This comes to an end quickly. It is quite important."

The cross-examination then continued for a short while thereafter. I have explained above why I consider the relationship between the Post Office and the NFSP, and whether the latter is independent, relevant to the Common Issues.

255. I made clear in Judgment No.2 that I would not strike out the passages in the claimants' evidence, but that there were a large number of Common Issues, and what was relevant to one would not necessarily be relevant to the others. I also explained the following at the end of [53]:

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> "However, should I in the fullness of time make findings on the Common Issues by taking into account matters irrelevant in law (and hence inadmissible) on some of those Common Issues, there is a remedy available".

The conventional remedy is by way of an appeal.

256. The Post Office also in its skeleton argument for the recusal application submitted that "it maintained its objections throughout" the Common Issues trial in terms of relevance. I do not consider that to be an accurate representation of the stance of the Post Office at the Common Issues trial. The Post Office submitted a great amount of evidence of its own on (for example) training, the Helpline, audits conducted on SPMs, fraud by SPMs, suspensions and terminations. One Post Office witness, Mrs Dickinson, was a fraud specialist and her evidence was almost wholly directed to fraud. As another example, Mrs Ridge had interviewed Mr Abdulla pre-appointment, and she gave written evidence in chief about this. However, she also conducted his suspension interview, and she was cross-examined about this by Mr Green by reference to the transcript of that interview. Not only was there no objection to this from Mr Cavender, but Mr Cavender had also expressly and earlier cross-examined Mr Abdulla on the same matters by specific reference to his suspension interview in any event, as again I have explained above.

257. The sequence in which these matters unfolded is highly relevant, and in my judgment important. Mr Abdulla is a good example, but the same point could be made in respect of other Lead Claimants such as (for example) Mrs Stockdale. Mr Abdulla is a Lead Claimant and he was called as a witness. There were factual matters in issue concerning his contractual formation. Mr Cavender QC cross-examined him, not only on contractual formation, but also upon other matters that went to his credit and credibility, and including putting to him in terms that he had committed a criminal offence. Mr Cavender was entitled to do this, but it must have been a conscious decision by the Post Office to do so. This also included Mr Cavender putting to Mr Abdulla certain things that he, Mr Abdulla, had said in his suspension interview conducted by Mrs Ridge, and whether he had admitted false accounting in that interview. It is difficult to see how the Post Office can now in this application portray what occurred in that respect as not relevant. The Post Office certainly put it in issue at the Common Issues trial. Had Mr Cavender sought to object to the cross- examination of Mrs Ridge when that was taking place later in the trial, such an objection would have been considered. However, given Mrs Ridge's suspension interview of Mr Abdulla was effectively just the other side of the coin, of what had already been put to Mr Abdulla expressly on behalf of the Post Office, it is difficult to see how this stance can sensibly be maintained by the Post Office. The Post Office had expressly sought to adduce in the Common Issues trial Mr Abdulla's own oral evidence of what occurred at his suspension interview conducted by Mrs Ridge, and other evidence concerning his branch accounts, to mount a challenge to his credibility. That made evidence from Mrs Ridge on the same subject admissible. In written Closing Submissions the Post Office submitted Mr Abdulla was lying. This is not consistent with a submission, in this recusal application, that the Post Office "maintained its objections throughout".

258. This aspect of the submissions upon the recusal application does have the appearance of the Post Office, with hindsight and having received Judgment No.3, wishing it had conducted the trial of the Common Issues differently. All that could be done by the court in Judgment No.3 was to resolve the Common Issues on the evidence advanced by each party, and in the light of their detailed legal arguments, and making clear that no findings were being made on breach, causation, loss and the Horizon Issues. That is what was done.

259. Lord Grabiner submitted that Judgment No.3 had gone far too far in analysing the evidence of the Lead Claimants. He drew specific attention to the number of paragraphs of Judgment No.3 in which each Lead Claimant had their evidence considered. I do not consider this to be a sound submission by Lord Grabiner. The number of paragraphs devoted to witness analysis is probably not a sound comparator. The Post Office's evidence was analysed over 203 paragraphs, together with the further 25 paragraphs dealing with the relationship between the Post Office and the NFSP. Comparing this, say, to the 55 paragraphs in which Mr Bates' evidence was considered, or the 36 paragraphs concerning Mrs Dar, is not particularly useful, nor do I consider it to be an appropriate approach. All the evidence was considered in a reasonable amount of detail. That was necessary to identify the way that the findings for the factual matrix were made. Had there been no issues of fact between the parties, Judgment No.3 could have started at or about Part E, when the factual matrix is explained and then the

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legal issues considered. Both the Common Issues trial, and Judgment No.3, would have been markedly shorter had this been done. However, it was not, which was why so many weeks of factual evidence took place.

260. Lord Grabiner also submitted that Judgment No.3 ought not to have considered the evidence in the detail that it did. I reject that submission. The factual evidence of both sides had to be considered in detail because there were so many facts in dispute. Judicial evaluation of evidence in any case requires a proper evaluation of all the evidence, including consideration of its strengths and weaknesses, as well as testing what a witness says (for example) about the contents of a contemporaneous document, compared to the actual text of that document. If any authority is needed for that, it is to be found at [32] to [39] in *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz [2016] EWCA Civ 556* , and in particular at [39] in the judgment of the Master of the Rolls:

> "[39] Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases."

(emphasis added)

261. The Post Office litigation is particularly fact heavy, and given it is Group Litigation, if these trials are to have any particular utility, the judgments have to deal with contested points in some detail. This is part of demonstrating that the essential issues have been addressed, which parts of the evidence have been given what appropriate weight, and why.

262. Finally, Lord Grabiner submitted that this application was a clear case of the test for apparent bias being made out. He submitted that the different elements of Judgment No.3 under consideration, either individually or collectively, justified, if not required, my recusal from any further involvement in this case, including bringing the Horizon Issues trial (currently practically at the end of the factual evidence) to a premature end. He realistically accepted that the consequence of this would be that the Horizon Issues trial would have to start again before another judge. The claimants took a markedly different approach. Their submission, summarised at paragraph 132 of their skeleton argument, was "This Application is hopeless and should not have been made".

Apparent bias

263. Here, I have taken account of the well-known legal test, and analysed all of the different features and passages of Judgment No.3 against that test, both collectively and individually, and with considerable care.

264. Lord Grabiner submitted that the fair-minded and informed observer would not consider the overall outcome of the Common Issues trial. When I asked him this specific question, he said "absolutely not", and also submitted that it would be irrelevant. I have therefore considered the matter both with, and without, taking account of the overall result in the Common Issues trial.

265. Firstly, approaching it on the basis urged upon me by Lord Grabiner, I conclude that there are no grounds for any conclusion that the test of apparent bias has been made out. In my judgment, the fair-minded informed observer would not reach the necessary conclusion in respect of any of the passages identified by the Post Office. I do not consider that there is anything contained in Judgment No.3 that demonstrates that I have reached any sort of concluded view on any matters

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going to breach, causation, or loss, and/or upon any of the Horizon Issues, or that there is a real possibility that I have had, or otherwise that my present and future involvement is tainted by apparent bias.

266. However, I must make it clear that I disagree with Lord Grabiner's submission on this point. What his submissions on this point amount to is that a fair-minded and informed observer would only read *some* of Judgment No.3, and not take into account all of it, including its result. That is, in my judgment, fundamentally wrong. In my judgment, a fair-minded and informed observer *would* take account of everything contained in Judgment No.3, including the overall result. They would not consider just one part of it, (or even isolated passages of one part). I consider that the fair- minded and informed observer would take into account the overall result of Judgment No.3, and not limit themselves to the isolated passages relied upon by the Post Office in this recusal application (which in my judgment are, in any case, taken wholly out of context from the rest of the judgment in any event).

267. Were they to do so, the conclusion that the test for apparent bias is not made out would be even more readily reached. This is because on any view, the Post Office was partially successful on a number of the Common Issues.

268. I consider the Post Office's written submissions on costs, which I refer to above at [26] and which were received on Friday 29 March 2019, accurately reflect the state of play in the litigation after Judgment No.3. These were served in respect of the costs of the Common Issues trial, and release of the security of £3.9 million which I had ordered be provided in the Post Office's favour in September 2018. Oral submissions will be required in due course on both of those matters to deal with the costs of the Common Issues trial, which led to Judgment No.3, and that issue has not yet been decided. I consider it noteworthy that the Post Office's written submissions on costs of the Common Issues maintains at paragraph 4 as follows:

> "4. It is submitted that the costs should be reserved, because it is too soon to tell whether any Claimant will be successful."

It was also contended for in the alternative by the Post Office's solicitors in those written submissions (at paragraph 3(b)) that "any costs order in the Claimants' favour should reflect the fact that they were not wholly successful".

269. I consider that both of these statements accurately reflect the outcome of Judgment No.3. They are, however, arguably contradictory to the stance adopted by the Post Office in the recusal application. The fact that the written submissions were lodged by WBD, and are not signed by any of the Post Office's counsel (they have three QCs and four juniors in total, two of those QCs and one junior being instructed on this application) does not dilute this point, in my judgment. The submissions on costs were served on behalf of the Post Office by its legal advisers. I do not see how a sensible acceptance of the outcome of Judgment No.3 as being partly in the Post Office's favour, such that it is not possible to see which side will prevail, can readily sit with submissions that Judgment No.3 on its face demonstrates apparent bias. I wish to make it clear that the outcome of Judgment No.3 is not determinative of this application. However, it is a relevant fact that the fair-minded and informed observer would take into account, and would weigh in the balance. The Post Office seeks to have me ignore it entirely, and I do not consider that to be correct.

270. The claimants maintain that the recusal application essentially attacks the contents of Judgment No.3 (and also Judgment No.2) and challenges (albeit by an unconventional route) those two judgments, as well as seeking to recuse me from further involvement. I do not consider that Judgment No.2 can now be challenged on appeal in any event, but this application is not about Judgment No.2. The Post Office has not yet issued any application for permission to appeal, so far as any appeal in respect of Judgment No.3 is concerned, but given paragraph 17 of the skeleton argument on the recusal application submits

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that I went "seriously wrong in two key respects" I assume an application for permission to appeal might be expected to occur. Lord Grabiner submitted at the hearing of the application that an appeal would be brought in respect of Judgment No.3, but as yet, no permission to appeal has been sought, let alone granted. I do not consider whether Judgment No.3 is to be challenged by the route of appeal to be relevant to this application.

271. I consider that it is important to keep separate the two different avenues. This is not an application for permission to appeal, it is an application for recusal. There should be no confusion in this respect; the legal test for apparent bias is completely different to that for whether to give permission to appeal.

272. Certain of the passages of Judgment No.3 have been argued by Lord Grabiner QC on this recusal application as demonstrating that a fair-minded and informed observer, in possession of all the material facts, would conclude that there was a real possibility that I was biased against the Post Office. That is different to arguing that those passages are wrong, or contained matters that were taken into account on particular Common Issues when they ought not to have been. It is the legal test for apparent bias that I have applied upon this application.

273. Nothing that I have stated in this judgment on the recusal application should be taken as my having made my mind up on any future issues yet to be decided, and that includes any consequential matters arising out of Judgment No.3 including costs.

Waiver and delay in making the application

274. Even if I had found that there were grounds of apparent bias on the face of Judgment No.3, I would not have recused myself. This is because of the fact that the Post Office waited until almost two weeks after it had received Judgment No.3 before it did anything in respect of making an application to recuse.

275. Here, there was not only silence by the Post Office, and continuing participation in proceedings, but there was active involvement in the actual Horizon Issues trial. The parties had the draft of Judgment No.3 on 8 March 2019. The Horizon Issues trial commenced on 11 March 2019, and the final version of Judgment No.3 was handed down at 12.00 noon on 15 March 2019. The Post Office not only were represented by counsel in court every day from 11 to 15 March 2019, but an order was produced in agreed terms by the parties which included (at my suggestion made on Day 1 of the trial) an extension of the period for either party to make an application to appeal, so that this did not have to be dealt with by them during the Horizon Issues trial. Whatever the "watershed moment" was (to use the expression from [36] in *JSC BTA Bank v Mukhtar Ablyazov [2012] EWCA Civ 1551*) it must have come, in my judgment, no later (and putting this at its most favourable for the Post Office) than 18 March 2019 when it called its first witness of fact, who happened to be Ms Van den Bogerd, one of the senior executives in respect of whom my comments in Judgment No.3 are said to justify the recusal application. Even if an actual application could not have been prepared by 18 March 2019, which I doubt, since by then the Post Office would have had the draft for 10 days, the Post Office could have asked for a short adjournment to consider such an application, prior to calling any of its own witnesses. Instead, the Post Office ploughed on and called almost all its witnesses of fact.

276. In fact, what should have happened on the morning of 11 March 2019 (the first day of the trial) or the morning of 12 March 2019 (the second day, just before any witnesses were called) is the court should have been asked for a short adjournment, and told why.

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277. Even if that is too soon, which I do not accept, the point immediately prior to the Post Office calling its first witness was certainly not too soon, and in my judgment was the very latest. By then – 18 March 2019 - the Post Office would have had the draft of Judgment No.3 for ten days, since 8 March 2019.

278. Not only that, but this delay is not explained, in even the most cursory or terse terms, in either of Mr Parsons' 14th or 15th witness statement. It is entirely ignored. I do not consider recusal applications to be entirely run of the mill events. This is even more so when one considers this recusal application is of a Managing Judge in Group Litigation. It is also even more so when it is made in the very middle of a lengthy trial. An explanation is called for in my judgment, particularly in the light of the authorities above concerning waiver.

279. I expressly asked Lord Grabiner about this delay in making the application. The exchange was as follows:

> LORD GRABINER: My understanding is that we received the draft judgment on the Friday immediately prior to commencement of the Horizon trial on the Monday.
>
> I am afraid, standing here now, I don't know what the dates are.
>
> MR JUSTICE FRASER: It is the 8th. It was sent out on Friday, the 8th [March]. Monday, the 11th, was oral openings.
>
> LORD GRABINER: There was a passage of time between then and the decision that was communicated to make this application. I need hardly point out that this has been – this is regarded as an extremely serious application to be making. It was made at board level within the client and it also involved the need for me to be got up to speed from a standing start.
>
> And I am not the only judicial figure or barrister that has looked at this with a view to reaching that conclusion. It has also been looked at by another very senior person before the decision was taken to make this application.
>
> The delay, such as it is, is very, very tiny in the context of the seriousness of case that is being put forward.
>
> We had no control over the commencement of the Horizon case, obviously, because that was already predetermined by the arrangements that were then in place.
>
> MR JUSTICE FRASER: I suppose one might observe an adjournment could have been requested of a week or something.
>
> LORD GRABINER: It may be. I just don't know because I wasn't involved at that stage. I have only been involved just for a few days, literally."

280. The following important points can be made:

1. Evidence should have been served by the Post Office dealing with why the application was not issued until 21 March 2019, and also why no prior notice was given, even limited to the fact that consideration to such an application was being given.
2. Delay has to be weighed in the context of an actual trial about to start, and then being underway for some time.

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3. This delay was not "tiny". It was substantial in the context of the ongoing Horizon Issues trial.
4. That trial is of the Horizon Issues, crucial in the context of this litigation as a whole, and this went on for almost two full weeks before the application was issued.
5. Entirely separate counsel teams have, for the Post Office, been dealing with the Common Issues (and associated recusal application), and the Horizon Issues. Different Leading Counsel are at the helm for the Post Office in each of these two areas. The fact that the Horizon Issues trial was underway does not excuse the delay, it actually makes it even more pronounced.
6. There can be no question that a modest adjournment could have been sought by the Post Office, even if the application itself could not be issued before 21 March 2019.

281. Nor is the scope of Mr Parsons' 14th witness statement particularly detailed or wide, such that it could be said to have required very lengthy preparation. It consists of 26 paragraphs only. Paragraphs 1 to 20 are historical. The last six paragraphs take up less than one page. I consider that such a statement could have been prepared extraordinarily quickly, and easily in less than one day.

282. The Post Office conducted itself for the whole of the factual evidence that was called during the first two weeks of the Horizon Issues trial (16 different witnesses in total) without any hint of making any application that I recuse myself. This falls to be considered, not only in terms of waiver (which has been dealt with above) but also in terms of other consequences. Almost the entirety of the evidence of fact of both parties has already been fully cross-examined in the Horizon Issues trial.

283. This could potentially give the Post Office an enormous advantage if the Horizon Issues trial were to be abandoned, and started again before another judge. Every single one of its witnesses of fact who has been cross-examined so far in the Horizon Issues trial, which is all of them save for Messrs Parker and Membery, would have had a full practice run of that cross-examination before me. "The trial is not a dress rehearsal. It is the first and last night of the show" is an expression that has been used at least twice before at appellate level, by Lewison LJ at [14] in *FAGE UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5* , and more recently by Coulson LJ in *Wheeldon Brothers Waste Ltd v Millennium Insurance Company Ltd [2018] EWCA Civ 2403* at [7]. Both of these cases concern the approach of appellate courts to findings of fact, but as a principle it demonstrates that a trial is not supposed to be a practice run. I do not, for a moment, consider that this principle should be considered to be more important than the fundamental principle of natural justice that parties are entitled to have their disputes resolved by an impartial tribunal, without actual or apparent bias. However, it demonstrates that it was incumbent upon the Post Office, once it considered the contents of Judgment No.3, to have asked (at the very least) for the start of the Horizon Issues trial to be postponed so that it could consider the situation, and if necessary make the recusal application before any evidence of fact was heard. Instead, the Post Office waited until the final day of the second week of the trial, and then made the application practically at the very end of its own factual evidence. The Post Office had certainly had time to consider Judgment No.3 in detail by the end of opening submissions on Day 1, as their Leading Counsel drew my attention to a passage in the draft judgment at [341](4) regarding the cross- examination of Mrs Stockdale. The first witness of fact was not called by the claimants until Tuesday 12 March 2019 when Mr Latif gave evidence by video link from Kashmir.

284. I consider that it was incumbent upon the Post Office to have issued its application far more quickly than it did, given it had the draft Judgment No.3 from 8 March 2019, and given the Horizon Issues trial started on 11 March 2019. Rather than acting quickly and promptly, the Post Office delayed, and as explained above, acted somewhat curiously. When I asked Mr de Garr Robinson QC about the application at 2.00pm on the day it was issued, he did not know very much about it. The Post Office has at least three Queens' Counsel acting for it in this litigation. Mr de Garr Robinson QC is the Post Office's trial counsel in the Horizon Issues trial, but he is not the only QC acting for the Post Office. Mr Cavender QC acted for it in the Common Issues trial, and has attended numerous interlocutory hearings, including two case management conferences for the third trial set down for November 2019, and he is acting on this recusal application. I was told on 21 March 2019 that Lord Grabiner QC was also acting for the Post Office on the recusal application. The fact that Mr de Garr Robinson was extensively involved in the actual Horizon Issues trial from 11 March 2019 onwards does not excuse the Post Office

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in delaying the making of the application until the last day of the factual evidence. A short adjournment could have been requested at the very least. In any event, the recusal application could and should have been made far earlier.

285. I have found that there is no apparent bias in any event. However, even were I to have concluded that point to the contrary, and found that there was sufficient to justify the Post Office's application for recusal, I consider the delay, and the continued conducting of the Horizon Issues trial, including both the cross-examination of all of the claimants' witnesses of fact, and the calling of almost all of the Post Office's own witnesses of fact, to constitute an unequivocal waiver of any right the Post Office might have had to ask me to abandon the Horizon Issues trial and recuse myself from further involvement as the Managing Judge.

286. Finally, at [71] and [72] of *JSC BTA Bank v Mukhtar Ablyazov* the question of what was called on that appeal "analogous" issues was considered. Teare J had referred to this as an "overlap" of issues, the overlap being between matters considered on the committal hearing and the substantive trial(s) to come. Rix LJ stated:

> "In my judgment, however, concepts of analogy or overlap are too general and amorphous to give definitive shape to the doctrine of pre-judgment in what must always be a fact-sensitive enquiry."

287. He did however consider the concept and stated: "However, even if I do seek to apply the concept of overlap, in my judgment the judge was right to say and Mr Smith was right to submit that the overlap between the issues at the committal proceedings and at trial will be small."

288. In the instant case, there is absolutely no overlap at all between the Common Issues, which deal with whether the contracts are relational, contractual interpretation of numerous terms, incorporation of onerous and unusual terms, the Unfair Contract Terms Act, agency and other associated matters; and the Horizon Issues, which concern computer issues and in respect of which each party is calling an expert witness in the field.

289. Having considered all the matters relied upon by the Post Office to support its application, and applied the necessary tests, this disposes of the application brought by the Post Office. That application is dismissed. However, I will go on to identify some other matters in any event. A fair-minded and informed observer would take account of these particular features of the litigation. I have however reached my conclusion on the application without taking these features into account.

Other potentially relevant matters

290. There are other matters which I consider to be potentially relevant on this application for recusal. There have been a large number of interlocutory applications, a number of which have been resolved in the Post Office's favour, and some of which are significant. As an example, the parties were agreed that the claimants would provide security for the Post Office's costs (as a resolution of a contested application by the Post Office to join the claimants' third party litigation funder as a party to the litigation). However, the amount was hotly disputed and the claimants wished only to provide security in the sum of £2.5 million. After a contested hearing, I ordered security for the Post Office's costs in an Order dated 26 September 2018 in a far higher amount, namely £3.9 million. This meant that the claimants' funders had to provide a substantial amount in security above the amount contended for, and provide £1.4 million more than they were prepared to provide. This would be taken into account by the fair-minded observer.

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291. Turning to the dicta of Longmore LJ at [18] in *Otkritie* , I am not aware of the Post Office seeking to appeal any of my interlocutory decisions.

292. I have also been directly critical of both parties in this litigation. At [13] of Judgment No.2 "Strike Out Application" [2018] EWHC 2698 (QB) I said:

> "I have now had a total of 10 separate interlocutory hearings with these parties in a 12 month period prior to the trial of even the first issues. The legal advisers for the parties regularly give the appearance of taking turns to outdo their opponents in terms of lack of cooperation. Behaviour from an earlier era, before the overriding objective emerged to govern all civil litigation, has appeared to become almost the norm, at least from time to time. One would have thought that *all* of the parties involved in this litigation would wish to resolve the many different issues between them – which are highly controversial – fairly, speedily and with as much cost-efficiency as possible. I am making no findings about this at this stage, and which party is primarily responsible for this state of affairs is only likely to be considered, if at all, at the final costs stage of the litigation, far in the future. However, it appears to me that extremely aggressive litigation tactics are being used in these proceedings. This simply must stop. It is both very expensive, and entirely counter-productive, to proper resolution of what is so far an intractable dispute. I made similar comments in Judgment No.1. These must have fallen on deaf ears, at least for some of those involved in this case."

293. I also said at [16] in the same Judgment No.2:

> "However, this application regrettably falls into a pattern that has, in my judgment, clearly emerged over the last year at least. Attempts are being made to outmanoeuvre one another in the litigation, and tactical steps have led to constant interlocutory strife. This is an extraordinarily narrow-minded approach to such litigation."

294. The claimants originally did not want the next substantive trial (which is currently called Round 3) to take place in 2019 at all. Time was requested for a period following the Horizon Issues in order to hold a mediation. I was prepared to provide some time, but ruled against having Round 3 in 2020 and set it down for the autumn of 2019. The claimants did not wish me to do this.

295. I have already identified that the findings in Judgment No.3 on the Common Issues were not wholly in the claimants' favour. There were 23 different issues and two of them, 17 and 18, did not arise (these related to what was called the "true agreement" or *Autoclenz* issue). These issues were advanced by the claimants in the alternative, which meant effectively that the claimants' case on this alternative approach was not preferred. Of the other 21 Common Issues, the Post Office's case was preferred in five (those numbered 10, 11, 15 (in part), 21 and 22). The Post Office's case was also preferred, in part, in some of the others. For example, in Common Issue 5, 33 separate express terms were alleged by the claimants to be onerous and unusual. I found that only 8 were, with the potential of another three (if my finding on relational contracts were wrong) and another two (if my construction that termination provisions without notice were to be construed as applying to repudiatory

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breaches) also being onerous and unusual in those alternatives. This therefore meant that the maximum number of terms that could be classified as being found in the claimants' favour was 13 out of 33 in total, but this number is in reality only 8 out of 33, if my findings on relational contracts and repudiation were correct. Termination without notice provisions being construed as relating to repudiatory breaches was the Post Office's case.

296. I also found (in relation to Common Issue 2(t)) that there was no requirement upon the Post Office to take care in performing its functions which could affect the business, health and reputation of the claimants, and that this requirement extended only to matters that could affect the branch accounts. I also found in relation to Common Issues 5 and 6 that due to the signature of SPMs on the NTC contract form, and the recommendation to those SPMs to seek legal advice, for those who had contracted upon the NTC, all of the clauses in the NTC were incorporated, even those that were onerous and unusual, due to the law on incorporation. I also did not accept all of the Lead Claimants' evidence of fact. For example, I found that Mr Trotter had not told Mrs Dar in interview that she did not need to get legal advice. To portray the outcome of Judgment No.3 as an unqualified victory for the claimants on all the Common Issues would not be accurate.

297. I have already stated, in Judgment No.2, that the court is not concerned with either marketing or public relations for any litigants, and the guiding principle is that of open justice. This arose in the context of the Post Office expressly stating that one of the reasons why it sought to strike out some of the claimants' evidence was for reasons of adverse publicity.

> "55. Mr Parsons gave evidence at paragraph 36 of his 9th witness statement in support of the application stating that the defendant was concerned that "advance allegations of misconduct by Post Office at the Common Issues Trial" would be made by the claimants for "prejudicial reasons or to generate adverse publicity for Post Office". (The defendant does not use the definite article when referring to itself.) It seems to me that this narrow passage in the witness statement of Mr Parsons, expressly supporting the application, might contain the origin of the expenditure of time, resources and money by the defendant on restricting the claimants' evidence, that has been the subject matter of this application. It certainly must have had some bearing upon the application in the defendant's mind, otherwise Mr Parsons would not have included it in his witness statement. Such concerns would be pertinent if the challenged passages constituted the airing of "irrelevant grievances", to use the expression of Harman J in *Re Ubisoft* , quoted by Mann J in the passage quoted above at [4] of *Wilkinson v West Coast Capital* at [22] above.
>
> 56. However, they do not, in my judgment. I consider that the challenged evidence is relevant to the Common Issues trial for the reasons that I have explained, is therefore admissible, and ought not to be struck out. This conclusion has been reached having considered the principles applicable to an application such as this, and the Common Issues to be tried. Whether this "generates adverse publicity" for the defendant is not a concern of the court, as long as the evidence is properly admissible under the CPR, which I have found it is. The court is not a marketing or PR department for any litigant, and the principle of open justice is an important one."

These statements also equally apply in terms of how litigants may seek to portray the outcome of any judgment. The reasonable and fair-minded observer will neither make his or her "judgment after a brief visit to the court" (to adopt the phrase of Sir Thomas Bingham MR in *Arab Monetary Fund v Hashim (No.8)*), nor will they skip through a judgment of 1122 paragraphs (excluding appendices) or rely upon isolated extracts. They will be aware of the detail of the judgment, and also be aware of the history of the litigation.

298. There was no appeal from Judgment No.2 on the Post Office's application to strike out the claimants' evidence of fact, and indeed, the Post Office did not even ask me for permission to appeal. The application to strike out the claimants'

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evidence was heard on 10 October 2018 and the judgment was handed down on 17 October 2018. The Common Issues trial commenced on 7 November 2018, and there was ample time for the Post Office to have mounted an appeal against the dismissal of that application, if so advised. The evidence sought to be struck out by the Post Office was therefore admitted as evidence for the Common Issues trial, and it was cross- examined upon by the Post Office extensively. I do not consider that I have relied upon irrelevant matters in arriving at my conclusions on the answers to the Common Issues, but if I have, then the correct route to remedy that would by way of an appeal. Permission has not yet been sought by either party to appeal any part of Judgment No.3.

299. Miss Philips, in her evidence for the Post Office in the Horizon Issues trial, readily confirmed what had been in dispute for so long during the Common Issues trial, namely that SPMs had no option but to accept the figures provided to them, even though amounts may have been "settled centrally". This is notwithstanding that her original terminology in her witness statement said that SPMs "chose to accept" TCs. She accepted that SPMs did not have a choice. It had been necessary for me to make findings on this very point in the Common Issues trial, and all the Lead Claimants in that trial (but particularly Mr Abdulla) had been directly challenged on this very point in their cross-examination. Mr Godeseth also gave evidence in the Horizon Issues trial that the lack of any ability on the part of a SPM to dispute an item in Horizon was "by design". All a SPM could do was to telephone the Helpline. This shows that the Post Office had been advancing a case, at least for a substantial part of the Common Issues trial, which was directly contrary to the evidence of its own witnesses of fact in the Horizon Issues trial.

300. I do not consider that what has occurred in the Horizon Issues trial can be entirely irrelevant to the recusal application. However, I consider that great care must be taken to ensure that forensic developments in the ongoing trial are not allowed to become any part of the focus on the recusal application. The reason for identifying the point in [299] is it shows that the Post Office has, to date, put in issue matters that ought not to have been put in issue. In resolving those matters, hearing contested matters of fact and making the necessary findings, it was necessary to go somewhat wider than my initial comments at earlier case management hearings about the expected scope of evidence for the Common Issues trial, when I (perhaps over-optimistically) assumed that the parties would agree non-contentious matters. This would have left the real battleground as those areas of fact, and law, that were truly contentious, so that cost- effective and proportionate resolution of the litigation could occur.

301. Finally, the role of Managing Judge in Group Litigation in particular, is such that some litigants may be extremely unhappy with what occurs at different points throughout. Possibly all of the litigants will be extremely unhappy with what occurs at some stage or another during what is already (in this case) about three years since the first claim form was issued. Effective case management is required to move the litigation forwards, and this may cause discontent to some, or even all, as well as the substantive findings themselves. Substantive issues cannot all be resolved in one trial, so answers on some substantive issues will inevitably be provided before others. To deal expressly with the point raised at [32] in *Otkritie International Investment Management Ltd and others v Urumov [2014] EWCA Civ 1315* , I do not feel any embarrassment or difficulty in proceeding with this group litigation, either as a result of the contents of Judgment No.3 or of the recusal application itself.

302. I intend to continue with the Horizon Issues trial, and I intend to continue as the Managing Judge. I am confident that I can resolve all the existing and future issues in this litigation in a wholly impartial and judicial manner. However, the timetable going forward for the resumed Horizon Issues trial must take account of the significant disruption to that trial already caused by the recusal application; the possibility that the Post Office may seek to obtain permission to appeal this decision on my recusal; as well as the effect of the impending Easter break. I will now deal with this with counsel.

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Otkritie International Investment Management Ltd and others v Urumov [2014] EWCA Civ 1315

Court of Appeal, Civil Division

Lord Justice Laws, Lord Justice Longmore and Lord Justice Moore-Bick

14 October 2014

Natural justice — Judge — Bias — Main judgment being given in proceedings — Judge making adverse findings against defendant, U — Claimants issuing committal application against U — U making application for judge to recuse himself alleging imputed and apparent bias — Judge recusing himself on account of seriousness of allegations — Whether judge erring in recusing himself.

Judgment

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

LORD JUSTICE LONGMORE:

Introduction

1. It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see *Porter v Magill* [2002] 2 AC 357 para 103per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case.

2. This can give rise to potential difficulties in long running cases where a judge has been case-managing a case and has then to conduct the trial or in cases where a trial has occurred and the judge has then to consider consequential matters such as, in the present case, proceedings for contempt. It is obviously convenient for a single judge rather than different judges to deal with a complex case but the question can arise whether there comes a point where findings made by a judge pre-trial disqualify a judge from continuing with a case or findings made at trial disqualify a judge from hearing consequential matters. This is the question at the heart of this appeal.

The Facts

3. On 10th February 2014 Eder J handed down a 559 paragraph judgment in which he found that numerous defendants had conspired to defraud and had actually defrauded the claimant companies (to which I shall compendiously refer as "Otkritie") in relation to two quite separate matters referred to as the Sign-On Fraud and the Argentinian Warrants Fraud. The first defendant in the trial was Mr George Urumov who was a senior employee and trader with Otkritie. The judge made numerous damaging findings about Mr Urumov's fraudulent deception of his employer and his conduct of the interlocutory proceedings and the trial itself and found him personally liable for US$23,000,000 in respect of the Sign-On Fraud and US$150,933,750 in respect of the Argentinian Warrants Fraud.

4. Otkritie have now launched proceedings against both Mr Urumov and other defendants for contempt. Those proceedings include an application for the committal of Mr Urumov to prison (or other relief) for

> 1) Knowingly and deliberately giving false information in response to and in breach of orders for disclosure of assets contained in or ancillary to a freezing order made against him;
>
> 2) Breaching the terms of the freezing order by dissipation of assets after having notice of the freezing order;
>
> 3) Making knowingly false statements in his statement of defence in contravention of the statement of truth contained in that document; and
>
> 4) Making a false disclosure statement in the lead-up to the trial, knowing that the relevant statement of truth signed by him was false.

Otkritie need the permission of the court to institute the proceedings under heads (3) and (4) but not the proceedings under (1) and (2). The findings of the judge in his trial judgment are much relied on.

5. The judge fixed 29th April 2014 for the hearing of the application for permission to bring committal proceedings but on 24th March Mr Urumov (who was represented by Mr Anthony Peto QC and Mr Jonathan McDonagh instructed by Messrs Farrer & Co throughout the trial, but was then and is now acting in person) applied to the judge to recuse himself from the hearing of the committal proceedings on the grounds

> 1) that a fair-minded and well-informed observer would think that the judge had already decided the committal application against Mr Urumov in the light of the many adverse findings in the judgment;
>
> 2) that the judge had unnecessarily expressed many of his findings in the judgment to a high level of certainty (e.g. by saying he "had no reasonable doubt") which again showed he had pre-judged the committal proceedings;
>
> 3) that the judge had not been even-handed in his criticisms because he had failed to hold that Otkritie had themselves been in breach of their disclosure obligations and had procured their witnesses (including their solicitor Mr Neil Dooley) to commit perjury;
>
> 4) that the judge had, in particular, been highly critical of Mr Urumov's failure to disclose that he had possession or control of documents and USB sticks found in what was called the Dunant box in December 2012 when, as the judge knew, it had by then been seized by the Swiss prosecutor in the course of criminal proceedings instituted by the claimants in Switzerland; and
>
> 5) that the judge had deliberately mistaken "centuries old principles and law governing early termination" of the trading instruments or financial derivatives which were at the heart of the allegations of fraud.

6. The judge treated grounds (1) and (2) as assertions of apparent (or imputed) bias and grounds (3) (4) and (5) as assertions of actual bias. He dismissed grounds (1) and (2) saying that no well informed or impartial observer would think he was biased against Mr Urumov in relation to the committal applications on the grounds of his adverse findings or the strength with which they were expressed.

7. He acceded, however, to the recusal application (albeit "with extreme reluctance") because, although he regarded the specific points relied on in support of actual bias as being "entirely groundless", the allegations were

> "so serious that the appropriate course is that I should recuse myself."

He handed this judgment down on 29th April 2014 and, on the same date, he gave Otkritie permission to appeal his decision saying not only that Otkritie had a real prospect of success but also that he would welcome his decision being overturned; no further steps have been taken in the committal applications meanwhile either against Mr Urumov or against other defendants.

8. The nature of the frauds found by the judge was as follows. The essence of the Sign-On Fraud was that Mr Urumov and others falsely represented that they each had a guaranteed income of US$5 million per annum with their previous employers, Knight Capital Ltd, where Mr Urumov had been executive director at the Emerging Markets Fixed Income Desk. As a result of this representation Otkritie paid Mr Urumov a "golden hello" of some US$25 million which Mr Urumov had falsely represented he intended to share with his other four team members. He did not in fact so intend and pocketed most of the US$25 million part of which he used as bribes or kickbacks paid to other defendants.

9. The Argentinian Warrants Fraud was a scheme whereby Otkritie were deceived into purchasing Argentinian warrants for US$213 million when they were only worth about US$62 million thus incurring a loss of about US$151 million. This fraud was achieved, at any rate in part, by pretending that the value of the warrants was about 15-16% in US dollars whereas their true value was the same percentage in Argentinian currency. It was also falsely represented that a company called Threadneedle was the ultimate vendor of the warrants and had agreed to re-purchase them at a higher price, when in fact no such agreement existed.

Application to set aside grant of permission to appeal

10. Mr Urumov feels strongly that Otkritie should not have been granted permission to appeal by the judge. He also submits that he was given no effective notice of the application for permission to appeal because he understood the hearing of 29th April to relate to the question whether, in the light of the judge's decision to recuse himself (of which he had received notice in the draft judgment sent to him a few days earlier), contempt proceedings against other defendants should be heard and determined. In these circumstances and in the additional circumstance that his wife had a relapse of her auto-immune condition he had decided not to attend the hearing on 29th April and had so informed the judge on 28th April. He was then given notice "a few hours before" that hearing that Otkritie intended to apply for permission to appeal but he could not alter his decision not to attend and asked for an opportunity to make submissions on a later date.

11. The judge dealt with the matter in this way:-

> "12. The position of Mr Urumov in relation to that application for permission to appeal as set out in an e-mail, was that he had had insufficient notice of that application and that I should adjourn that application for leave to appeal. He has not appeared today. A further e-mail, again received earlier this morning, was to the effect that he was having to look after his wife Miss Yulia Balk. In any event, he had previously indicated, quite apart from that, that he had taken the decision not to appear today.
>
> 13. In these circumstances, I saw and see no reason why I should not deal today with the application for leave to appeal and, having considered the grounds of appeal, I have no hesitation whatsoever in granting that leave to appeal. In my view, that leave to appeal is justified because the claimants have indeed a real prospect of success. I should make it plain that, as far as I am concerned, I would welcome my earlier decision being overturned because, as I have said previously, the allegations of actual bias against me are, in my view, entirely spurious. For the reasons set out by Lord Clarke in *Summers v Fairclough Homes Limited* in the Supreme Court, it seems to me that I am the best person to deal with all these applications and, if I can, also with the substantive proceedings if I were to grant such permission, as to which I keep an open mind.
>
> 14. There is a second point as well which seems to be important and why there is good reason for granting leave to appeal. In particular, it seems to me that applications of this kind for permission to bring committal

> proceedings following a trial are becoming more common. A good illustration of this practice, of this modern trend, perhaps, is reflected in the judgment of Andrew Smith J given last week in *Dar Al Arkan Read Estate Development Company and another v Al Rafai and others* [2014] EWHC 1055 (Comm). As appears from the judgment in that case Andrew Smith J decided to recuse himself. If this type of application is reflective of a recent trend, it seems to me that it would be extremely beneficial for the Court of Appeal to consider what is the proper approach in cases of this kind."

12. In my view the judge was entitled to deal with the question of permission to appeal in the way he did. Applications for committal should be dealt with promptly. He was familiar with all the relevant arguments on the question whether permission to appeal should be granted. The appeal is plainly one which it is appropriate for this court to entertain. It is, in any event, a rare case in which, once permission to appeal has been granted it is appropriate to set it aside, see *Nathan v Smilovitch* [2002] EWCA Civ 759. I would certainly not set it aside in this case.

The Law

13. There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive.

14. *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 is a comparatively early case decided in favour of a defendant (barrister) who was facing an application to strike his name off the roll of counsel in New South Wales. Ms Bacon, at the time a law student and later an applicant for admission to the roll as a barrister, had provided $10,000 as cash surety for Sellers, a defendant in criminal proceedings, who was then granted bail but absconded. The cash surety was duly forfeited. When Ms Bacon applied to be admitted as a barrister, the Admission Board rejected her application on the basis that she knew full well that the $10,000 surety was Sellers' money and not her own and could not therefore be used as surety. She appealed to the New South Wales Court of Appeal which heard evidence and concluded that Ms Bacon had not told the truth. Her case was that she had been lent the money by a Ms Altman and that she had been unaware that Ms Altman had herself obtained the money with the help of Livesey (Sellers' barrister) who had then transported the cash from Victoria to Sydney and visited Sellers in jail before Ms Altman supposedly visited Ms Bacon and offered to lend her the money. In circumstances where both Livesey and Ms Altman "well knew where the money had come from" (page 296) Moffitt P found it impossible to believe Ms Bacon did not. Reynolds JA agreed so that the judges found that

> "the bail money had been lodged by Ms Bacon pursuant to a "corrupt agreement" or a "conspiratorial arrangement"… between a number of persons including [Livesey] aimed at achieving Sellers' release on bail by depositing $10,000 which was in truth his own money or money which was available to him."

15. When a subsequent application was made to disbar Livesey, he found that both Moffitt P and Reynolds JA were members of the tribunal hearing his case. He applied for them to recuse themselves but they refused and he was struck off the roll. The High Court however decided (page 300):-

> "a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact which constitutes a live and sufficient issue in the subsequent case or about the credit of a witness whose evidence is of significance on such a question of fact."

It was important that Livesey was not a party to Ms Bacon's original application nor does it appear that he had himself given evidence to the first tribunal.

16. By contrast many English cases have emphasised that the fact that a judge has made adverse findings against a party or a witness does not preclude him from sitting in judgment in subsequent proceedings and some cases have even emphasised the desirability of his doing so.

17. In wasted costs proceedings or applications that a witness be liable for costs (the consequences of which can be highly adverse to a defendant, if not as potentially adverse as contempt proceedings) it is usual for the trial judge to be the decision maker. In *Bahai v Rashidian* [1985] 1 WLR 1337the claimant's solicitor had given evidence in support of the claim and the judge had been very critical of that evidence. The defendant sought an order that the solicitor be jointly liable with his client for the defendant's costs and the solicitor asked for the application to be heard by a different judge. The judge refused to make that order. In this court Sir John Donaldson MR said:-

> "I accept that it must always be open to a judge to decline to proceed further with the hearing of any matter on the grounds that he is personally embarrassed by, for example, an appearance of bias. Subject to that, I have no doubt that it was the duty of (the trial judge) having heard and determined the issues in the action, himself to determine all applications as to the costs of the action … the fact that a judge has determined the issues in the action and in doing so has expressed views on the conduct of the parties and of the witnesses, neither constitutes bias nor the appearance of bias in relation to subsequent applications in the action … If the application can only be sustained by proof of serious misconduct or crime, the standard of proof should be higher than would otherwise be the case, but, subject to that, the application should be dealt with the same way as would any other application for costs against a solicitor."

Parker LJ dissented as to the result on the particular facts of the case, but agreed as to the principle, saying at page 1343G:

> "Save in exceptional circumstances, it will be for the judge, who heard the case … to determine the matter on a subsequent hearing … there can be no doubt of this, the judge is dealing with the costs of an action which he has himself heard."

Balcombe LJ agreed with Sir John Donaldson, saying at page 1346D:-

> "I accept that the judge has a discretion to direct that the application be heard by another judge, but the discretion is a judicial one, to be exercised in accordance with settled principles, of which one is undoubtedly that the application should be tried by the judge who heard the action unless there are compelling reasons to the contrary. … A judge properly exercising his judicial function, e.g. by criticising the conduct of a party's solicitor in the course of his judgment on a matter which he considers relevant to his decision, cannot by that process be said to be biased. Bias is the antithesis of the proper exercise of a judicial function. … If such an application has to be heard by another judge, the procedure will lose its summary character. It will become even more expensive and time consuming than it is already, and the defendants are justified in their contention that the remedy of the party damnified by the solicitor's misconduct will become illusory"."

This authority was followed in *Re P (A Barrister)* [2002] 1 C.A.R. 207.

18. In long trials where many applications have to be decided in the course of the hearing, a party may persuade himself that a judge is biased against him as a result of his rulings. In *Arab Monetary Fund v Hashim (No. 8)* (1993) 5 Admin LR 348, it was suggested that Chadwick J should not continue with the case. He refused to recuse himself and, on appeal, Sir Thomas Bingham MR posed the question whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible. He continued (pages 354-355):-

> "…Most, if not all, of the cases in which this test has been discussed have been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the

> detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in *Vakauta v Kelly* (1988) 13 NSWLR 502, 513A: "In considering the content of the apprehended bias principle the court must look to, inter alia, two things: what are the norms or standards relevant to the kind of case before it; and whether, on the facts, the requirements have been fulfilled."

Sir Thomas Bingham MR also said this, at p 355:-

> "In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the other. There are a number of possible explanations for this, the most obvious being that the successful party has shown greater judgment, determination and knowledge of the rules than its opponent. Mr Ross-Munro accepted, as we understood, that no inference of apparent bias could be drawn from the fact that most, or all interlocutory applications had been decided against Dr Hashim. We agree. He also disclaimed any attack on the correctness of Chadwick J's interlocutory decisions. This we find puzzling. It must, we think, be hard to show consistent unfairness in the absence of consistent error."

19. A few years later in *Locabail (UK) Ltd v Bayfield* [2000] QB 451, Lord Bingham of Cornhill (now CJ) giving the judgment of the court which comprised himself, Lord Woolf MR and Sir Richard Scott V-C said (para 25):-

> "… a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 C.L.R. 569); or if, for any reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case."

20. In *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004, the claimant had an accident at work which injured his heel. He obtained judgment on liability and claimed £800,000 on the basis that he was grossly disabled, largely dependent on crutches and in constant pain. The defendants secured surveillance evidence showing that he was not dependent on crutches, was in fact working, and was able to play football. The defendants sought to strike out the claim in its entirety as supported by false evidence. The Supreme Court decided that it would have to be an exceptional case to justify striking out the claim rather than giving judgment for the proper sum, one effective sanction for exaggeration of a claim being an application to commit for contempt. The defendants had indicated some reluctance to proceed for contempt but Lord Clarke of Stone-cum-Ebony giving the judgment of the court said (para 59):-

> "… We, however, see no difficulty in proceedings by way of contempt in such cases, provided of course that the relevant facts can be proved. It was submitted in the course of argument that there might be difficulties in inviting the trial judge to hear applications for permission to bring proceedings for contempt. However, in the absence of special circumstances, we cannot see any difficulty in the trial judge hearing both the application for permission and, if permission is granted, the proceedings themselves. On the contrary, it seems to us that the trial judge is likely to be best placed to hear both. Such an approach is likely to be both the most economical and the most just way to proceed. The only circumstances in which that would not be the case would be where there was apparent bias on the part of the judge."

21. Lastly there is the similar (though converse) case of *JSC BTA Bank v Ablyazov* [2013] 1 WLR 1845in which Teare J had made findings adverse to Mr Ablyazov in interlocutory proceedings holding him to be in contempt by failing to comply with a freezing order, dealing in frozen assets and lying while being cross-examined about his assets. At a later stage Mr Ablyazov applied to the judge to recuse himself from continuing with the case and trying the actions. The judge refused to recuse himself and was upheld by this court. Rix LJ (with whom Toulson and Maurice Kay LJJ agreed) asked whether there could be any difference between the judge who bears in mind his own findings and observations and another (second) judge who reads what the first judge has written, as he must be entitled to do. He answered his own question by saying (para 69):-

> "… unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge – other than that he is more experienced in the litigation.
>
> 70. In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in *Ex Parte Lewin; In re Ward* [1964] NSWR 446, approved in *Livesey v New South Wales Bar Association* 151 CLR 288). He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being "influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case": see *Secretary of State for the Home Department v AF (No. 2)* [2008] 1 WLR 2528, para 53. I have also found assistance in this context in Lord Bingham's concept of the "objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments."

22. There is thus a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences". There can be no suggestion that Eder J would proceed in the present case by reference to such matters.

23. The judge appears to have thought that the charges of "actual bias" by Mr Urumov made all the difference because the allegations were "so serious" (para 17) that he ought to recuse himself. But can the mere elevation of the allegation from imputed bias to actual bias make a critical difference? I cannot think that it does. Of course such an allegation is an extremely serious one; it should not be lightly made. But the mere fact that a litigant decides to raise the stakes in that way cannot give rise to any difference of legal principle.

24. Eder J gave 3 reasons for his decision. The first reason was that it was consistent with previous authority. I cannot agree; the above analysis shows that bias is not to be held to exist unless there is some reason to suppose that the judge would not bring an objective mind to bear on the case. If Mr Urumov wishes to rely on different arguments or different evidence from evidence previously adduced, no doubt the judge will take such arguments or evidence into account. There is no reason to suppose he will be influenced by extraneous matters or predilections or preferences. In one sense the present case is even less promising for Mr Urumov than it was for Mr Ablyazov because Mr Urumov can rely on the principle that a charge of contempt must be proved to a criminal standard. Mr Ablyazov had already been found to be in contempt to the criminal standard of proof and yet the judge was held to have rightly not recused himself from a trial where only the civil standard of proof applied.

25. Secondly Eder J applied the observation in *Locabail* that, if there is any real ground for doubt, that doubt should be resolved in favour of recusal. But he does not explain what the real ground for doubt is in this case. The judge

specifically said (in para 17 and also in para 13 of the judgment giving permission to appeal) that the allegations of bias are “groundless” and “spurious”.

26. The third reason given by the judge is that the matter could be dealt with by another judge of the Commercial Court. No doubt it could be but that cannot in itself be a good reason for recusal any more than it could be a good reason not to recuse himself (in a proper case) that another Commercial judge could not be made available.

27. The judge appears not to have been referred to the remarks of Chadwick LJ in this court in *Triodos Bank N.V. v Dobbs* [2001] EWCA Civ 468; [2006] C.P. Rep 1 in which Mr Dobbs invited the court to recuse itself and (more particularly) Chadwick LJ to recuse himself, as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ, giving the judgment of the court of which Neuberger LJ and I were members, said this:-

> “7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard.
>
> 8. In the circumstances of this case, I have considered carefully whether I should recuse myself. Mr Dobbs has not advanced this morning any reason why I should approach his appeal with a disposition to decide against him; other than that he tells me that he is criticising me in relation to past conduct. That, I am afraid, is not a good reason for me to recuse myself. I do not do so. The other members of the court, who are within the rather wider ambit of Mr Dobbs' application take the same view.”

If the judge had been referred to these remarks (reiterated by this court in *Ansar v Lloyds TSB Bank Plc* [2007] IRLR 211, para 17) he might very well have decided he ought not to recuse himself.

28. Another matter which concerned the judge was that a few days before he gave judgment Andrew Smith J decided to recuse himself in the complex and long-running case of *Dar Al Arkan Real Estate Development Company v Al Refai* [2014] EWHC 1055 (Comm) from hearing a committal application after he had ruled in favour of the applicant/defendant that without notice orders made against them should be discharged because the claimants had misled the court and failed to comply with undertakings given to the court in the court's orders. Once the defendants had obtained this ruling, they applied for an order that the managing director of the first claimant be committed to prison. The judge first decided that that application should be heard before any trial and then turned to an application by the claimants that he should recuse himself from hearing the contempt application. On the discharge application the judge had rejected the managing director's account of how documents came to be deleted from certain hard drives which were to be preserved and delivered to the claimant's solicitors as to which no full and honest explanation had been given. He accepted (para 36) that the views he had formed had been formed on issues (quite possibly on all the issues) likely to be crucial on the committal application and that the evidence on the committal application was likely to be essentially the same as the evidence he had heard on the discharge application. In the light of these considerations he considered the claimants were entitled to have another judge to hear the contempt application.

29. It is thus clear that in *Dar's* case the judge felt that the informed observer could not have the necessary confidence in the proceedings when the judge had already considered the essential evidence that would be deployed on the committal application and had come to the conclusion that the witnesses giving it were lying to him. A recusal application is a very personal matter for the judge to decide and this court will seldom interfere with this delicate jurisdiction. The overall feeling I have from reading Andrew Smith J's judgment is that he himself felt uncomfortable about reconsidering essentially the same evidence on the very same issue which he would have to decide in the contempt application.

30. The present case is different for two quite separate reasons. First as trial judge Eder J has considered an enormous number of issues and sub-issues between the parties. He has not focussed solely or mainly on the very issue that the judge will have to decide on the contempt application; the canvas of his judgment is infinitely broader. The focus of the contempt application will be much narrower and it is (in theory) quite possible that that narrow focus, coupled with the higher standard of proof required for the application, could produce a different result even if the evidence is essentially the same. In any event, the evidence may not be essentially the same.

31. Secondly, it is clear that Eder J feels no personal embarrassment or discomfort in considering the contempt application. Not only has he not said anything to indicate such embarrassment or discomfort; he has positively said that the fears expressed by Mr Urumov are groundless and that he would welcome his decision (which he reached with “extreme reluctance”) being overturned. Since the reasons he gave for his decision are, in my view, defective, overturned it should be.

32. Usually this court will be astute to support judges exercising what I have called “this delicate jurisdiction” of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined. Of course, if the judge himself feels embarrassed to continue, he should not do so; if he does not so feel, he should.

33. This principle may be less important in less complex cases. Our attention was drawn to *Re K* [2014] EWCA Civ 905 handed down a fortnight or so before the hearing of this appeal. In that case the trial judge had made it plain to a recalcitrant father that, if he did not take action against the child's grandparents in Singapore for the return of the child to the UK, he would be likely to be imprisoned for a lengthy term. He took no such action and she declined to recuse herself from the subsequent committal hearing. Kitchin LJ (with whom McFarlane and Maurice Kay LJJ agreed) criticised the judge's very short judgment on the basis that she did not make clear that, despite her earlier observations and comments, she had not pre-judged the question whether the father was in deliberate breach of her orders and should be sentenced to a substantial term of imprisonment. This court held that there was therefore an appearance of bias or, at any rate, pre-judgment. By contrast, in the present case Eder J has given no indication of pre-judgment let alone that he has in mind any (let alone a lengthy) term of imprisonment.

34. For these reasons I do not consider the judge was right to have recused himself, even if he was right to hold that the allegations made by Mr Urumov were allegations of actual bias. I would therefore allow this appeal.

35. I should add that, for my part, I do not think that the judge was right to hold that Mr Urumov's allegations were allegations of actual bias, even though Mr Urumov chose to call them by that name. The suggestion that the judge should have held that Otkritie (and their solicitor Mr Dooley) had failed in their disclosure obligations and had procured their witnesses to commit perjury is no more than a suggestion that the judge should have found the facts differently from the way he found them at trial. The fact that the judge knew that the Dunant box with its documents had been seized by the Swiss prosecutor at the time of Mr Urumov's disclosure statement cannot be an allegation of actual bias, since Mr Urumov was, of course, required to disclose documents of which he had at one time been in possession or control just as much as documents in his possession or control at the time he made his disclosure statement.

36. The allegation that the judge had “deliberately” mistaken centuries old principles and law governing early

termination of the relevant financial instruments could perhaps be understood as an allegation of actual bias if it had the slightest foundation since it would be odd if a judge of the Commercial Court were deliberately to mis-state an elementary principle of law. But on analysis there was, of course, no mis-statement of the law, let alone a deliberate one.

37. The particular point centres on paragraph 337 of the trial judgment. One of the many matters which the judge had to decide was whether the claimants relied on the representation that there was a supposed forward trade with Threadneedle. A Mr Lokhov gave evidence that he did so rely and supported that evidence by discussions which took place at a restaurant on 3rd June 2011 relating to an early close-out of that forward position with a split of the resulting profit. Mr Urumov said that this could not have happened because the proposed arrangement was “a commercial nonsense” because Threadneedle could have taken an off-setting position and have completely hedged the position, so that there was no point in such early close-out. The judge gave three reasons in para 337 of the judgment for saying that he did not consider the proposed arrangement a commercial nonsense all of which were cogent. None of the reasons given related to, let alone contravened, any principle or law governing early termination of Threadneedle's forward position and there was thus no room for any mistake of law by the judge, let alone a deliberate one.

38. It seems to me, therefore, that the judge should have treated all the grounds supporting Mr Urumov's application that he recuse himself as being grounds of imputed rather than actual bias.

Respondent's Notice

39. That is not quite the end of the matter because Mr Urumov by a respondent's notice seeks to support the judge's judgment (that he should recuse himself) by saying that even if the grounds of objection are to be regarded as imputed bias rather than actual bias, the fair-minded and informed observer would conclude that there was a real possibility of the judge being biased.

40. This is an impossible argument which the judge rightly rejected when dealing with the first two grounds of the application. The authorities to which I have referred make it clear that the mere fact that the judge has made adverse findings against a defendant (or any party to an action) does not mean that a fair-minded and informed observer would think the judge was biased. That is so, even if the findings are expressed to be “clear” or “clear beyond doubt”. That is just the judge doing his duty as a judge in dealing with the matters in controversy before him. The fact that the judge did not accept arguments that Otkritie have been in breach of their disclosure obligations or that they had procured their witnesses to commit perjury is likewise no more than the judge doing his job, not evidence of a lack of even handedness. I have already said, there is nothing in the points about the Dunant box or the law of early termination of financial instruments; as such they can support an assertion of imputed bias no more than they can an assertion of actual bias.

41. Mr Urumov provided the court with a skeleton argument of 88 pages from which I have sought to extract the arguments which can be made on his behalf and which I have set out above. His industry shows that he is much less disadvantaged than the average litigant in person. Having absorbed all that he has had to say, I am nevertheless left in no doubt that this appeal should be allowed and that the matter should be restored to Eder J in order that he may continue the hearing of the contempt application.

LORD JUSTICE MOORE-BICK:

42. I agree.

LORD JUSTICE LAWS:

43. I also agree.

End of Document

Steadman- Byrne v Amjad & Others

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
27 June 2007

Case No: B3/2006/1760

Court of Appeal (Civil Division)

[2007] EWCA Civ 625, 2007 WL 1729785

Before : Lord Justice Sedley Lady Justice Smith and Lord Justice Hughes

Date: 27/06/2007, Hearing date: Thursday 19 April 2007

On Appeal from the Manchester County Court District Judge Jones

No. 5MA13485

Representation

Mr P N Hinchcliffe (instructed by Messrs Keoghs) for the Appellant.
Mr B Coulter (instructed by Messrs Clear Law) for the Respondent.

Judgment

Lord Justice Sedley :

This is the judgment of the court.

1. The appellant was the defendant in a personal injury action arising out of a low-velocity motor collision. There were three claimants. The claim was allocated to the multi-track in Manchester and released by the designated civil judge to District Judge Jones for trial.

2. On 14 July 2006 the district judge gave a judgment about the content of which there could be no complaint. It recorded that at trial the day before the defendant had admitted liability — which up to that point he had denied — for running into a car driven by the first claimant, but that he contended that there had been only two people in the car — the first claimant and, in the passenger seat, the second claimant. The district judge, however, found for all three claimants, accepting their testimony that, contrary to the defendant's evidence, all three had been in the car. They were awarded respectively agreed sums of £2,816, £1750 and £2000 for what were, self-evidently, minor injuries, and the defendant, or rather his insurers, was ordered to pay their costs in the sum of £11,773:65.

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3. This would have been an unappealable end to an unremarkable case but for what had happened half way through the trial. The claimants gave their evidence during the morning of 13 July and were cross-examined in accordance with the defendant's case. Towards 1 p.m., at the conclusion of their evidence, the judge adjourned and invited counsel for the parties into his room. It is what transpired there that has brought the case to this court, with permission granted by Smith LJ on sight of the papers.

4. According to a note prepared shortly afterwards by counsel for the claimants, Angela Georgiou, and agreed in its essentials by Brian McCluggage, counsel for the defendant, the district judge said in substance:

(1) Having heard the claimants give evidence, he believed them.
(2) He had considered the manner in which they gave their evidence and in particular the quickness with which they responded to questions.
(3) He had warned each one of them of the consequences of his deciding that they were pursuing a fraudulent claim and had seen their reply. He did not consider the men to be dishonest.
(4) He accepted that he had not yet heard the defendant give evidence, but in view of his decision that the claimants were honest he could not see how the defendant could win.
(5) He wanted to give both counsel an indication of his thoughts.
(6) It was 'flavour of the month' for insurers to prosecute claimants with 'Asian sounding names'.
(7) He would, if necessary, say something about that in his judgment.
(8) Insurance companies are trying to send out a message about fraudulent claims to the Asian community, if there was such a thing.
(9) There were some discrepancies in the evidence given by the claimants but not such as to make him think that this was a fraudulent claim.
(10) He noted that the defendant worked for the police.
(11) Someone with a police background 'always thinks that they are right' [or 'never thinks that they are wrong'] 'and find it difficult to accept that they might be mistaken'.
(12) The defendant may or may not be mistaken, but he believes that he saw two people in the car and may have concluded that the claimants are 'at it'.
(13) He would continue to hear the case, but the defendants' counsel may wish to take instructions over the lunch break.

The only difference of recollection is that the defendant's counsel does not recall (5) featuring in the dialogue. We will return to its significance in a short while.

5. The appellant's case is that the judge, by saying what he said, went well beyond giving counsel an initial indication of his thinking and expressed firm views adverse to a defendant whose evidence he had not yet heard. When therefore in his judgment next day he found against the defendant, a reasonable observer knowing what we have recounted would infer that he might well have done so because of a prior prejudice in favour of the claimants and against the defendant.

6. The district judge has, correctly, been invited to respond. In a letter of 6 October 2006 he wrote to the Head of Civil Appeals:

> "My perceived "sin" is set out in paragraph 4 of the Notice of Appeal. I do not have the court bundle in front of me as this was returned to the Claimant's representative, but from memory I believe that the evidence of each Claimant was completed at about 12.50p.m. on the 13 July 2006. I invited Counsel for the parties into my chambers and told them that I considered in the light of the evidence and the substantial cross-examination that the Claimants were telling the truth.
>
> The trial recommenced at about 2.15p.m. No mention was made in Open Court of the discussion I had had with Counsel for the parties. Again from memory, the Defendant's evidence was completed at about 4.00 p.m. I adjourned to prepare a judgment which I gave the next day.

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> It is my belief that I have given judgment in accordance with the evidence heard. The Defendant's evidence given on the afternoon of the 13th July 2006 did not persuade me that my initial reaction that these Claimants were telling the truth was wrong. This Defendant gave his evidence with such precision in relation to an incident that happened 17 months before the trial that I found myself disbelieving it. It never occurred to this Defendant that he could be wrong as to the presence of the third Claimant within the car. He thoroughly resented the fact that his Counsel on the morning of the trial had advised him that he had no defence to the claim for negligence because, as he stated in his evidence, he was of the view that he was not to blame for the accident."

The judge goes on to explain an aspect of his judgment which is not now in issue, and ends:

> "In conclusion, my decision is based upon evidence that I heard and my remarks to counsel during the lunchtime adjournment were made on the basis that during the course of cross-examination of each Claimant the Defendant's case had not been made out. The weight of evidence favoured the Claimant."

7. We heard argument on this appeal on 19 April 2007. The respondents were represented pro bono by Mr Barry Coulter. They had brought their claims, as is now usual, on a conditional fee agreement backed by after-the-event insurance which, however, expired on the giving of judgment. Although, as will be seen, this dispute has reached a relatively happy ending, the respondents found themselves through no fault of their own or their counsel facing the loss of the judgment and costs order in their favour, with the prospect of a retrial at which their honesty would again be called in question.

8. Having called first upon Mr Coulter to show cause why the appeal on bias should not be allowed, and having not found it necessary thereafter to call on counsel for the appellant, we adjourned the hearing so that Mr Coulter could consider whether he was in a position to contend that the appearance of bias had been waived by the voluntary act of the appellant in continuing with the case before the district judge. We gave him liberty to restore the appeal for this purpose if so advised. The court has now been notified that it is not sought to adopt this course, and we therefore proceed to give judgment.

9. Parenthetically, the appellant's notice also complains of a remark made in the judgment below to the effect that the case might be one of those which insurers had banded together to contest because of a spate of inflated and fraudulent claims. Although we did not hear argument on this point, it seemed to us at first blush to add nothing to the bias claim and, albeit the remark was said to be based on no evidence and to ignore the fact that the claim was being contested on its merits, had no appreciable impact on the eventual decision. For present purposes, at all events, it can be set on one side

10. The test of ostensible bias is not contentious. It is whether a fair-minded observer informed of all the relevant circumstances would have concluded that there was a real possibility that the judge was biased. Bias in the present context has to mean the premature formation of a concluded view adverse to one party. We put it in this way because it is well recognised not only that a judge may and commonly will begin forming views about the evidence as it goes along, but that he or she may legitimately give assistance to the parties by telling them what is presently in the judge's mind. This may properly include, as it did for example in Jacob J's decision in Hart v Relentless Records Ltd [2002] EWHC 1984 (Ch), §38, letting the parties know before reaching the defence case that the judge did not think much of the claimant's evidence. What is not acceptable

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is for the judge to form, or to give the impression of having formed, a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it. The appellant says that is what has happened here.

11. The respondents say not. They submit first of all that the district judge's remarks were made "in the confines of his own room". This cannot matter if they were made, as they were, to counsel, neither of whom was permitted by the rules of professional conduct to keep what was said from her or his client. The same test has to be applied as if the words had been spoken in open court.

12. The respondents next rely strongly on the one remark recorded by their counsel but not recalled by the appellant's counsel, namely that the judge "wanted to give both counsel an indication of his thoughts". We are entirely content to accept that whether the district judge said it or not, it is what he was seeking to do. The question remains whether the thoughts he communicated were nevertheless such as to suggest to a reasonable observer that his mind was all but closed against the defendant.

13. As to this, the respondents submit that what the district judge did was simply undertake some active case management, which according to CPR 1.4 includes helping the parties to settle. Reliance is placed by them on what Lady Smith said in Project v Hutt (2006) UKEAT S/0065/05/RN , §22:

> "There are, of course, occasions when a judge or tribunal can quite properly explore difficulties that have become apparent from the evidence in a case, prior to the point at which all evidence has been led and submissions made, whether with a view to encouraging parties to consider settlement or narrowing the issues between them, or otherwise. There must, though, be few occasions when that can properly be done at a point prior to the leading of any evidence in the case since, at that stage, there is, by definition, no evidence before the court or tribunal on which it can comment. Moreover, if minded to make such a comment, it is plain that the risk of giving an impression of prejudgment will arise if it is not made clear to the parties that any views expressed are but provisional, that the tribunal's mind is not yet made up and that it remains open to persuasion."

14. We would respectfully endorse the whole of that passage. But it is the caveat in it which is particularly important to the present case. If the judge's remarks had ended at (9), he would have done no more than tell the defendant's counsel that he had not in the judge's eyes succeeded in discrediting the claimants' evidence, leaving open the impression which the defendant would now make. But the judge went on to close this door, having already told counsel that he did not see how the defendant could win, by expressing the view that his insistence that there were only two people in the car was, in paraphrase, rigid thinking typical of members of the police service.

15. The respondents seek to defend this, first by listing other pointers in the conduct of the trial to a dogmatic attitude on the defendant's part and secondly by submitting that if the judge was right in his view that the claimants were honest witnesses "the appellant had to be mistaken". Both of these arguments seem to us to compound the respondents' problem. The first is in effect an argument that the judge was justified in forming a view about the defendant's credibility before he had even entered the witness box. The second overlooks the possibility that if the defendant were to prove equally or more credible, the judge would have to reconsider his view of the claimants. It has also to be said that the concluding comment in the district judge's letter to this court falls into the same error.

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16. Both the common law and the European Convention on Human Rights recognise the fundamentality of every litigant's right to a tribunal free both of bias and of the objective appearance of bias. The appearance of bias includes a clear indication of a prematurely closed mind. In our respectful view the district judge, albeit acting out of the best of motives, gave the parties an inescapable impression that he had formed a view not only favourable to the claimants but such that the defendant was not going to be believed if he contradicted them.

17. For reasons which we do not doubt are sound, a plea of waiver has not been pursued on the respondents' behalf. We would, however, stress that the time to draw the attention of a tribunal to a clear manifestation of bias on its part is ordinarily when it occurs. There is no reason why a judge to whom it is courteously pointed out that he or she may have overstepped the mark should not accept that it may be so and stand down. Equally, however, it is only in a clear case that an advocate can responsibly take this course and a judge accede to it, both because such applications have been known to be made opportunistically and because of the expense that a recusal will inevitably throw upon one or both parties, neither of whom will ordinarily be to blame for what has happened. The law of waiver is not simple, but appellate and reviewing courts tend not to look favourably on complaints of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome. In the present case, however, there is no criticism of the course adopted at trial by the defendant's counsel.

18. Were it not for the good sense of the parties, the ineluctable result of our decision would have been that this modest trio of claims had to go back to the county court and be reheard there. It is pleasing to be able to record that the parties have agreed that there need be no order for remission, the action having been compromised while the appeal stood adjourned, and that the costs of the appeal should lie where they fall. The order of this court will accordingly be simply that the appeal is allowed with no order as to costs.

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Helow (AP) v Secretary of State for the Home Department and another (Scotland)

Positive/Neutral Judicial Consideration

Court
House of Lords (Scotland)

Judgment Date
22 October 2008

House of Lords

SESSION 2007–08 [2008] UKHL 62, on appeal from:[2007] CSIH 5, 2008 WL 4552845

Appellate Committee Lord Hope of Craighead Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe Lord Cullen of Whitekirk Lord Mance

Wednesday 22 October 2008

Opinions of the Lords of Appeal for Judgment in the Cause

Hearing dates: 16 and 17 June 2008

Representation

Appellant: Mungo Bovey QC Scott Blair (Instructed by Drummond Miller LLP).
First Respondent: Lord Davidson of Glen Clova QC Colin Tyre QC Ailsa Carmichael (Instructed by Office of the Solicitor to the Advocate General for Scotland).
Second Respondent: Gerry Moynihan QC (Instructed by Office of the Solicitor to the Scottish Executive).

Judgment

Lord Hope of Craighead

My Lords,

1. The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair- minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.

2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488 , 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer

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makes are not to be attributed to the observer unless they can be justified bjectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

4. The context is crucially important in a case such as this. As my noble and learned friend Lord Mance whose speech I have had the advantage of reading in draft has explained, the appellant's argument depends entirely on the judgment that the observer would make of the fact that Lady Cosgrove was, at all relevant times, a member of the International Association of Jewish Lawyers and Jurists. As a member of the Association, she must be assumed to have received its quarterly publication, "Justice", all of whose editions are readily accessible on the Association's website. She was present at a meeting held in Edinburgh on 30 November 1997 when, in the presence of a number of other distinguished Jewish members of the legal profession, a Scottish Branch of the Association was inaugurated. There is no suggestion that she either did or said anything after that date which associated her either one way or the other with views that were being expressed on behalf of the Association. It was on the some of the contents of some of the more recent issues of "Justice", and those contents only, that Mr Bovey QC for the appellant concentrated in presenting his argument. The question is to what extent, if at all, the picture presented by this material would indicate to the observer, taking everything else into account, that there was a real possibility that Lady Cosgrove was biased.

5. There is no doubt that some of the articles that have been published in Justice, including messages by the Association's President, Judge Hadassa Ben-Itto, are fervently pro-Israeli. Inevitably, given the conflicts that have been taking place in the region, such a partisan stance carries with it sentiments that are hostile to those that people in Israel feel are ranged against them. It is not difficult to find publicity being given in "Justice" to views that are markedly antipathetic to the Palestinian Liberation Organisation with whom the appellant, who is an ethnic Palestinian, has connections. Had there been anything to indicate that Lady Cosgrove had by word or deed associated herself with these views so as to indicate that they were her views too, I would have had no difficulty in concluding that the test of apparent bias set out in *Porter v Magill [2001] UKHL 67; [2002] 2 AC 357* , para 103 was satisfied.

6. But the fair-minded and informed observer would, as I have said, put the material published in "Justice" on which Mr Bovey relied into its context. The first point is that the material on which he relied was a one- sided selection of what has been published. It is incomplete. If one is looking for a balanced and fair-minded presentation of what is available to the reader one would need to see the other side. It is clear from the contents listed at the front of each edition that some of the material that was published was of genuine interest to a lawyer. From to time, for example, articles were published about judgments issued by the courts in Israel including its Supreme Court. Other aspects of Jewish and Israeli law were also sometimes dealt with. This is important, as it provides an explanation of why, leaving aside all the highly charged political material, the publication might be thought to of interest to a Jewish lawyer living outside Israel. It is not only Jewish lawyers in this country who value information about judgments issued by the Supreme Court. But Jewish lawyers in particular might be thought to have a particular interest in keeping themselves informed about its activities.

7. The second point relates to the nature of the Jewish diaspora. There is an affinity between Jewish people everywhere that expresses itself in participation in bodies such as the Association's UK and Scottish Branches out of sympathy with Jews who live in Israel. But, as Judge Ben-Itto herself recognised in one of her policy statements, it is well known that not all Jews agree with the views as to how Israel's problems should be solved that have been expressed by the Israel government. The

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editorial board of "Justice" is located in Israel and the journal itself in published in Tel Aviv. Its members live every day in the cauldron of public opinion which has been generated by the circumstances to which people on all sides are exposed in that country. A Jewish reader living abroad would be expected to recognise the partisan nature of some of the material that appeared in it. Statements by Ariel Sharon, for example, contain exactly the kind of sentiments about the problems that Israel faces that he would have been expected to express in his capacity as Prime Minister. The greater the geographic separation, the more likely it is that the educated reader will feel detached from the pressures that give rise to them. No fair-minded person would think that a judge who regularly takes one of the leading national newspapers circulating in this country was, simply by doing so, associating himself or herself with everything that was printed in it. In principle, this case is no different.

8. The Extra Division referred in its discussion section of its opinion to the fact that the judge had taken the judicial oath: *[2007] CSIH 5* ; *2007 SC 303* , para 44. This is, of course, a factor to be taken into account along with all the other facts. In this case, however, where the issue is whether a judge having access to this material is to be associated with its contents, I would attach more weight to the other factor that the Division mentioned. The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views about anything that she reads. She can be assumed to be capable of detaching her own mind from things that they contain which she does not agree with. This is why the complete absence of anything said or done by her to associate herself with the published material that the appellant complains of is so crucial to what the observer would make of this case. In the absence of anything of that kind there is no basis on which the observer would conclude that there was a reasonable possibility that the judge was biased.

9. For these reasons, and for those given by my noble and learned friends Lord Rodger of Earlsferry and Lord Mance with which I agree, I would dismiss the appeal and affirm the Extra Division's interlocutors.

Lord Rodger of Earlsferry

My Lords,

10. I have had the advantage of considering the speeches of my noble and learned friends, Lord Hope of Craighead and Lord Mance, in draft. I agree with them. I add some remarks of my own, only because the challenge in the case is to the integrity of the justice system in Scotland. This is a matter of general concern, as was indeed indicated by the presence at the hearing of Mr Moynihan QC representing the Lord Advocate, not only as a Scottish minister with responsibility for the courts but also acting in the public interest.

11. The appellant is a Palestinian by birth. She avers that her family were supporters of the Palestinian Liberation Organisation. More particularly, she was actively involved in the preparation of a lawsuit brought in Belgium, alleging that the then Prime Minister of Israel, Mr Sharon, was personally responsible for the massacre in the Sabra and Shatila camps in Lebanon in September 1982. She avers that, in consequence, she is at risk of harm not only from Israeli agents, but also from Lebanese agents and, because of her links with the Palestinian Liberation Organisation, from Syrian agents. On that basis she claimed asylum in this country, but her application was refused by the **Home Secretary** and, on appeal, by an adjudicator. The appellant was refused leave to appeal by the Immigration Appeal Tribunal. She then lodged a petition in the Court of Session seeking a review of that refusal under section 101 of the Nationality, Immigration and Asylum Act 2002 . The petition was considered by Lady Cosgrove who dismissed it.

12. The appellant makes no criticism of Lady Cosgrove's reasons for dismissing her petition. Instead, in a petition to the nobile officium, she craved the court to set aside Lady Cosgrove's interlocutor on the ground that it was vitiated for "apparent bias and want of objective impartiality".

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13. The appellant does not suggest that the judge could not be impartial merely because she is Jewish. Rather, the contention is that, by virtue of her membership of the International Association of Jewish Lawyers and Jurists, Lady Cosgrove gave the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of a petition for review concerning a claim for asylum based on the petitioner's support for the Palestinian Liberation Organisation and involvement in the legal proceedings against Mr Sharon.

14. The legal test to be applied in cases of apparent bias is to be found in the speech of my noble and learned friend, Lord Hope of Craighead, in *Porter* **v** *Magill [2002] 2 AC 357* , 494H:

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

It is equally well established that the fair-minded observer is not unduly sensitive or suspicious: Johnson **v** Johnson (2000) 201 CLR 488 , 509, para 53, per Kirby J.

15. If all that the appellant could have pointed to was the aims of the Association, her petition could not possibly have got off the ground, since they are unexceptionable. The Association's website at the relevant period explained that:

> "The Association strives to promote Human Rights goals such as the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions.
>
> The Association particularly addresses issues that are on the agenda of the Jewish people everywhere, and is particularly committed to combat racism, xenophobia, anti-semitism and denial of the Holocaust."

The same web page records that among the founders of the Association were a justice of the Supreme Court of Israel and Justice Goldberg of the United **States** Supreme Court. Lord Woolf is an Honorary Deputy President of the Association.

16. Counsel for the appellant submitted that it was necessary to look below the surface, however. He pointed to various articles in the Association's journal, "Justice", referred to by Lord Mance. These included criticisms of the Belgian case against Mr Sharon. Understandably, counsel drew particular attention to the messages and addresses of the President of the Association, Judge Hadassa Ben-Itto. As a member of the Association, Lady Cosgrove would have received its journal and, counsel argued, there was nothing to show that she had ever dissociated herself from the views expressed by the President. So noscitur a sociis: the observer would identify Lady Cosgrove's views from the company that she kept in an association whose President expressed extreme pro-Israeli sentiments.

17. In particular, at a conference held by the Association in December 2001, about three months after 9/11, the President said:

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> "As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order."

This appeared in the Winter 2001 issue of "Justice". In my view, a judge who defined herself in that way would indeed be unable to deal with the appellant's petition: a fair-minded and informed observer would readily conclude that there was more than a real possibility that such a judge was biased. The Advocate General accepted that.

18. But it is not suggested that Lady Cosgrove has ever said anything remotely comparable. Nor is it suggested that she has ever expressed support for the more extreme views expressed by the President of the Association or in any of the articles in "Justice". In that situation there is, as a matter of general principle, no basis for fixing her with the views of the President or other contributors. She is, quite simply, an intelligent and educated individual whose reaction to the articles – supposing that she had read them – is quite unknown.

19. Moreover, those who were conducting the affairs of the Association during the relevant period were well aware that, in actual fact, members of the Association held widely differing views. The journal specifically says that the views of individuals and organisations published in it are their own and that inclusion in it does not necessarily imply endorsement by the Association. Even when referring to the issues confronting Israel, in her address to the international conference in December 2001, the President acknowledged that "We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere."

20. I am accordingly satisfied that the fair-minded and informed observer would not impute to Lady Cosgrove the published views of other members, by reason only of her membership of the Association.

21. Mr Bovey QC had a second line of attack. He suggested that the observer would think that, by reading "Justice", Lady Cosgrove might well have absorbed the more extreme views expressed in its pages by a process of osmosis. So there would be a real possibility that, as a result, she would be biased in dealing with the appellant's petition.

22. I accept that much of the material from the journal, which the House was shown, could be described as highly partisan. But the selection was, naturally, skewed in the direction of contributions of that character. Reading this selection all at once is an artificial exercise. The lists of contents of the issues show that, as would be expected in a journal of an organisation with the aims set out above, many articles are of quite a different character. Even the issue for Winter 2001, containing the text of the polemical address by the President in December 2001 and other partisan material, included a scholarly article on "Integrity as a Value" in Jewish Law and a factual account of a judgment of the Supreme Court of Israel about the broadcasting of a particular programme on the Sabbath. So, for purposes of considering their impact, the selected articles have to be seen as simply part of the contents of the relevant issues. Moreover, the journal appears quarterly: anyone reading an article would be unlikely to retain any clear recollection of a similar article in an earlier issue. This would greatly reduce the chances of the articles having a cumulative effect on the reader.

23. So the hypothetical observer would have to consider whether there was a real risk that these articles, read at perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially. In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are expected to be able to put aside any prejudices they may have. Judges

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have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge was biased. Taking all these matters into account, I am satisfied that the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case.

24. In my view the decision of the Extra Division was correct and the appeal should be dismissed.

Lord Walker of Gestingthorpe

My Lords,

25. I agree that this appeal should be dismissed, for reasons set out in the opinions of all your Lordships. But I have reached that conclusion rather less readily, I think, than some of your Lordships.

26. Those who take on the responsibility of judicial office have to exercise a measure of restraint in associating themselves publicly with controversial causes. I agree with my noble and learned friend Lord Mance that a judge who expressed or endorsed the views put forward in December 2001 by an Israeli judge, speaking publicly and formally as President of the International Association of Jewish Lawyers and Jurists ("IAJLJ"), would not be a fit person to adjudicate on a case to which Ms **Helow** was a party, and to which the Sabra and Shatila massacres were relevant.

27. It is said that there is insufficient evidence that Lady Cosgrove did endorse those views. I accept that, and for that reason I would dismiss this appeal. But I do not accept that membership of an association such as the IAJLJ can be equated with subscribing to a daily or weekly newspaper, or that there is any room for conjecture that Lady Cosgrove may simply have omitted to cancel her annual subscription to the IAJLJ. She had been a high-profile member of the Scottish Branch at its inaugural meeting. Moreover the fair-minded and informed observer would be tending towards complacency if he treated the fact of having taken the judicial oath as a panacea.

Lord Cullen of Whitekirk

My Lords,

28. The primary argument for the appellant was that the informed and fair-minded observer, having considered the relevant facts, would conclude that, by reason of her being a member of The International Association of Jewish Lawyers and Jurists, there was a real possibility of bias on the part of Lady Cosgrove. It was asserted the Association had, or had acquired, a "strong commitment to causes and beliefs at odds with the causes and beliefs espoused by the appellant". That assertion gained no support from the stated aims and objects of the Association, as published on its website. However, the appellant's counsel relied on the views expressed in articles and pronouncements by the Association's representatives and officials which appeared in its quarterly journals. I am indebted to the noble and learned Lord Mance for his survey of them. While these views were without doubt strongly partisan in tone, they were drawn from a small selection of the total material appearing in the journal over a period of years. An informed and fair-mined observer who took account of what appeared in the issues of the journal would no doubt take an overall view and not simply concentrate on parts. Examinations of the lists of contents

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shows that the journals also included articles on matters of legal interest, the type of articles which one would expect to find in a periodical for lawyers and judges.

29. Critical to the appellant's argument was the assumption that by reason of her membership Lady Cosgrove shared the views expressed in these articles and pronouncements. However, beyond the bare facts that she was a member throughout the relevant period and had helped to found the Scottish branch of the Association in 1997, there is nothing to indicate what part, if any, she had taken in the activities of Association. The informed and fair-minded observer would proceed on an assumption only if on an objective basis. While he or she would no doubt assume that as a member of the Association Lady Cosgrove regularly received copies of the journal, there is nothing to suggest that she endorsed or was interested in, let alone read, the articles and pronouncements founded on by the appellant's counsel, as opposed to articles on matters of legal interest. Furthermore, as the President of the Association recognised, it could not be assumed that the members of the Association, who lived in a wide range of countries, were all of one mind in regard to the controversies in which Israel was embroiled. Thus there was not, in my opinion, an objective basis for the assumption on which the appellant's argument depended.

30. The alternative argument for the appellant was that there was a real possibility of bias by reason of Lady Cosgrove having been influenced by the views expressed in the articles and pronouncements founded on by the appellant's counsel. This argument runs into the same difficulty in the lack of an objective basis for the assumption that Lady Cosgrove would have read and been receptive to these views. That assumption also involves the inherent unlikelihood that Lady Cosgrove, despite her training and experience as a judge, would not have been able to put aside what she had read.

31. For these reasons and those given by my noble and learned friends, Lord Hope of Craighead, Lord Rodger of Earlsferry and Lord Mance, with which I agree, I would dismiss the appeal and affirm the Extra Division's interlocutors.

Lord Mance

My Lords,

32. The appellant, Miss Fatima **Helow**, appeals against an Interlocutor of 16 January 2007 whereby the Extra Division of the Inner House of the Court of Session refused the prayer in her petition seeking to hold vitiated for apparent bias and want of objective impartiality an interlocutor of the Lord Ordinary, Lady Cosgrove, of 24 November 2004 which had refused her petition under section 101(2) of the Nationality, Immigration and Asylum Act 2002 .

33. The appellant is a Palestinian who arrived in the United Kingdom in August 2001 and claimed asylum here on 4 September 2001. After refusal of that claim, notice of decision to remove her to Lebanon was given on 16 December 2003. Her appeal against that notice was dismissed by the Adjudicator, Mr K R Forbes, on 27 May 2004. She sought permission to appeal against such dismissal by lengthy grounds of appeal, supplemented by letters dated 11 June and 22 July 2004. Permission was refused by the Vice-President, Mr Allan Mackey, of the Immigration Appeal Tribunal ("IAT") on 29 September 2004 with short nine-line reasons. The appellant filed a further lengthy grounds (covering 25 pages) seeking review of that refusal by the Court of Session. The matter was in the ordinary course allocated to Lady Cosgrove to deal with on the papers. After seeking and obtaining from the parties a copy of the letter of 11 June 2004, she affirmed the decision to refuse permission to appeal in reasons extending to just over four pages.

34. The appellant's case, in seeking asylum and resisting removal, was and is that she and her family were involved politically with the PLO, that she was in September 1982 living with other family members in the Sabra/Shatila refugee camp when it

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was attacked, that numbers of her relatives were killed in the attack, that she had maintained publicly that Mr Ariel Sharon, later Prime Minister of Israel, was implicated in the massacre through the Israeli Defence Force, that in August 2001 she had assisted Belgian lawyers investigating the massacre and was involved in a criminal complaint brought in Belgium against Mr Sharon by survivors, that she was regarded as holding political opinions which were anti-Israeli, anti-Lebanese and anti-Syrian, and would be risk from Israeli, Lebanese and Syrian authorities as well as anti-Arafat and pro-Syrian and pro-Lebanese factions, were she to be required to return to Lebanon.

35. The Adjudicator did not accept the credibility of the appellant's account in a number of respects. One related to her late statement that she had taken part in a television programme with one Elie Hobeika or Hubeika, leader of the Lebanese Phalange special security troops allegedly involved in the massacre and later killed in a bomb blast on 24 January 2002, whose denial of involvement in the massacre she said that she had challenged in the interview. The Adjudicator regarded this as a late assertion regarding a "crucial" connection, which would if true have been mentioned earlier, and did not believe that there had been any such television appearance, although adding that "Even if she had appeared her concerns were directed solely at Hobeika. She does not claim that she put forward her own views or widened her list of targets". Another point on credibility made by the Adjudicator related to a lack of contemporary medical evidence to show that she was suffering from or being treated for post-traumatic stress syndrome at the time of the hearing as she had maintained.

36. The letter dated 22 July 2004 with which the appellant supplemented her application to the IAT contained material, including a videotape and transcript, confirming that she had indeed taken part as she had stated in a television interview broadcast on 8 August 2001, and a statement from her explaining why the video had not previously been produced and commenting on the transcript. This statement explained that the transcript showed not only that she was present in the Shatila camp in 1982 and outspoken in blaming both the Lebanese and the Israelis for the massacre, but also that Mr Hobeika has been prepared to give evidence to convict Israelis in relation to the massacre, and repeated the suspicion which she had uttered before the Adjudicator that Mr Hobeika had been killed by Israelis for this reason. The statement also took issue with the Adjudicator's statements that she had directed her claims solely at Mr Hobeika, and had not widened her targets. On the contrary, it maintained, she had in the broadcast held Israelis assisted by Lebanese soldiers to be responsible for the massacre. The letter dated 22 July 2004 also contained a doctor's letter dated 19 August 2002 regarding her medical condition and an explanation as to why it had not previously been produced.

37. The matters mentioned in the preceding three paragraphs were referred to in the grounds put before Lady Cosgrove. It was submitted that, since the IAT had only mentioned the letter of 11 June 2004, it cannot have considered the further evidence, lodged with the letter of 22 July 2004, confirming the appellant's account regarding the television interview, and cannot have conducted the requisite balancing exercise in deciding whether or not to admit the fresh evidence. The IAT's decision was further challenged on the grounds of inadequate reasoning, and error of law in failing to apply the proper test of a "real prospect of success". Lady Cosgrove analysed the new evidence, and considered that the material regarding the television broadcast gave no reason to think that the Adjudicator's conclusions regarding the safety of return to Lebanon were not sustainable generally or that the petitioner was suffering from a medical condition at the time of the hearing before the Adjudicator. In her decision dated 24 November 2004, she found herself quite unable to hold that the IAT had erred in the exercise of its discretion or in law in refusing to give permission to appeal and considered that its reasons were sufficient and adequate. No criticism is made of and no point is made on Lady Cosgrove's reasoning or decision as such.

38. The submission regarding apparent bias and want of objective impartiality on the part of Lady Cosgrove arises from research on the web undertaken by the appellant's legal advisers after Lady Cosgrove's refusal of the petition under section 101(2) . This revealed on 30 November 2004 that Lady Cosgrove is a member of The International Association of Jewish Lawyers and Jurists ("the Association"), and later that she as a member of the Outer House together with Lord Caplan of the Inner House was a founder member of a Scottish branch of the Association, welcoming participants to an inaugural meeting in Parliament House, the Court of Session's **home**, on 30 November 1997. The fact that Lady Cosgrove is Jewish is of itself, rightly, not relied upon. But it is submitted that the Association "has a strong commitment to causes and beliefs at odds with the causes and beliefs espoused by the appellant", this on the basis that the Association is "anti-Palestinian …, anti-Moslem …, anti-pathetic to the PLO …, supportive of Israel …, supportive of Ariel Sharon …, critical of the legal action against

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Mr Sharon …, a campaigning organisation …, [using] immoderate expression …, one-sided …, and recruiting members as activists …". These epithets are alleged to be justified by the contents of various policy statements, presidential messages and contributors' articles published or reproduced in the Association's quarterly publication "Justice" in years ranging from 1994 to 2004.

39. The basic legal test applicable is not in issue. The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the Association: *Porter v Magill [2001] UKHL 67; [2002] 2 AC 357* . The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross- examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451* , para. 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in Johnson v Johnson (2000) 201 CLR 488 , para 53, which was approved by my noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond in *Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; 2006 SC (HL) 71* , paras 17 and 39.

40. The appellant also invokes or seeks assistance from the principle of automatic disqualification applied in *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte (No 2) [2000] 1 AC 119* . It was there held that a judge was automatically disqualified not merely if he or she had a pecuniary interest in the outcome of the case, but also if his or her decision would lead to the promotion of a cause in which he or she was involved together with one of the parties. In that case the judge's involvement was as the chairman and a director of Amnesty International Charity Ltd, a charity wholly controlled by Amnesty International which had intervened in the case as a party to support the prosecution's application for the extradition of Senator Pinochet to Spain. However, in my opinion the present case is a long way away from Ex p Pinochet , since the Association was not a party to or in any way concerned with (or so far as appears even aware of) the proceedings involving Miss Helow. Even where proceedings are brought by, for example, a bar association, mere membership of the association, as opposed to active involvement in its affairs or in the institution of the proceedings, may not bring the principle in Ex p Pinochet into play: *Meerabux v Attorney General of Belize [2005] UKPC 12; [2005] 2 AC 513* , esp at para 24 per Lord Hope of Craighead. I consider, therefore, that it is the principles mentioned in the previous paragraph that govern the present appeal.

41. There has, in this case, been no statement obtained, or so far as appears sought, from the judge. The petition seeking to vitiate Lady Cosgrove's decision of 24 November 2004 is based exclusively on material taken from the internet and from the Association's quarterly publication "Justice". No material or information has been put forward to show or suggest that Lady Cosgrove had any involvement with the Association other than her membership and her welcoming appearance at the opening of its Scottish branch in 1997. A fair-minded observer would assume that, had she been an active member, some trace of this would have appeared.

42. The basis upon which it is suggested that a fair-minded observer would conclude that Lady Cosgrove's membership of the Association gave rise to a real possibility of bias has fluctuated between two poles: one, that the fair-minded observer would think that the views put forward by the Association represented views which she shared as a member, the other, that, if the fair-minded observer did distinguish between the Association and its members, he or she would think that Lady Cosgrove may have been "influenced" by the views expressed by the Association of which she was a member.

43. If the epithets quoted in para 38 above represented an accurate characterisation of the Association and its aims, then the basis on which bias was alleged would not much matter. It would not be appropriate for a judge to join a one-sided, anti-Palestinian and anti-Moslem Jewish campaigning organisation using immoderate expression, and still less so for such a judge to decide a case involving an activist Palestinian Muslim who had engaged in criticism and pursuit of alleged illegal conduct

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by Israelis. The express aims and objects of the Association, as published on the Association's website, are however very different from those suggested by the stated epithets. They appear under the heading "Pursuing human rights" as follows:

> "The International Association of Jewish Lawyers and Jurists strives to advance human rights everywhere, including the prevention of war crimes, the punishment of war criminals, the prohibition of weapons of mass destruction, and international co-operation based on the rule of law and the fair implementation of international covenants and conventions.
>
> The Association is especially committed to issues that are on the agenda of the Jewish people, and works to combat racism, xenophobia, anti-Semitism, Holocaust denial and negation of the **State** of Israel.
>
> IAJLJ was founded in 1969. Among its founders were Supreme Court Justices Haim Cohn of Israel, Arthur Goldberg of the United **States** and Nobel Prize laureate René Cassin of France. Our membership comprises lawyers, judges, judicial officers and academic jurists in more than 50 countries who are active locally and internationally as the need arises. Membership is open to lawyers and jurists of all creeds who share our aims.
>
> The Association has Category II Status as a non- governmental organization (NGO) at the United Nations, enabling it to participate in the deliberations of various UN bodies. In this capacity, the representative of the Association has been actively involved in the work of the Commission on Human Rights in Geneva and of related bodies, and will now be engaged with the work of the United Nations Human Rights Council, which has replaced the Commission on Human Rights.
>
> The Association also publishes **Justice** … which examines a variety of relevant issues and current topics and is mailed to thousands of lawyers and jurists throughout the world…"

44. Membership was invited on the website in the following terms:

> "Membership in the International Association of Jewish Lawyers and Jurists is by direct individual membership. Lawyers and Jurists who share the aims of the Association as described on this site, are invited to join the IAJLJ by filling out the enclosed membership form and mailing it to us together with the annual membership fee for the current year."

The relevant form contained this declaration:

> "I hereby apply to become a member of The International Association of Jewish Lawyers and Jurists. I declare that I approve the aims and objects of the Association and undertake to comply with the Articles and Rules of the Association."

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45. Clearly, there is nothing objectionable about the aims and objects of the Association as stated on its website and to which its members had expressly to subscribe. The appellant's case is that the Association had in practice acquired a different and unbalanced character as shown, it is said, by the material exhibited and relied upon in support of the petition. I would observe at once, however, that the material exhibited and relied upon is selective rather than representative. It consists of those statements and articles which in the appellant's or her advisers' submission advance the case made regarding the character and purposes of the Association. Accordingly, it is necessary to be cautious about drawing general conclusions from it about the Association's character or about the significance of such material as regards any individual member. It is clear from those indexes to issues of "Justice" which have been exhibited that there are many other articles not exhibited on subjects likely to have been of legal interest and of a character which any legal journal would be expected to contain. The second point is that any approach which assumes that a member of the Association would have read all or even most of the selected material is highly suspect, particularly when one is without any overview of the other material not selected. It is common experience for a member of an organisation receiving its regular publication to do little more than glance at its contents table or page, reading only the occasional item appearing to be of particular interest.

46. It is, nevertheless, necessary to look at the material which has been selected and exhibited. This falls into three main categories: speeches made and reproduced or articles written by third party contributors; "policy statements" by the Association's United Nations' representative (in most cases Mr D Lack); and speeches or messages by the Association's President (in most cases Judge Hadassa Ben-Itto, an Israeli judge). Starting with speeches and articles by third parties, each contents page of "Justice" carries the unsurprising disclaimer "Views of individuals and organisations published in JUSTICE are their own, and inclusion in this publication does not necessarily imply endorsement by the Association". Individual phrases from speeches and articles must be read in this light. Apart from this, the presentations and articles published in "Justice" do not anyway appear to go generally beyond legitimate expression of reasoned views; and they certainly do not appear objectionable in a way which justifies any criticism of the Association for publishing them or justifies any conclusion that the Association must implicitly have agreed with or endorsed them. An example is the article cited in support of the proposition that the Association is anti-Palestinian: "The Current Conflict – Legal Aspects", by Colonel Daniel Reisner, Head of the International Law **Department** ("ILD") of the Israeli army, published in edition No 30 of "Justice". The article was the text of a presentation made by Colonel Reisner to an international conference on *Standing by Israel in Time of Emergency* organised by the Association and the Jewish Agency in Jerusalem in December 2001. In it he said at one point that "The Palestinians believe that while we are constrained by rules of morality and legality, they are not". Colonel Reisner went on to say that "As a lawyer, it is my job to make sure that the Army will fight lawfully and morally", and he also welcomed the supervision of the Israeli Supreme Court. Although the first passage is a generalisation which, taken literally, must be far too broad, no other passage is suggested to be objectionable and the article appears generally to be a useful account of the ILD's activities and approach.

47. The "Winter 2002" edition of "Justice" (No 30, evidently published early in 2002) reproduces the text of five other presentations at the December 2001 conference, on three of which reliance is placed in various respects, one entitled "Anti-Israel Bias in the International Arena: Politicisation of International Criminal Law" by Alan Baker, Legal Adviser of Israel's Foreign Ministry, another "Geneva: Israel being Singled Out and Discriminated Against, Fighting Back, with Few but very Important Allies" by Israel's Ambassador to the United Nations, Mr Yaakov Levy. The senior Israeli officials who gave these presentations clearly felt strongly that Israel was receiving a raw deal in international fora, particularly the United Nations, but such expressions of view, backed by specific instances, are legitimate. They would not justify a description of such officials as "anti-Moslem", a phrase which suggests general prejudice against anything Muslim. Still less can they support a case that the Association is anti-Moslem.

48. Reliance is also placed on presentations and articles by third parties which contain references to Mr Sharon and to the Belgian legal proceedings against him. A warm greeting by Mr Sharon to the December 2001 conference was reproduced in edition No 30 of "Justice" and is relied upon for the assertion that the Association is supportive of Mr Sharon. But this greeting was made in the context of the December 2001 international conference in Jerusalem at a time when Mr Sharon was Prime Minister of Israel and is on any view unsurprising in such a context. Criticisms directed - by Mr Alan Baker in the presentation already mentioned and by others in the later Spring 2003 and Summer 2004 editions of "Justice" - at the Belgian prosecution instituted against Mr Sharon as a politically motivated abuse are covered by the disclaimer and are again

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in terms which, however forceful, remain within the bounds of legitimate expression of view. The material exhibited from the Spring 2003 edition includes well-informed articles by an academic and two Belgian lawyers. They went to the legal aspects of what Mr Alan Baker had in his article described as the "extremely wide and liberal system of universal jurisdiction" in relation to international crimes which the Belgian legislator had, as Mr Baker put it, introduced as "a well intentioned if perhaps a somewhat naïve action".

49. The Spring 2003 edition also included a powerfully expressed article, to which considerable attention appears to have been given below, by Professor Yoav Gelber, Head of the School of History at Haifa University. In it he described the background to the Sabra/Shatila massacre and his personal frustration at the Israeli government's initial refusal to investigate the massacre and said that "The evasive answers given by Begin and his ministers to the media and the public made me feel cheated". He went on to record that he had as a result resigned his membership of another commission of inquiry, that within a week the government had given in to pressure to appoint a judicially chaired commission to investigate the massacre, and that its report, although not finding any office holder directly responsible, criticised several including Mr Begin, and led to Mr Sharon being required to resign from his post. Finally, he described how the Phalange had come to terms with the Syrians and how Mr Hobeika had served them to his last day. He concluded that "The lawsuit submitted in Belgium is no more than a propagandist attempt – using a very peculiar situation that Belgian law has created – to blame Israel for a domestic Lebanese act of revenge and to remind a forgetful world of [the Palestinian refugees'] continued existence in the their camps". As is evident, this is an article which was by no means one-sided in its attitude to Israel's past conduct. In the Summer 2004 edition Israel's Minister of Justice described how the prosecution of Mr Sharon had finally ended when Belgian law was changed at the instance of the United **States** (faced with suits against President Bush, **Secretary** of **State** Powell and others). Forcefully expressed though both these contributions once again are, I find it difficult to see what relevance or influence a fair-minded observer would think they had or might have for or on a professional judge in the United Kingdom, charged with the resolution of an issue such as that put before Lady Cosgrove, even if she happened to read them. It would be a very poor judge whose decision on the question whether the IAT erred in law in refusing permission to appeal was affected by descriptions by Israeli contributors of the Belgian proceedings as propagandist or political, and this is so even if she happened herself to share the same view.

50. The President's speeches or messages and the policy statements give rise to different considerations, in so far as they are not subject to any disclaimer and came from the Association's leading figure or were made on the Association's behalf. It may be true, as the Inner House observed, that one underlying theme is a demand for fair treatment for Israel, not so much on the basis that Israel had never done any wrong, as on the basis that Israel was being made the only target of blame for any wrong. But it is also true that the speeches, messages and statements take a very strong, verging on the strident, stance, pro-Israeli and highly critical of the Palestinian Authority and PLO, they are not confined to legal issues and they include what may be described as political or campaigning material of a nature and in terms unfamiliar in a legal journal. The majority of the policy statements on the Association's website relate to the Association's activity as a non-governmental organisation with Category II Status at the United Nations enabling it to participate in the deliberations of various United Nations' bodies, particularly the Commission on Human Rights in Geneva. Thus, from 2000 through to 2004, the Association's representative with the Commission issued a number of policy statements very critical of the Arab League, Islamic extremist groups and the Palestinian Authority for lies about Israel, for denial of Israel's right of existence, for racist or anti-Semitic statements towards Israel, for rejection of Israel's offer to accept virtually all their reasonable demands, and for the support of terror or a terror campaign against Israel. (Two such policy statements were made jointly with the World Jewish Congress, the banner of which organisation's website evidently bears the slogan "All Jews are responsible for one another". However, to seek to deduce from this association by the Association with the World Jewish Congress some conclusion relevant to Lady Cosgrove's suitability to adjudicate upon Miss **Helow's** application seems to me to go on any view too far into remote considerations.)

51. The President in statements in "Justice" and elsewhere extended her early criticism of Moslem fundamentalism in September 1994 to later, more general criticism of the Palestinian leadership. She said in Spring 2001 that such leadership had done nothing to curb and had even promoted incitement against Israel, in Autumn 2001 that it had chosen a path of violence, and in Spring 2004 that she was "sometimes told not to blame Moslems, only the radical fundamentalist elements", but that "at the expense of not being politically correct, the truth must be told. Today, it is not only radical groups like Hamas which are using the Protocols [the alleged 'Protocols of the Elders of Zion'] as a means to de-legitimize both the Jews and the Jewish **State**". Her address to the December 2001 conference (reproduced in edition No 30 of "Justice") was in even less commonplace terms and represents perhaps the highpoint of the appellant's case. She opened in this unusual way: "Let me

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be very personal. Let me speak not as a public figure, not as President of this Association, but as a person who constantly needs to define her own priorities, her own commitments. As a matter of personal choice I define myself as a Jew, a Zionist, an Israeli and a member of the legal community, in that order". Later she spoke of the welcome given by Jews and Israelis to the United Nations as the focal point for enforcing human rights, but of the bitter disillusion which had followed, because "We are still being discriminated against both as Jews and as the Jewish **State**". She criticised the Belgian prosecution of Mr Sharon, saying "…absent on the Belgian dock are those who actually committed the murders in Sabra and Shatila. The only one they propose to place in the dock is the Israeli Prime Minister. One group of Arabs killed another group of Arabs in a most brutal massacre, and I did not hear of the Lebanese government setting up a public committee of inquiry, as did Israel, or being censured in the United Nations, let alone being accused in a criminal court".

52. President Hadassa Ben-Itto ended her address to the December 2001 conference by recognising the existence of differences of view, but with a general call for solidarity, for support for Israel and the United **States** in a fight against terror and for support for the Association and the Israeli security forces, in these terms:

> "We have carefully organized this Jerusalem conference to supply you with relevant information, to expose you to the views of experts on important relevant subjects. Each one must decide for himself how to use this information; you will each define to yourself the extent of your commitment. Each one will decide how to deal with the enormous dilemmas that face us, and on which we must take a stand if we wish to sound credible.
>
> You may say: this conference is about solidarity, about standing together, and of course it is. By coming here you have made a statement: you have said that terror will not bring us down, you have said that Israel is not alone.
>
> So, why then am I burdening you with all these controversial issues? Why do I speak on this occasion of internal conflicts that are part of the political agenda in Israel? I do so because if you wish to do more than make a statement, if you are ready to be our emissaries abroad, if you are willing to confront the elements that are constantly at work creating a hostile world opinion against us, often using not only distorted facts but also sophisticated arguments, you must be well armed, not only with facts but also with ready answers to questions aired daily in the international media.
>
> I hope I have succeeded in posing this partial list of questions as objectively as possible. I myself do not have a ready answer to all of them, so, obviously, I have no answers for you. We know for a fact that the members of this Association are as divided on these issues as are Israelis and Jews everywhere. Our contribution is therefore limited to offering you as many facts as possible. The speakers you will hear were not chosen for their views but rather for their expertise. We shall continue to be as informative as possible both in our international meetings, through our publication *JUSTICE* , and through our site on the Internet.
>
> We urge those who have not yet formally joined our Association, to do so. When we speak out in public, including at the UN bodies, we need to speak in a strong voice representing large numbers of Jewish lawyers. By coming here to stand with us at this Jerusalem conference, I hope you are expressing not only your solidarity with Israel, but also your support for the aims of our Association, what we stand for and what we do.
>
> Bless you all for being here today. In these difficult times having convened in Jerusalem in such impressive numbers is no mean achievement in itself.
>
> May I conclude by sending a message of support to the Israeli security forces, both army and police, who are out there defending us daily, at great risk. We send our condolences to the bereaved families who lost their beloved ones in heinous acts of terror, and best wishes for a speedy recovery to all those wounded in these attacks.

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> We also send our condolences to the American people who have suffered such a tremendous loss in a barbaric attack on September 11. We who have been exposed to ongoing terror for so long, feel their anguish and share their anger. We congratulate the American President and his government for their firm commitment to fight terror all the way to victory, and we wish them and all those who support them success in this unique endeavour to save civilization."

53. In my opinion a judge who had expressed, or was President of an Association which had expressed, views of the nature summarised and set out above could not sit on an application such as that which Lady Cosgrove determined. A fair-minded observer would regard such a judge as too closely and overtly committed to supporting the cause of Israel generally and of Mr Sharon in relation to the Sabra/Shatila massacre. It would not be appropriate for her to decide a case in which the appellant was relying on her past conduct and condemnation regarding Israel's and Mr Sharon's involvement in the Sabra/Shatila massacre as a main basis for her fear of reprisals if she was returned to Lebanon. But the President - when she said that she was speaking personally, when she invited solidarity and support and when she recognised the existence of internal conflicts and divisions of opinion within Israel – was, correctly, acknowledging that she could not either determine or reflect the views of any individual member. There is nothing save membership of the Association to link Lady Cosgrove and the President. There is no suggestion that Lady Cosgrove was in Jerusalem in December 2001 to hear the President's greeting. There is no question of Lady Cosgrove having committed herself expressly to any such views as the President or any other spokesperson for the Association expressed. There is nothing to show that she was even aware that they were being expressed. Lady Cosgrove is in these respects, and apart from her membership, in no different position to any judge, who may or may not have private views about issues which come before the court, but who is expected to put them aside and decide the case according to the law.

54. Would Lady Cosgrove by virtue of her membership alone be taken to subscribe to or approve all that the Association's President or spokesperson may publish or communicate to organs such as the United Nations Human Rights Commission? In my opinion, the answer is a clear negative. Membership of such an association - for a subscription most unlikely to be regarded as in any way burdensome - connotes no form of approval or endorsement of that which is said or done by the association's representatives or officers. In the case of Lady Cosgrove, membership may connote an interest in the content of legal articles none of which may be included in the material exhibited. Or it may be or have become effectively formal - connoting little if anything more than a failure to review and cancel the annual subscription or a general willingness to subscribe to an organisation believed to stand simply for the unobjectionable aims and objects to which every member had to subscribe.

55. It is no doubt possible to conceive of circumstances involving words or conduct so extreme that members might be expected to become aware of them and disassociate themselves by resignation if they did not approve or wish to be thought to approve of them. But the present material falls far short of involving such circumstances. Lord Nimmo Smith giving the opinion of the *Inner House 2007 SC 303* , para 44 said: "we do not accept that it could reasonably be assumed by any fair-minded and informed observer that every member of this apparently very large and widely-based international organisation (with wide and generally-expressed aims which are beyond criticism) would necessarily share all the views apparently expressed by its representatives in the ways, and on the occasions, referred to. … It must not be forgotten that, although the concentration in the hearing before us was necessarily on certain views apparently expressed on particular matters (especially on what was said to be the 'material aspect of the case', the question of Israeli responsibility in respect of the Sabra/Shatila massacre), these represented only a very small proportion of the many views expressed on diverse and varying issues over many years". My only comment would be that the relevant question is not whether it can be concluded that a member would "necessarily" share the views of the Association's representatives. But I cannot think that a fair-minded and informed observer would in the light of Lady Cosgrove's continuing membership alone conclude that there was a real possibility that the Association's President was in substance speaking on Lady Cosgrove's behalf or that Lady Cosgrove was in any way endorsing or associating herself with statements of the character presently in issue made by the President or Mr Lack or anyone else speaking on the Association's behalf in public or to bodies such as the United Nations Commission on Human Rights

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56. The other basis on which the case is put involves the submission that, by virtue of her membership and receipt of "Justice", Lady Cosgrove may have been influenced, albeit subconsciously, by the content and general attitude of some of the material, particularly once again the policy statements and President's speeches or messages. In my view, that submission must be categorically rejected, even if one assumes that Lady Cosgrove ever read and digested such material. Judges read a great deal of material which is designed to influence them, but which they are trained to analyse and to accept, reject or use as appropriate. A person may well subscribe to or read publications in order to inform him or herself about views different to his or hers. The suggestion that mere membership gives rise in the eyes of a fair-minded observer to a real possibility of unconscious influence, through some form of osmosis, by materials in the relevant association's periodical which would be available to be read by the member is a blanket proposition of great potential width that I reject without hesitation.

57. It remains to mention two considerations to which attention was paid during submissions. The first is the oath that Lady Cosgrove will as a judge have taken, in familiar terms: "I, …, do swear that I will well and truly serve our Sovereign … in the office of Judge of the Court of Session, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or illwill. So help me God." In R v. S(RD) [1997] 3 SCR 484 , L'Heureux-Dubé and McLachlin JJ identified the taking of the judicial oath as often the most significant occasion in the career of a judge (para 116), and said (para 117) that "Courts have rightly recognised that there is a presumption that judges will carry out their oath of office. … This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias." At para 119, they went on to say that

> "The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial 'does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind'".

So viewed, the judicial oath appears to me more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practise and display. But on no view can it or a judge's professional status and experience be more than one factor which a fair-minded observer would have in mind when forming his or her objective judgment as to the risk of bias.

58. The other consideration is that Lady Cosgrove did not volunteer a reference to her membership of the Association. Had she disclosed this, the very fact of disclosure could have been seen by a fair-minded observer as a "badge of impartiality", as showing that "she ha[d] nothing to hide and [was] fully conscious of the factors which might be apprehended to influence … her judgment": *Davidson v. Scottish Ministers (No 2) 2005 1 SC (HL) 7* , paras 19 and 54, per Lord Bingham of Cornhill and Lord Hope of Craighead. Again, however, this can only be one factor, and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non- disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing. In the present case, I do not consider Lady Cosgrove's failure to disclose her membership of the Association to be a factor which would carry any great weight in the balancing of factors which a fair-minded and informed observer must be assumed to undertake. A fair-minded and informed observer would I think be

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much more likely to conclude that it never crossed her mind that her membership involved anything which it was relevant for her to disclose.

59. For these reasons, I would dismiss this appeal and affirm the decision of the Extra Division of the Inner House refusing the prayer of the appellant's petition.

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Positive/Neutral Judicial Consideration

Court
Privy Council (Scotland)

Judgment Date
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No 2

PC

Lord Bingham of Cornhill , Lord Nicholls of Birkenhead , Lord Hope of Craighead , Lord Clyde and Lord Scott of Foscote

24 July 2001

Representation

DAVID CAMERON **MILLAR**, Appellant— Bovey, QC, Shead
DJ **DICKSON** (Procurator Fiscal, Elgin), Respondent— Solicitor General (Davidson,QC), McCreadie
KERRY PAYNE, Appellant— Bovey, QC, Shead
PAUL STEWART, Appellant— O'Neill QC, Di Rollo
JOSEPH TRACEY, Appellant— Bovey, QC, Collins, Shead
BARRY HEYWOOD(Procurator Fiscal, Dundee), Respondent— Solicitor General (Davidson, QC), McCreadie

Justiciary—Human Rights—Devolution Issue—Summary procedure—Waiver—Trial before independent and impartial tribunal—Conviction and/or sentence occurring before High Court's decision that temporary sheriffs were not independent and impartial tribunal—Appellants' solicitors not objecting to temporary sheriffs—Whether appellants waived rights under European Convention — Scotland Act 1998 (cap 46) sec 57(2) — European Convention on Human Rights, arts 6(1) and (2)

Section 57(2) of the Scotland Act 1998 provides *inter alia* that a member of the Scottish Executive (which includes the Lord Advocate) has no power to do any act insofar as that act is incompatible with certain rights ('Convention rights') set out in the European Convention on Human Rights . Subsection (3)(a) of the Act provides that subsec (2) does not apply to an act of the Lord Advocate in prosecuting any offence which, because of sec 6(2) of the Human Rights Act 1998 is not unlawful under sec 6(1) of that Act. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right. Subsection (2) provides *inter alia* that ' Subsection (1) does not apply to an act if—...((b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect to in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions'. Article 6(2) of the European Convention on Human Rights provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Each of the appellants was the subject of (unrelated) criminal proceedings before a temporary sheriff between 20 May 1999 and 11 November 1999. With effect from 20 May, the Scotland Act prohibited the Lord Advocate from doing any act incompatible with Convention rights. On 11 November, the decision in *Starrs v Ruxton* was issued, holding that temporary sheriffs were not an independent and impartial tribunal within the meaning of art 6 of the Convention. The appellants raised bills of advocation or suspension of the convictions and sentences imposed by temporary sheriffs. They argued before the High Court of Justiciary that the Lord Advocate and the respondents had acted incompatibly with the appellants' Convention

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rights in prosecuting them before temporary sheriffs, who were not an independent and impartial tribunal; that the proceedings were *ultra vires* and null; and that the convictions and sentences should be quashed. These complaints were unsuccessful, but leave to appeal was granted, and the appellants appealed to the Judicial Committee of the Privy Council.

The appellants argued before the Committee (1) that the Lord Advocate had no power to do any act incompatible with the appellants' Convention rights; that they were entitled to be tried before an independent and impartial tribunal; that temporary sheriffs were not at the material time an independent and impartial tribunal; and therefore that the Lord Advocate had no power to continue to prosecute them before temporary sheriffs after 20 May 1999; and (2) that they had not waived their entitlement under art 6 to trial before ***31** an independent and impartial tribunal. The respondents argued (1) that, as the proceedings were complete before the challenge was raised, overall fairness should be viewed in light of the circumstances as a whole, and that there had been no overall unfairness to the appellants, and thus no breach of their Convention rights; (2) that, as the appellants had not taken objection at the appropriate time, they had waived their rights to object to proceedings on the grounds of want of independence and impartiality of the tribunal; and (3) that the act of the Lord Advocate fell to be exempted under subsec 57(3) as he was giving effect to sec 11 of the Sheriff Courts (Scotland) Act 1971 which could not be read or given effect in a way compatible with the Convention rights.

Held that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is a right which, unless validly waived by the accused, cannot be compromised or eroded (pp 39G, 50D); (2) (*diss* Lord tribunal could be waived but only if all of the relevant circumstances were known to the applicant and the waiver was voluntary and unequivocal (pp 43F, 50G, 57G); (3) that the appellants' knowledge of that sec 57(3) of the Scotland Act 1988 gave a remedy against acts of the prosecutor which breached Convention rights was not sufficient to impute knowledge of all of the facts necessary to make an informed choice as to what to do where the law was unsettled; and that the appellants did not have such knowledge (pp 36F – H , 46E – G , 52B – F , 52H, 57H); (4) that the right to an independent and impartial tribunal was so fundamental that the question of a breach could not be tested after the trial, by asking whether the proceedings overall were fair (pp 53D – 54I); (5) that the act of the Lord Advocate in bringing prosecutions before temporary sheriffs was not giving effect to or enforcing sec 11 of the Sheriff Courts (Scotland) Act , which related to the different act of appointing temporary sheriffs; and hence the exemption under sec 57(3) did not apply (pp 43D – E , 55A – D, 60H); (6) that the act of prosecuting a case continued up to and included the moment when sentence was passed, and the act of the Lord Advocate in bringing a prosecution continued beyond the calling of the case and conviction; and accordingly that the appeals in which the temporary sheriff had only passed sentence could not be distinguished from those where the case had proceeded to trial (pp42H, 50B, 56F); (7) that by continuing to prosecute the accused before a tribunal which was not independent and impartial, in the absence of waiver, the Lord Advocate infringed the right of the accused to a have the charges against them determined by such a tribunal (p 42G); and appeals *allowed* .

Observed by Lord Bingham of Cornhill (1) that, in the context of waiver, knowledge of the law could not be imputed to a party regardless of his own or his agent's actual knowledge, ignorance or misapprehension of the law (pp 44B – 45C); (2) that a declaratory theory of law (which assumes that a decision of the court states not only the law at the date of the decision, but what it has always been) is not apposite in the field of waiver, and consequently that there can be no waiver where a party relies upon what is reasonably understood to be the law at the relevant time, even if a court subsequently rules that the law is different from that understanding, because that party lacks the knowledge necessary to make an informed choice(pp 44E, 45D); (3) that failure to take a point on the qualification of the trial court as a plea in bar would be taken as a waiver unless a contrary intention, or a reasonable explanation for the failure, was shown; and that the more obvious and notorious it was that a point was there to be taken by a party, the more readily it might be inferred that failure to take it represented a true decision to waive it; but that even an express declaration of waiver might not constitute abandonment of a right if knowledge of a material matter were absent (pp 44E, 45D); (4) that there are few if any Convention rights of more practical importance to the accused than the right to a fair trial, which is a safeguard that should not, least of all in the criminal field, be weakened or diluted, whatever the administrative consequences (p 42E).

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Observed by Lord Hope of Craighead that an appeal was an imperfect safeguard where the right to trial before a fair and impartial tribunal was concerned, as many decisions at first instance were incapable of being reviewed effectively on appeal(p 50D).

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Observed by Lord Clyde that the existence of a right of appeal was not a matter which could cure a failure in impartiality of a tribunal(p 59A).

David Cameron **Millar** was convicted on indictment of drug offences in the Sheriff Court at Elgin on 27 August 1999 and was sentenced to imprisonment the same day. He brought a bill of advocation in the High Court of Justiciary praying the court to quash his conviction and sentence. Kerry Payne pleaded guilty to a charge of assault and other offences in the Sheriff Court at Dundee on 16 September 1999 and was sentenced to a term of imprisonment on 12 October 1999. Paul Stewart was summarily convicted of driving offences in the Sheriff Court at Dundee on 16 February 1999, and appeared in the Sheriff Court again on 28 June 1999 when he was sentenced to non-custodial penalties. Joseph Tracey was summarily convicted of offensive weapon and assault offences in the Sheriff Court at Dundee on 23 September 1999 and was sentenced to a term of imprisonment on 8 November 1999. They each brought bills of suspension in the High Court of Justiciary praying the court to suspend the convictions and sentences imposed by temporary sheriffs. At advising, on 3 August 2000, the bills were refused (reported at 2000 JC 648).

On 15 August 2000, the appellants were granted leave to appeal to the Judicial Committee of the Privy Council. They did so by virtue of sec 98 of the Scotland Act 1998 and para 13(a) of schedule 6 to that Act. The Committee heard the appeals on 2 and 3 July 2001.

Cases referred to:

Bradford **v** *McLeod 1986 SLT 244*
Brown **v** *Stott 2001 SC(PC)43*
Bulut **v** *Austria (1996); 24 EHRR 84*
Caledonian Railway Co **v** *Ramsay (1897) 24 R(J) 48*
Clancy **v** *Caird 2000 SC 441*
De Cubber **v** *Belgium Series A No 86 (1984); 7 EHRR 236*
Deweer **v** *Belgium Series A No 35 (1980); 2 EHRR 439*
Dimes **v** *Proprietors of Grand Junction Canal (1852) 3 HL Cas 759*
Doherty **v** *McGlennan 1997 SLT 444*
Evans **v** *Bartlam [1937] AC 473*
Findlay **v** *United Kingdom (1997); 24 EHRR 221*
H **v** *Belgium Series A No 127 (1997); 10 EHRR 339*
Hakansson and Sturesson **v** *Sweden Series A No 171 (1990); 13 EHRR 1*
Howdle **v** *Beattie 1995 JC 65*
Jones **v** *Randall (1774) 1 Cowp 37*
Law **v** *Chartered Institute of Patent Agents [1919] 2 Ch 276*
Locabail (UK) **v** *Bayfield Properties Ltd [2000] QB 451*
McGonnell **v** *United Kingdom (2000); 30 EHRR 289*
Martindale **v** *Faulkner (1846) 2 CB 706*
Millar* v *Dickson *2000 JC 648*
Oberschlick **v** *Austria Series A No 204 (1991); 19 EHRR 389*
Pfeifer and Plankl **v** *Austria Series A No 227 (1992); 14 EHRR 692*
R **v** *Secretary of State for the Environment , Transport and the Regions ex parte Alconbury Developments Ltd [2001] 2 WLR 1389*
R **v** *Bow Street Metropolitan Magistrate , Ex parte Pinochet Ugarte (No 2) [2000] 1 AC 119*
R **v** *Gough [1993] AC 646*
Rimmer **v** *HM Advocate, High Court, 23 May 2001* (unreported)

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Skeen v Fullarton 1980 SLT (Notes) 46
Starrs v Ruxton , *Ruxton v Starrs 2000 JC 208*
Werner v Austria (1997); 26 EHRR 310
Zumtobel v Austria Series A No 268-A (1993); 17 EHRR 116

Textbooks referred to:

Mitchell, *Constitutional Law* , (2nd edn; 1968)
Renton and Brown, *Criminal Procedure* (6th edn), para 20.02
Stair Memorial Encyclopaedia , vol 5, para 663–667
Willock, *Temporary Sheriffs* 1993 SLT (News) p 352 ***33**

At advising on 24 July 2001—
Lord Bingham of Cornhill—

1. — Each of these four appellants ('the accused') was the subject of criminal proceedings before a temporary sheriff between 20 May 1999 and 11 November 1999. Mr **Millar** was convicted on indictment of drug offences in the Sheriff Court at Elgin on 27 August 1999 and was sentenced on the same day to a term of imprisonment. Ms Payne pleaded guilty to assault and other offences in the Sheriff Court at Dundee on 16 September 1999 and was sentenced to a term of imprisonment on 12 October 1999. Mr Stewart was summarily convicted of driving offences in the Sheriff Court at Dundee on 16 February 1999, but appeared in the Sheriff Court again after 20 May 1999, on 28 June 1999, and was then sentenced to non-custodial penalties. Mr Tracey was summarily convicted of offensive weapon and assault offences in the Sheriff Court at Dundee on 23 September 1999 and was sentenced to a term of imprisonment on 8 November 1999. All the accused were represented by solicitors.

2. It was on 20 May 1999 that sec 44(1)(c) of the Scotland Act 1998 came into force. The Lord Advocate thereupon became a member of the Scottish Executive. As such, by virtue of sec 57(2) of the Act, he had no power to do any act incompatible with any of the Convention rights defined in sec 1 of the Human Rights Act 1998 (unless the act in question fell within sec 57(3)).

3. It was on 11 November 1999 that the High Court (the Lord Justice-Clerk (Cullen), Lord Prosser and Lord Reed) gave its decision in *Starrs v Ruxton* , *Ruxton v Starrs* , holding that temporary sheriffs were not an 'independent and impartial tribunal' within the meaning of art 6(1) of the European Convention on Human Rights .

4. Before the High Court and again before the Board the accused made the same very simple complaint that the Lord Advocate (and thus the respondent procurators fiscal who conducted the prosecutions) acted incompatibly with the Convention right of the accused under art 6(1) by prosecuting them before temporary sheriffs who were not an independent and impartial tribunal; that such proceedings were accordingly *ultra vires* and null; and that the convictions and sentences of **Millar**, Payne and Tracey and the sentence of Stewart should accordingly by quashed. These complaints were resisted by the Solicitor General on behalf of the respondents, and were rejected by the *High Court on 3 August 2000: **Millar v Dickson***.

5. The issues raised by each of the accused before the High Court were devolution issues within para 1(d) of sched 6 to the Scotland Act 1998 , namely 'a question whether a purported or proposed exercise of a function by a member of the Scottish Executive [the Lord Advocate] is, or would be, incompatible with any of the Convention rights'. On 15 August 2000 the High Court gave leave to the accused to appeal against its determination of those issues, and the accused come before the Board by virtue of sec 98 of and para 13(a) of sched 6 to that Act. The appeals are of obvious practical importance since these cases have been selected for decision out of a significant number of other cases brought before temporary sheriffs between 20 May and 11 November 1999. The sentences imposed upon the accused have been suspended pending final resolution of these issues.

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The High Court's decision in Starrs

6. Before the High Court and again before the Board the Solicitor General accepted the correctness of the decision in Starrs and accordingly accepted, on **34* the basis of that decision, that the temporary sheriffs were not at the material time 'an independent and impartial tribunal': see 2000 JC at p 651B , para 4. It follows that the correctness of that decision is not open to review before the Board. It is nonetheless necessary to summarise its effect since the present appeals are based upon it.

7. The accused Starrs and Chalmers appeared before a temporary sheriff on a summary complaint on 5 May 1999, when their trial began but was not concluded. The trial diet was adjourned to 8 July 1999, and on that date was further adjourned and leave was given to the accused to raise a devolution in prosecuting them before a temporary sheriff. When the devolution issue came before the temporary sheriff he decided it against them. The accused challenged the temporary sheriff's decision in the High Court. The issue in that court was described by the Lord Justice-Clerk in this way (at p 213C): 'I come then to the main issue which was debated at some length, namely whether a temporary sheriff such as Temporary Sheriff Crowe, was an "independence and impartial tribunal/ in the sense of art 6(1) of the Convention. I should, of course, make it clear that this point does not involve any reflection whatsoever on his conduct. The point is of general importance, not only for its potential effect in individual cases but also for any future consideration of the terms of the relevant legislation and any appointments made thereunder.'

8. In the course of their judgements the Lord Justice-Clerk and Lord Reed reviewed the legislation governing the appointment of temporary sheriffs and also some additional information (not previously public knowledge: p 215A) concerning the recent practice of the Lord Advocate in making appointments of temporary sheriffs: see pp 213D – 219A , 235B – 241A . The Lord Justice-Clerk drew attention in particular to the fact that temporary sheriffs were appointed for one year only and were subject to recall during that period at the instance of the Lord Advocate, perhaps without the possibility of challenge: see pp 214C, 216E, 218E, 226G . The Lore Justice-Clerk quoted the material terms of art 6(1) of the Convention. 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.' He made extensive reference to Strasbourg and other authority on the meaning of 'an independent and impartial tribunal': see pp 219 – 226 . He expressed a number of conclusions: (1) 'Rather than a control over numbers, the use of the one year term suggests a reservation of control over the tenure of office by the individual, enabling it to be brought to an end within a comparatively short period. This reinforces the impression that the tenure of office by the individual temporary sheriff is at the discretion of the Lord Advocate. It does not, at least *prime facie* , square with the appearance of independence' (p 228); (2) 'There is no question whatever as to the integrity and fair mindedness with which the Lord Advocate has acted. However, what I have to consider is whether the basis on which the temporary sheriff holds office is truly independence, that is independent of the executive, whether it presents an appearance of such independence, and whether and to what extent the lack of the former gives rise to the appearance of lack of impartiality. I do not have difficulty with the fact that temporary sheriffs are appointed by the executive, following upon their selection by the Lord Advocate. Counsel did not contend to the contrary. However, appointment by the executive is consistent **35* with independence only if it is supported by adequate guarantees that the appointed judge enjoys security of tenure. It is clear that temporary sheriffs are appointed in the expectation that they will hold office indefinitely, but the control which is exercised by means of the one year limit and the discretion exercised by the Lord Advocate detract from independence' (p 229); (3) 'This line of reasoning seems to me to be persuasive and to support the view that even when full allowance is made for the matters relied upon by the Solicitor General, the power of recall under sec 11(4) is incompatible with the independence and appearance of independence of the temporary sheriff. For the reasons which I have already indicated, I regard the one year limit to the appointment as being a further critical factor arriving at the same result… I also accept that in this case there is a link between perceptions of independence and perceptions of impartiality, of the kind which has been categorised in Canada as institutional impartiality. I consider that there is a real risk that a well-informed observer would think that a temporary sheriff might be influenced by his hopes and fears as to his prospective advancement. I have reached the view that a temporary sheriff, such as Temporary Sheriff Crowe, was not an "independent and impartial tribunal/ within the meaning of art 6(1) of the Convention' (p 230); (4) 'In the whole circumstances, therefore, I am of opinion that in proceeding with the trial the Lord Advocate, as represented by the procurator fiscal, acted incompatibly with the right of the accused under art 6(1) to trial by "an independent and impartial tribunal/' (p 231).

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9. Lord Prosser was in complete agreement. His conclusions were expressed as follows: (1) 'the answer to the question of whether a person has had a hearing "by an independent and impartial tribunal established by law/ when the tribunal is a temporary sheriff holding office at the pleasure of the Lord Advocate, with no security of tenure, can in my opinion be answered in the negative without any deep or detailed consideration of the words "independent and impartial/. Nothing in the statutory provisions regarding temporary sheriffs, and nothing in the account which we were given of how they are selected and appointed, or how they are used, or how they cease to be used or to hold office, appears to me to point to any other answer. Equally, nothing in the authorities to which we were referred appears to me to point to any other answer. The opinions of your Lordships appear to me to demonstrate with great clarity why no other answer is appropriate' (p 231); (2) 'As regards the actual words "independent/ and "impartial/, the latter appears to me to be of the essence of the judicial process. I would regard the concept of a partial judge as a contradiction in terms. But I am inclined to see independence - the need for a judge not to be dependent on others - as an additional substantive requirement, rather than simply a means of achieving impartiality or a perception of impartiality. Independence will guarantee not only that the judge is disinterested in relation to the parties and the cause, but also that in fulfilling his judicial function, generally as well as in individual cases, he is and can be seen to be free of links with others (whether in the executive, or indeed in the judiciary, or in outside life) which might, or might be thought to, affect his assessment of the matters entrusted to him. The requirement of independence seems to me to have an importance which runs even wider than that of impartiality. The two concepts appear to me to be inextricably interlinked, and I do not myself find it useful to try to separate the one from the other' (p 232); (3) 'like your Lordships, I am not suggesting in any way that there has ever been any impropriety, either **36* on the part of temporary sheriffs or on the part of any holder of any ministerial office, or of their officials. But I would add that if a judge is not independent, then however great his integrity, it may be very difficult for him to know whether his want of independence affects the way in which he carries out his judicial duties. And however determined a Minister or public servant may be to carry out his functions in relation to the judiciary only on the basis of wholly appropriate considerations, it will be important for him to remember that his own confidence in his own integrity is not, and cannot be regarded as, a guarantee' (p 234).

10. Lord Reed delivered a comprehensive judgement. It is necessary to cite the following extracts only: (1) 'Given that temporary sheriffs are very often persons who are hoping for graduation to a permanent appointment, and at the least for the renewal of their temporary appointment, the system of short renewable appointments creates a situation in which the temporary sheriff is liable to have hopes and fears in respect of his treatment by the executive when his appointment comes up for renewal: in short, a relationship of dependency. This is, in my opinion, a factor pointing strongly away from 'independence' within the meaning of art 6 ' (p 243); (2) 'There can be no doubt as to the importance of security of tenure to judicial independence: it can reasonably be said to be one of the cornerstones of judicial independence. The critical importance of judicial security of tenure has been recognised in Scots law since at least the declaration in art 13 of the Claim of Right 1689 (cap 28, APS IX 38) that "the changing nature the [sic] of the judges' gifts *ad vitam aut culpam* into commissions *durante beneplacito* / is "contrary to law/.' (p 245); (3) 'There is, however, no objective guarantee of security of tenure, such as can be found in sec 12 of the 1971 Act; and I regard the absence of such a guarantee as fatal to the compatibility of the present system with art 6 . The Solicitor General emphasised that it is inconceivable that the Lord Advocate would interfere with the performance of judicial functions. I would readily accept that; but that is not the point. Judicial independence can be threatened not only by interference by the executive, but also by a judge's being influenced, consciously or unconsciously, by his hopes and fears as to his possible treatment by the executive. It is for that reason that a judge must not be dependent on the executive. It is for that reason that a judge must not be dependent on the executive, however well the executive may behave: "independence" connotes the absence of "dependence"' (p 248); (4) 'Even if I were mistaken in my conclusion that the necessary objective guarantees of independence were lacking, it seems to me that the need for the temporary sheriff's appointment to be renewed annually at the discretion of the executive, and his lack of security of tenure, are in my event factors which could give rise to a reasonable perception of dependence upon the executive. The necessary appearance of independence is therefore in my opinion absent' (p 252); (5) 'Given my conclusion that trial before a temporary sheriff violates the right of the complainers under art 6 to a trial before an independent and impartial tribunal, and the Solicitor General's concession that such a trial involves the doing of acts which must be taken to be acts of the Lord Advocate for the purposes of sec 57(2) of the Scotland Act , it follows that sec 57(2) , if it is applicable, renders those acts incompetent' (p 255); (6) 'Before concluding this part of my opinion, I wish to make it plain that I am not suggesting that any temporary sheriff has ever allowed his judicial conduct to be influenced by any consideration of how he might best advance his prospects of obtaining the renewal of his appointment, or his promotion to a permanent **37* appointment. Nor am I suggesting that any official or minister has ever sought to interface with the judicial conduct of a temporary sheriff or would ever be likely

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to do so. There is, however, no objective guarantee that something of that kind could never happen; and that is why these appeals must succeed' (p 257).

The High Court's decision in the instant cases

11. In his leading judgement in these cases Lord Prosser defined the main issues then before the High Court at p 651 , para 4: 'In relation to these cases, the solicitor-General on behalf of the respondents conceded that there was a relevant "act" for the purposes of paragraph 1(d) of sched 6 to the Scotland Act 1998 . It was accepted, upon the basis of the decision of *Starrs* , that the temporary sheriffs were not an "independent and impartial tribunal" within the meaning of article 6(1) . The Crown's position was, however, that each of these complainers had tacitly waived the right to an independent and impartial tribunal. And regardless of the question of waiver, the Crown's position was that, notwithstanding the decision in *Starrs* , the acts of each of the temporary sheriffs, in convicting and/or sentencing the complainers prior to the date of that decision were those of a *de facto judge* , and should be treated as valid. Moreover, it was not suggested on behalf of any of these complainers that waiver of the entitlement to an independent and impartial tribunal under article 6(1) would be incompetent or otherwise impossible as a matter of law: the question was not whether that entitlement could be waived, but whether it had been in these cases. It is convenient to deal with the question of waiver first, before considering the contention that these decisions are valid as decisions of *de facto* judges. Upon both issues, it appeared to me that there was no substantial difference between the submissions advanced on behalf of the different complainers, and I have not found it necessary to deal with these submissions separately from one another.' Most of Lord Prosser's judgement, with which Lord Cowie agreed, and most of the shorter judgement of Lord Johnston, were devoted to the waiver issue, which was resolved against the accused and in favour of the Crown. The issue concerning *de facto* judges was decided against the Crown: in his written case the Solicitor General sought to challenge that adverse ruling, but in oral argument before the Board he did not seek to pursue that submission and no further reference need be made to it.

12. It is clear that in the High Court the accused, relying on sec 57(2) of the Scotland Act , challenged the *vires* of the Lord Advocate to pursue prosecutions against them before temporary sheriffs after 20 May 1999, but this issue does not appear to have featured prominently in the argument and was disposed of in a single paragraph of Lord Prosser's judgement (at p 664 , para 39): 'I should mention briefly one further argument which was advanced on behalf of the complainers in these four bills, which was founded upon this same proposition, that it terms of section 57(2) of the 1998 Act, the Lord Advocate was acting *ultra vires* in continuing the prosecution. Viewing the matter as one of *vires* , it was submitted that a waiver could not overcome his lack of *vires* . But it my opinion this argument is misconceived. Section 57(2) means that the Lord Advocate has no power to do any act so far as that act is incompatible with "any of the Convenient rights". In terms of section 126(1) , that expression has the same meaning as in the Human Rights Act 1998 . In terms of sec 1(1) of that Act "the Convention rights" means the rights and fundamental freedoms set ***38*** out in, *inter alia* , article 6 . But where such a right can competently be waived, and in particular circumstances has been waived, it has in my opinion ceased to be a right of any kind, in those circumstances. I do not think that it was actually suggested by counsel for the complainers that once such a Convention right had been waived, so that it was no longer a right of the complainer in the circumstances, the Lord Advocate was nonetheless still obliged, in terms of section 57(2) , not to do an act which would have been incompatible with that right if it had still existed, and was incompatible only with the description of the right which had been waived. At all events, I would reject any such contention. I would accept that speaking generally, waiver cannot render *intra vires* an act which is inherently *ultra vires* . But the whole question of the Lord Advocate's powers is related to the complainers' rights under the Convention, and I am unable to see him as debarred from acting incompatible with rights which in the circumstances they do not have.'

13. In argument before the Board the balance of the argument very substantially altered. Counsel for the accused forcefully submitted, in reliance on Starrs, that the Lord Advocate had no power to continue to prosecute them before temporary sheriffs after 20 May 1999, although counsel continued to argue that the accused had not waived their entitlement under art 6 to trial before an independent and impartial tribunal. The Solicitor General for his part placed very muted reliance on the waiver submission which had prevailed below, but joined issue with the *vires* argument of the accused, which became the primary focus of the debate before the Board. It is accordingly convenient first to address the *vires* issue arising under sec 57(2) of the Scotland Act 1998 .

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Section 57(2)

14. It was common ground between the parties that the relevant acts of the respondent procurators fiscal were to be treated as acts of the Lord Advocate, that the conduct of the procurators fiscal in continuing to prosecute the accused before temporary sheriffs after 20 May 1999 were 'acts" within the meaning of sec 57(2) , and that temporary sheriffs were not at the material time an independent and impartial tribunal within the meaning of art 6(1) , at p 651 , quoted above. The argument for the accused on this point was in essence both short and simple: by virtue of sec 57(2) the Lord Advocate as a member of the Scottish Executive had no power to do any act incompatible with any of the Convention rights of the accused; art 6(1) of the Convention entitled the accused to trial of the criminal charges against them by an independent and impartial tribunal; temporary sheriffs were not at the material time an independent and impartial tribunal because *Starrs* so decided; the Lord Advocate acted incompatibly with the Convention rights of the accused under art 6(1) by prosecuting them before temporary sheriffs as, again, *Starrs* decided; acts done in relation to the prosecution of the accused after 20 May 1999 were accordingly *ultra vires* , null, void and without legal effect; and the convictions and sentences of **Millar**, Payne and Tracey and the sentence of Stewart should therefore be quashed.

15. The Solicitor General sought to rebut this argument by distinguishing *Starrs* , essentially on the ground that the challenge in that case had been raised at a relatively early stage of the proceedings, before the trial had been concluded. Thus the court had no public or other interest to balance against the defect in ***39*** the qualification of the temporary sheriff before whom the trial was proceeding. The judgements in that case, he rightly submitted, did not attempt to weigh the interests of the public against the interests of the accused, doubtless because no argument was directed to that issue. But it was plain that rights under art 6 , save for the right to a fair trial, were not absolute; it was proper to consider the right allegedly infringed in the context of all the facts and circumstances of the case as a whole and to weigh the alleged infringement against the general interest of the public. The ultimate issue was one of overall fairness, viewing the proceedings as a whole, which could be done in these cases but could not be done in *Starrs* because of the early stage in the proceedings at which the devolution issue had there been raised and determined. In making the submissions the Solicitor General relied on recent observations of the Board in *Brown* **v** *Stott* at pp 60A – D , 61G – I , 62I – 64D , 67H, 73D – E , 74B – F , 79E , 81I – 82D , 84B – E and 87A – C , and on the Strasbourg authority there referred to. Applying these principles to the present cases it could be seen that the trials of the accused after 20 May 1999, albeit before temporary sheriffs, had been fair in all respects. **Millar** had been convicted by a jury and no criticism was made of the summing-up by the temporary sheriff. Payne had pleaded guilty; it made no practical difference that her plea was tendered to a temporary sheriff and there was nothing to suggest her sentence was excessive. Stewart no longer complained of his conviction before 20 May 1999, and the non-custodial penalties imposed after that date were moderate. Tracey had been convicted by a temporary sheriff on summary complaint after 20 May 1999, but had demonstrated no grounds to impugn conviction or sentence. Whatever the theoretical defects to which the appointments of the respective temporary sheriffs were subject, none of them was said to have shown any lack of independence or impartiality and none of the accused could shown that he or she had in the event suffered any injustice.

16. With these last submissions of the Solicitor General I have much sympathy. There is indeed nothing to suggest that the outcome of any of these cases would have been different had the relevant stages of the prosecution been conducted before permanent instead of temporary sheriffs. There is no reason to doubt that the conduct of all the temporary sheriffs involved was impeccable, and no reason to suppose that any of the accused suffered any substantial injustice. But I cannot accept that the outcome in *Starrs* would have been different had the challenge been raised after the trial in that case was concluded and it is in my view clear from authority that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded.

17. In *Locabail (UK) Ltd* **v** *Bayfield Properties Ltd the Court of Appeal* of England and Wales (the Lord Chief Justice, the Master of the Rolls and the Vice-Chancellor) said at pp 471 – 472 , paras 2–3: '2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms , is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes

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to all considerations extraneous to the particular case. 3. Any judge (for convenience, *40 we shall in this judgement use the term "judge" to embrace judicial decision maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgement given. Such objections and applications based on what, in the case law, is called "actual bias" are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.'

18. These observations, although directed to impartiality, would apply equally to independence. I do not understand them to be in any way inconsistent with Scots law on this subject, which attaches no less weight than the English common law to the integrity of a tribunal carrying out judicial functions, not least in the criminal field.

19. The observations are also, as I think, fully supported by the jurisprudence of the *European Court of Human Rights. In De Cubber v Belgium* the complaint was made, in reliance on an express prohibition in the national judicial code and art 6(1) of the Convention, that a judge had acted as a trial judge after conducting the preliminary investigation into the offences alleged against the complainant. Having found that there was no evidence of actual bias on the part of the judge, the Court summarised its general approach (in para 26, at p 244): 'However, it is not possible for the Court to confine itself to a purely subjective test: account must also be taken of considerations relating to the functions exercised and to internal organisation (the objective approach). In this regard, even appearances may be important; in the words of the English maxim quoted in, for example, the *Delcourt* judgement of 17 January 1970, "justice must not only be done: it must also be seen to be done". As the Belgian Court of Cassation has observed, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused.' The Court continued (in para 30, at p 246): 'In conclusion, the impartiality of the Oudenaarde court was capable of appearing to the applicant to be open to doubt. Although the Court itself has no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, it recognises, having regard to the various factors discussed above, that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part. Without underestimating the force of the Government's arguments had without adopting a subjective approach, the Court recalls that a restrictive interpretation of Article 6(1) - notably in regard to observance of the fundamental principle of the impartiality of the courts - would not be consonant with the object and purpose of the provision, bearing in mind the prominent place which the right to a fair trial holds in a democratic society within the meaning of the Convention.' In para 32, at p 248 , the Court went on to hold that *41 a lack of independence and impartiality in the trial court could not be excused because such qualities were met by another court to which an appeal lay.

20. It was held in *Hakansson and Sturesson v Sweden* (p 16 , para 66) that 'a waiver must be made in an unequivocal manner and must not run counter to any important public interest".

21. *Oberschlick v Austria* involved a journalist against whom a criminal prosecution for defamation was brought. The case against him was dismissed by a lower court but reinstated by a court of appeal which remitted the case to the lower court for trial. The journalist was convicted by the lower court, which held itself bound by the opinion of the court of appeal on the earlier occasion. The journalist's appeal against that decision came before a court of appeal over which the same judge as on the earlier occasion presided. This was contrary to the national code of criminal procedure. The journalist complained that the court of appeal on the second occasion was not an independent and impartial tribunal. The main argument in the case turned on waiver, which, it was said, had to be established in an unequivocal manner: para 51, p 420 . Such waiver was not established. It therefore followed that there had been a violation of art 6(1) because the tribunal was not impartial.

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22. The complaint in *Pfeifer and Plank v Austria* again was that, in breach of the national code of criminal procedure, the judges who had acted as investigating judges sat also as trial judges. The Court reiterated its position (paras 37, 39 on pp 712 – 713): '37. According to the Court's case law, the waiver of a right guaranteed by the Convention—in so far as it is permissible—must be established in an unequivocal manner. Moreover, the Court agrees with the Commission that in the case of procedural rights a waiver, in order to be effective for Convention purposes, requires minimum guarantees commensurate to its importance… 39. Thus even supposing that the rights in question can be waived by a defendant, the circumstances surrounding the applicant's decision deprived it of any validity from the point of view of the Convention.' A violation of art 6(1) was accordingly found.

23. In *Bulut v Austria* a trial judge had yet again, in breach of the national code of criminal procedure, acted as an investigating judge at an earlier stage of the proceedings. But on this occasion the lawyer representing the accused had been expressly asked, in writing before the trial and orally at the trial, whether he objected to the participation of the judge in the trial. On neither occasion did he object. In holding that there was no violation of art 6(1) the Court referred to the very limited participation of the judge at the investigatory stage and held (in para 34 at p 101): 'In this limited context, the applicant's fear that the Innsbruck Regional Court lacked impartiality cannot be regarded as objectively justified. In any event, it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so.'

24. In contrast with the other cases so far cited, *Findlay v United Kingdom* concerned the independence as well as the impartiality of the tribunal. A serving soldier pleaded guilty to a number of offences at a court martial. The Commission considered the court martial, because of the way in which it was composed and administered, to lack both independence and impartiality (paras 106, 108, pp 239 – 240). The court shared this view (paras 73, 76 at pp 244 – 245): '73. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had *inter alia* to the manner of **42* appointment of its members and their term of office, the existence of guarantees against outside pressured and the question whether the body presents an appearance of independence. As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect. The concepts of independence and objective impartiality are closely linked and the Court will consider them together as they relate to the present case. 76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court-martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified.' A violation of art 6 was found. It was further held that the defects in the trial tribunal could not be cured by any subsequent review proceedings; para 79, p 246 . No significance was attached to the fact that Findlay had pleaded guilty. The lack of independence and objective impartiality was fatal.

25. There was no accusation of actual bias or prejudice against the Bailiff of Guernsey whose role was reviewed in *McGonnell v United Kingdom* : see para 50. But his dual role was 'capable of casting doubt on his impartiality' and the applicant had 'legitimate grounds for fearing' that he might have been influenced by his earlier involvement in the planning process (para 57). It followed that there was a breach of art 6(1) .

26. In *Brown v Stott* at p 63G Lord Steyn said: 'And it is a basic premise of the Convention system that only an entirely neutral, impartial, and independent judiciary can carry out the primary task of securing and enforcing Convention rights.' There are few, if any, Convention rights of more practical importance to the citizen than the right to a fair trial. The conduct of trials at all stages by an independent and impartial tribunal is in my view recognised by the convention and the authorities, subject to waiver where that is permissible, as a necessary although not a sufficient safeguard of the citizen's right to a fair trial, It is a safeguard which should not, least of all in the criminal field, be weakened or diluted, whatever the administrative consequences.

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27. I accept the argument for the accused on this point. The Lord Advocate had no power to act in a way which infringed any Convention right of the accused. By continuing to prosecute the accused before a tribunal which was not independent and impartial he infringed the right of the accused to have the criminal charges against them determined by a tribunal which was independent and impartial. Unless the accused validly waived their entitlement to trial before an independent and impartial tribunal, he acted in a way which sec 57(2) denied him power to do. I think this is the view taken by the High Court.

28. No distinction is to be drawn between the case of Ms Payne, who pleaded guilty, and the other accused who pleaded not guilty and were convicted. It cannot be said that on the occasion when she entered her plea there was then no determination of a criminal charge against her within the meaning of art 6 . The role of a court before which an accused pleads guilty is not entirely passive: it has a duty to ensure that the accused understands the charge (a duty of greater significance when the accused is unrepresented) and that the plea is not equivocal. It is noteworthy that in *Findlay's* case the European Court drew no distinction between his plea of guilty and his sentence.

***43**

Section 57(3)

29. Before the Board, although not before the High Court, the Solicitor General sought to rely on sec 57(3) of the Scotland Act , which provides: ' Subsection (2) does not apply to an act of the Lord Advocate - (a) in prosecuting any offence, or (b) in his capacity as head of the systems of criminal prosecution and investigation of deaths in Scotland, which, because of subsection (2) of section 6 of the Human Rights Act 1998 , is not unlawful under subsection (1) of that section.' Section 6 of the Human Rights Act , so far as relevant provides: '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if - (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.' Relying on sec 6(2)(b) , the Solicitor General submitted that sec 11 of the Sheriff Courts (Scotland) Act 1971 could not be read or given effect in a way compatible with the Convention rights and that the prosecutors were acting to give effect to or enforce those provisions.

30. I cannot accept this argument. The appointment of temporary sheriffs under sec 11 of the 1971 Act was one thing. The prosecution of offenders was quite another. In appointing temporary sheriffs under sec 11 the Lord Advocate was giving effect to that section. In prosecuting the accused before temporary sheriffs so appointed the Lord Advocate (through the respective procurators fiscal) was performing a distinct and different function, which did not give effect to or enforce sec 11 . Section 57(3) gives the Solicitor General no help in these cases.

Waiver

31. In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression. That the waiver must be voluntary is shown by *Deweer* ***v*** *Belgium* , where the applicant's failure to insist on his right to a fair trial was held not to amount to a valid waiver because it was tainted by constraint (para 54, p 465). In *Pfeifer and Plankl* ***v*** *Austria* there was held to be no waiver where a layman had not been in a position to appreciate completely the implication of a question he had been asked (para 38, p 713). In any event, it cannot meaningfully be said that a party has voluntarily elected not to claim a right or raise an objection if he is unaware from passages already cited from cases decided by the European Court of Human Rights that a waiver, to be effective, must be unequivocal, which I take to mean clear and unqualified. I infer that the High Court was of this opinion: (at pp 654 – 655 , paras 12 and 13).

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32. Did the accused, then, make a voluntary, informed and unequivocal election not to claim their right to be tried by an independent and impartial tribunal or to raise to objection to the temporary sheriffs before whom they appeared as a tribunal which was not independent and impartial? There is no suggestion that *44 any reference was made at any stage in these cases before sentence to the standing or qualification of the respective temporary sheriffs. Thus any election, if made, must have been tacit. It was on the grounds of tacit waiver that the High Court resolved this issue against the accused. The High Court recorded that the parties were not really at issue as to the tests to be applied but as to application of those tests to the circumstances of the present cases: (para 16, p 655).

33. The High Court made its finding of tacit waiver in reliance on a series of very carefully formulated propositions: (1) If an accused or his agent wishes to take any point on the qualification of the trial court it should be taken timeously as a plea in bar of trial. If such a point is not taken, the omission to do so will be taken to show an intention to abandon or waive the point unless circumstances show that it was not intended to abandon or waive it or that the omission resulted from ignorance or misapprehension which provided a reasonable explanation of the failure to take it (para 17, p 656); (2) If knowledge of some material matter is absent, even an express intention to waive a right may readily be recognised as insufficient to constitute a binding abandonment of the right (para 18, p 656); (3) In general, regardless of the knowledge or ignorance or misapprehension of an accused or his agent as to the law, knowledge of the law will be imputed to him (para 20, p 656); (4) An authoritative decision of the courts operates retrospectively, stating not only what the law is at the date of the decision but what it has always been (para 21, p 657); (5) In judging whether a right has been waived, it may be seen as reasonable for a party to have proceeded upon the law as it appeared to be at the relevant time (para 22, p 657); (6) If the law is reasonably regarded as settled, that may afford a reasonable ground for not taking a point, even if the law is later changed, but it may be otherwise if the law is later changed, but it may be otherwise if the law is unsettled (para 23, pp 657 – 658); (7) In the present case there was no settled view of what the law was at the crucial time, and the accused and their agents were not subject to misapprehension attributable to some established view of what the law was (paras 24, 25, p 658); (8) The accused and their agents must be deemed to have known that the enactment of sec 57(2) of the Scotland Act 1998 had radically altered the rights of accused persons and that art 6(1) of the European Convention gave accused persons a right to an independent and impartial tribunal. Once the Scotland Act came into force the accused and their agents could not reasonably say how or why they took a view of the law which only the decision in Starrs revealed to be a misapprehension. Without deeming that they knew the law as declared in *Starrs* , they must be deemed to have known that the statute had changed the law and that new rights were in issue (para 25, pp 658 – 659); (9) The same deemed knowledge must be attributed to the temporary sheriffs and the prosecutors, but they were under no obligation to inform the accused of these known changes (para 26, pp 659); (10) It was of no real importance whether the accused's agents specifically knew that proceedings before temporary sheriffs were open to challenge, this being widely known in the legal profession (paras 10, 11 and 27, pp 653, 659); (11) The agents' deemed knowledge of the new legislation precluded any contention that the law could be assumed to be unchanged. It was for the agents to decide whether the new law created a new right or the possibility of asserting a new right. There was nothing which made it reasonable not to take the point (para 28, pp 659 – 660); (12) The agents were not to be criticised for not taking the point, since waiver could well have been seen as the best course to follow in the interests of the accused (para 29, p 660).

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34. Proposition (1) may, as I respectfully think, be accepted as generally true and as providing the correct starting point. I would also accept proposition (2). But I cannot accept proposition (3). In *Martindale v Falkner* at p 719 Maule I said, as I think correctly, ‘There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so’. In *Jones v Randall* , where Mr Dunning had argued that ‘all Judges know the laws’, Lord Mansfield differed (at p 40): ‘As to the certainty of the law mentioned by Mr Dunning, it would be very hard upon the profession, if the law was so certain, that every body knew it: the misfortune is that it is so uncertain, that it costs much money to know what it is, even in the last resort.’ More recently, in *Evans v Bartlam* at p 479 Lord Atkin laid down what I take to be the true principle: ‘For my part I am not prepared to accept the view that there is in law any presumption that any one, even a judge, knows all the rules and orders of the Supreme Court. The fact is that there is not and never has been a presumption that every one knows the law. There is the rule that ignorance of the law does not excuse, a maxim of very different scope and application.’ Thus ignorance of the law will not excuse unlawful conduct; but it cannot suffice to found a plea of waiver.

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35. As to propositions (4) and (5), I cannot accept a declaratory theory of law, which depends upon a fiction, as apposite in the very practical field of waiver. That there is no waiver where a party relies on what is reasonably understood to be the law at the relevant time is not because such conduct is reasonable (although it plainly is) but because the party lacks the knowledge necessary to make an informed choice. As to proposition (6), I consider the true rule to be this: the more obvious and notorious it is that a point is available to be taken, the more readily may it be inferred that failure to take it represented a deliberate intention not to take it. The contrary is also true.

36. I can readily accept that the agents for the accused in Elgin and Dundee knew of the enactment of the Scotland Act 1998 , knew that the legal landscape had altered, knew that members of the Scottish Executive (including the Lord Advocate) were bound by the European Convention , knew at least in general terms of the fair trial guarantee in art 6(1) and knew that the powers of the Lord Advocate as a member of the Scottish Executive were subject to the Convention (proposition (8)). Plainly, the standing of temporary sheriffs had been a subject of continuing discussion, both before the Scotland Act (see, for example, Willock, 'Temporary Sheriffs', 1993 SLT (News), pp 352 – 354) and, with greater intensity, afterwards. I would readily accept the informed observations of the *Court of Session in Clancy* ***v*** *Caird* at pp 453 and 470 as to the state of flux. But it is in my opinion impossible to accept that the qualification of temporary sheriffs was generally known to be open to serious question and that the agents were subject to no misapprehension attributable to some established view of what the law was (proposition (7)). I doubt very much if the outcome of Starrs was widely foreseen. I cannot accept proposition (9) and, since waiver depends on the making of an informed choice, I cannot accept the opening part of proposition (10).

37. Section 11(4) of the Sheriff Courts (Scotland) Act 1971 , which provided in effect that temporary sheriffs held office at pleasure (see *Starrs* , p 235F per Lord Reed), had stood unamended for nearly 30 years. No attempt had been made, in anticipation of the coming into force of the Scotland Act , to amend it or to ****46*** provide for the appointment of temporary sheriffs for fixed terms longer than a year, no doubt because the qualification of temporary sheriffs was not recognised to be vulnerable. Had that vulnerability been recognised, the Lord Advocate would, one assumes, have taken before 20 May 1999 the steps he took after 11 November 1999, and would not have resisted the challenge to the standing of temporary sheriffs which was made in *Starrs* . Had the respective procurators fiscal apprehended that their conduct as prosecutors of the accused on behalf of the Lord Advocate was or might be *ultra vires* they would doubtless have raised the issue at the hearings and sought the consent of the accused or made other arrangements. Had the respective sheriffs apprehended that they were not or might not have been an independent and impartial tribunal, they would doubtless have acted in the same way. Both the procurators fiscal and the temporary sheriffs would have been under the clearest obligation, if they entertained any doubt about the temporary sheriffs' compliance with art 6 , to share their doubts with the defence: see *Locabail* at p 478 , para 21, which I do not understand to be inconsistent with the law applicable in Scotland. I do not doubt that, if they had entertained any doubt, they would have acted in this way, and their failure to do so points towards an absence of doubt. The inescapable fact is that, until Starrs, no challenge was successfully made to the qualification of temporary sheriffs, despite their employment in greatly increased numbers over the years. It has not been suggested that their reputation was other than high. And to this day to accusation of actual bias has been made against them.

38. It was of course for the agents of the accused to decide what points to make on behalf of their clients (proposition (11)) and they could have seen advantages in proceeding before temporary sheriffs (proposition (12)). But the point is whether the agents on behalf of the accused made a voluntary, informed and unequivocal election not to claim trial before an independent and impartial tribunal and not to object to the respective temporary sheriffs as a tribunal not meeting the requirements of art 6(1) . They could only have done this if they appreciated, or must be taken to have appreciated, the effect of the eventual decision in *Starrs* or the real possibility of a decision to that or similar effect. In my regretful conclusion there is no evidence, and nothing in the judicial decisions before the Board, which would entitle us to find that the accused or their agents appreciated this nor is the Board entitled to infer that they must have done. A finding or inference to the opposite effect is in my view very much more compelling. I conclude, without enthusiasm, that the finding of tacit waiver cannot be supported.

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39. For these reasons, and those given by my noble and learned friends Lord Hope of Craighead and Lord Clyde, I am of opinion that these appeals should be allowed. All four cases will be remitted to the High Court for that court to consider what orders should now be made. The accused must have their costs against the respective procurators fiscal before the Board.

Lord Nicholls of Birkenhead—

40. —I agree that for the reasons given by my noble and learned friends Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Clyde, these appeals should be allowed.

Lord Hope of Craighead—

41. —Central to the rule of law in a modern democratic society is the principle that the judiciary must be, and must be seen *47 to be, independent of the executive. Writing on the independence of the judiciary in the title on Constitutional Law in the *Stair Memorial Encyclopaedia* , vol 5, paras 663–667, Lord Fraser of Tullybelton identified security of tenure and immunity from suit as the two most important ways of ensuring that judges perform their duties impartially and without fear of the consequences. Of these, security of tenure is the more vulnerable to erosion at the hands of the executive.

42. The appointment of temporary sheriffs to assist in the disposal of business in the sheriff courts was provided for by sec 11 of the Sheriff Courts (Scotland) Act 1971 . At first the use which was made of this additional judicial resource was modest and unremarkable. But as growth in the volume of business in the sheriff courts was matched by a tightening of controls over growth in public expenditure the executive became increasingly attracted to it. Preference was given to increasing the number of temporary sheriffs as a means of meeting the demand for more judges on the shrieval bench. Some doubted the wisdom of this policy. Professor I D Willock in his article 'Temporary Sheriffs', 1993 SLT (News) p 352 , observed that temporary sheriffs appeared to lack the independence which was attached to the permanent sheriffs. But there was no evidence that this was having any influence on the way in which the temporary sheriffs were in practice discharging their responsibilities. Furthermore, the Lord Advocate made it his business during this period to consult regularly with the Lord President and the Sheriffs Principal before making or terminating appointments to this branch of the judiciary.

43. It was not until the coming into force of sec 57(2) of the Scotland Act 1998 on 20 May 1999 that an opportunity arose for a challenge to be made to this system in the courts. It was not long in coming. On 30 July 1999 Temporary Sheriff Crowe resumed consideration of a case which had come before him for trial on summary complaint in Linlithgow sheriff court on 5 May 1999 and had been continued to a date after 20 May 1999 for the completion of the evidence. Minutes had been lodged under rule 40.5 of the Act of Adjournal (Criminal Procedure Rules) 1996 raising a devolution issue as to whether, by continuing with their prosecution before a temporary sheriff, the Lord Advocate had acted in a way which was incompatible with the accused's Convention right to a fair trial by an independent and impartial tribunal. Temporary Sheriff Crowe rejected this challenge to his presiding at the trial. But on 11 November 1999 it was upheld on appeal by the *High Court of Justiciary in Starrs v Ruxton* , the effect of which has been summarised so helpfully by my noble and learned friend Lord Bingham of Cornhill. The Lord Advocate decided not to seek leave to appeal against that decision to the Judicial Committee. Instead the use of temporary sheriffs for whatever purpose in both civil and criminal case, which had continued without interruption since 20 May 1999, was instantly terminated.

44. Legislation has been passed by the Scottish Parliament which provides for the creation of a new category of part-time sheriffs: sec 11A-11D of the Sheriff Courts (Scotland) Act 1971 , inserted by the Bail, Judicial Appointments, etc (Scotland) Act 2000 , ASP 9, sec 7 . The appointment and removal from office of part-time sheriffs is the subject of new provisions which have been designed to be compatible with the Convention rights. But the Scottish legal system now faces the not

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inconsiderable problem of dealing with objections which have been taken under the devolution legislation since *Starrs* **v** *Ruxton* to the disposal by temporary sheriffs of criminal cases under both solemn and summary procedure between 20 May 1999, when sec 57(2) of the 1998 Act came into ***48*** force, and 11 November 1999, when their use was terminated by the Scottish Executive.

45. The four cases which are now before your Lordships in this appeal were selected by the Law Officers to test the various factual situations that have arisen. David **Millar** was convicted after trial and sentenced by Temporary Sheriff Sinclair in solemn proceedings in Elgin on 27 August 1999. Kerry Payne, having pled guilty before Temporary Sheriff McSherry in summary proceedings in Dundee on 16 September 1999, was sentenced by Temporary Sheriff Eccles on 12 October 1999. Paul Stewart, who had been convicted after trial in summary proceedings in Dundee on 16 February 1999, was sentenced by Temporary Sheriff Pender on 28 June 1999. Joseph Tracey was convicted after trial in summary proceedings in Dundee on 23 September 1999 and sentenced by Temporary Sheriff Kelly on 8 November 1999. In the event no relevant point of distinction has emerged between them. They all stand or fall together on the same point, which is whether the continuation of the prosecutions before a temporary sheriff was an act by the prosecutor which was incompatible with the appellants' Convention rights.

The issues

46. In the High Court of Justiciary the Solicitor General conceded that there was a relevant act in each case for the purposes of para 1 (d) of sched 6 to the Scotland Act 1998 . He also accepted, in the light of *Starrs* **v** *Ruxton* , that the temporary sheriff before whom each was conducted was not an 'independent and impartial tribunal' within the meaning of art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms . His argument was that, as they did not take the objection at the appropriate time, the appellants had each waived their Convention right to object to the presiding judge on this ground. He also argued that, regardless of the question of waiver, the acts of the temporary sheriff were those of a *de facto* judge and should be treated as valid notwithstanding the decision in *Starrs* . The High Court of Justiciary (Lords Prosser, Johnston and Cowie) held that the appellants had waived their right to object to the hearing of their cases by a temporary sheriff and that the Lord Advocate was not obliged by sec 57(2) to comply with a Convention right which no longer existed: ***Millar* v *Dickson*** . The appellants sought and were granted leave to appeal against this decision to the Judicial Committee. The High Court rejected the alternative argument that the proceedings were valid as having taken place before a *de facto* judge. The Crown did not seek leave no appeal against this decision. In my opinion the application of the doctrine which gives validity to the acts of *de facto* judges does not raise a devolution issue within the meaning of para 1 of sched 6 to the 1998 Act.

47. The appellants have identified the issue in this appeal as being whether in the proceedings before the temporary sheriffs their agents effectively waived on their behalf their right to object to the presiding judge. As put, the question of waiver might be thought in itself not to raise a devolution issue as defined in para 1 of sched 6 to the Scotland Act 1998 . But the point which the appellants wish to raise can be put in a way which does bring the question within the jurisdiction of the Judicial Committee under that Schedule. As senior counsel for the appellant Paul Stewart said, the point on waiver bears directly on the issue whether the Lord Advocate was acting compatibly with the appellants' ***49*** Convention rights. Falling within that broad issue there are a series of closely related issues which may be raised by way of a preliminary objection. For example, a person cannot bring proceedings under the Act on the ground that an act in incompatible with the Convention rights unless he would be a victim for the purposes of art 34 of the Convention if proceedings in respect of the right were brought in the European Court of Human Rights: sec 100(1) . So too the question may be raised whether the person has waived his right to object to the act which is alleged to be incompatible. In my opinion preliminary objections of that kind fall within the scope of the questions which have been identified in para 1 of Sched 6 as devolution issues.

48. As the argument developed however the Solicitor General sought to raise a new and more fundamental question in answer to the appellants' devolution issue. This was whether, as the facts have turned out, there was truly an incompatibility with the appellants' Convention rights. He accepted the decision in *Starrs* **v** *Ruxton* and did not seek to attack its analysis. But he maintained that an infringement of the right to an independent and impartial tribunal in art 6(1) did not necessarily

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mean that the act of continuing with the prosecution in these cases was unlawful as being incompatible with that right. The question that had now to be asked was whether in the light of all the facts and circumstances they had a fair trial. It had not been alleged that the temporary sheriffs were affected by an actual lack of independence or impartiality, and it had not been demonstrated that any of the appellants would benefit from being retired or sentenced again by a permanent sheriff. There had been an irregularity, but no more than that. So the acts of the Lord Advocate in continuing to prosecute these cases before the temporary sheriffs were not made unlawful by sec 57(2) of the Act.

49. The statutory regime which sets the context for an examination of these questions is simple and uncompromising. Section 57(2) of the Act provides that a member of the Scottish Executive has no power to do any act which is incompatible with any of the Convention rights. An act which he has no power to do is an unlawful act: see the corresponding provision in sec 6(1) of the Human Rights Act 1998 . Two questions must therefore be addressed. The first is, what is the act which the Lord Advocate is said to have had no power to do? The issue of waiver belongs to that question. The second is, if he had no power to do that act, what are the consequences? To this question there belongs the Solicitor General's argument that the act was not unlawful as the appellants are unable to say that they did not have a fair trial.

The 'act'

50. The act of the Lord Advocate which is in issue in these cases can best be described as conducting a prosecution in proceedings before a temporary sheriff. It is for the prosecutor to determine whether or not a case is to be called: Renton and Brown *Criminal Procedure* , 6th edition looseleaf, para 20.02; *Howdle* ***v*** *Beattie* . He is the master of the instance, and no proceedings can take place in his absence. He is entitled to withdraw the indictment or complaint at any time: *Skeen* ***v*** *Fullarton* . If a conviction results it is for him to lay any information before the court which the sheriff needs to have in order to pass sentence. From start to finish the procedure which takes place in the court is on his initiative. Had it not been for his participation in the proceedings the temporary sheriff would not have been able to determine the issues which were before the court.

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51. In each of the cases which are before us therefore the determination of the criminal charges by the temporary sheriff was the result of an act by the prosecutor. Senior counsel for the appellant Paul Stewart said that, by having the case called in a court which was presided over by a temporary sheriff, the prosecutor was acting incompatibly with the appellants' Convention right. But the prosecutor's act in conducting the prosecution did not end with the calling of the case. By maintaining the prosecution up to and including the moment when sentence was passed he was also performing an 'act' within the meaning of sec 57(2) of the Act. It is for this reason that I do not see any grounds for distinguishing those cases where all the temporary sheriff was required to do after the case was called was to pass sentence from those where the case had to proceed to trial.

Waiver

52. The right which a person has under art 6(1) of the Convention to a hearing by an independent and impartial tribunal is fundamental to his right to a fair trial. Just as the right to a fair trial is incapable of being modified or restricted in the public interest, so too the right to an independent and impartial tribunal is an absolute right. The independence and impartiality of the tribunal is an essential element if the trial is to satisfy the overriding requirement of fairness. The remedy of appeal to a higher court is an imperfect safeguard. Many aspects of a decision taken at first instance, such as decisions on the credibility of witnesses or the exercise of judgement in matters which are at the discretion of the presiding judge, are incapable of being reviewed effectively on appeal. As Lord Steyn said in *Brown* ***v*** *Stott* at p 636 , it is a basic premise of the Convention system that only an entirely neutral, impartial and independent judiciary can carry out the primary task of securing and enforcing Convention rights.

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53. Senior counsel for the appellant Paul Stewart said that there was no example in the case law of the Strasbourg Court of a case in which a tribunal was held to be defective on this ground but that the right to object to it had been waived. But the Court's jurisprudence shows that this element of the right to a fair trial, like the right to a public hearing, is not so fundamental that it is incapable of being waived if all the circumstances which give rise to the objection are known to the applicant and the waiver is unequivocal. In practice waiver of the right is not uncommon, as in the case where the parties agree to the resolution of their dispute by private arbitration or the payment of a fixed penalty is tendered in composition of a criminal charge. The legal system would be unduly hampered if the right to a public hearing by an independent and impartial tribunal were to be incapable in any case of being waived.

54. In *Hakansson and Sturesson v Sweden* , p 16 , para 66 the Court said that, while the public character of court hearings constitutes a fundamental principle enshrined in art 6(1) , neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public so long as this is made in an unequivocal manner and is not counter to any important public interest. The rule that, according to the Court's case law, waiver of a right guaranteed by the Convention, in so far as it is permissible, must be established in an unequivocal manner was emphasised in *Oberschlick v Austria* and *Pfeifer and Plankl v Austria* , in the context of a discussion in each case as to whether there had been a ***51** waiver of the right to an independent and impartial tribunal. The rigorous nature of the requirement that the waiver be unequivocal is illustrated by the grounds on which the argument on waiver was rejected.

55. In *Oberschlick* the Court observed at p 420 , para 51 that neither the applicant not his counsel were aware until well after the hearing of all the circumstances which provided grounds for objecting to the tribunal on the ground of a lack of impartiality. In *Pfeifer* waiver was rejected because of the circumstances surrounding the decision not to object to the composition of the tribunal. The court observed at p 713 , para 38 that the judge had approached Mr Pfeifer in the absence of his lawyer and put a question to him whose implication, as it was essentially a question of law, he was not in a position to understand completely. Similarly, *Werner v Austria* where it was contended that the applicant had waived his right to a public hearing because he did not ask for one, the Court said at p 349 , para 48 that the applicant could not be blamed for not having made an application for a public hearing of his case which had no prospects of success as the relevant provisions of Austrian legislation made no provision for such a hearing in his case.

56. In *Bulut v Austria* the Court held at p 101 , para 34 that the applicant's fear that the tribunal lacked impartiality could not be regarded as objectively justified in view of the limited role that the judge whose impartiality was questioned had played in the questioning of witnesses during the preliminary investigation of the case. It also made this observation: 'In any event, it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained form doing so.' But that was a case where the facts were made known to the applicant's lawyer before the trial began and they were mentioned again by the presiding judge before the court began to hear evidence. In *McGonnell v United Kingdom* the court rejected the argument that the applicant, who was legally represented and did not raise an objection to the fact that the Bailiff was presiding over the Royal Court when it was open to him to do so, had tacitly waived his right to an independent and impartial tribunal. One of the reasons given for this decision in para 44 was that the Court of Appeal had held that there was not structural conflict between the Bailiff's duties in the Royal Court and in the States of Deliberation. It appears that this too was a case where, in the light of authority which was binding on the Royal Court, the objection would have had no prospects of success.

57. In none of the cases which are before us was there was an express waiver of the right to an independent and impartial tribunal. The High Court held that waiver was to be implied from the fact that the appellants' agents remained silent. As Lord Prosser put it, their failure to take a plea in bar of trial was to be construed as a waiver of all rights which require to be asserted by such a plea unless it appeared that there was some ignorance or misapprehension which could be regarded as a reasonable explanation for not taking the point: p 656D – E . Acknowledging that knowledge was at the heart of the matter, he said that the court was not concerned in this case with ignorance of facts but with an alleged ignorance or misapprehension as to the law: p 656G – H . He said that the appellants' agents must be deemed to have known that the effect of sec 57(2) of the Scotland

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Act 1998 was to introduce new provisions giving accused persons a right to an independent and impartial tribunal which could not be assumed to be of no significance and that there were new, unsettled issues to be resolved: pp 658H – 659A .

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58. But it is one thing to know that the effect of sec 57(2) was to introduce new provisions giving accused persons a remedy in domestic law against acts of the prosecutor which were incompatible with their art 6 Convention rights. It is quite another to be in possession of all the information that was needed to appreciate fully that the acts in question were incompatible. The Strasbourg jurisprudence shows that, unless the person is in full possession of all the facts, an alleged waiver of the right to an independent and impartial tribunal must be rejected as not being unequivocal. It was not suggested that in any of the four cases which are before us the appellants' agents were not aware that the sheriff before whom the case had called was a temporary sheriff or of the statutory provisions under which they had been appointed. But no evidence has been produced by the prosecutor, on whom the onus lies, to show that they were aware of the system which had been developed by the executive for making and not renewing these appointments. A full description of this system was given to the court in *Starrs v Ruxton* , pp 215 – 218 . But, as the Lord Justice-Clerk (Cullen) said at p 215A , the content of that description was not a matter of general public knowledge.

59. There are other reasons for not regarding any waiver that might be implied from the absence of a plea in bar of trial based on the Convention right as unequivocal. The circumstances in which the point was not taken are also relevant to this issue. There is no suggestion that, if it had been taken, the prosecutor would have refrained from calling the case or that he would have conceded the point after calling and sought an adjournment so that the case could be called before a permanent sheriff. This is not one of those cases, of which *Oberschlick* and *Pfeifer* provide examples, where there was an undoubted right to object and a clear remedy in the event of doing so. Lord Prosser made it clear at p 659A that he was not suggesting that the appellants' agents must be deemed to have known just how the unsettled issues in the new legal landscape would be resolved. I agree that there is no basis for making that assumption. But in my opinion the fact that there is no basis for it strengthens the argument that it would not be reasonable to infer waiver in any of these cases. The appellants were not, through their agents, in a position to make an informed choice as to what to do, as they were in a situation where the law was unsettled and the consequences of that choice were not predictable.

60. The Solicitor General, in a notable change of position from what which he had adopted in the High Court, said that the issue of waiver was not central to these appeals. He maintained that the decisive factor was the issue whether or not the appellants had a fair trial, bearing in mind the lack of evidence as to any real difference in the result which was to have been expected if the cases had been heard by a permanent sheriff. He did not seek to develop a sustained argument in support of the reasons for holding waiver established which were given by the High Court. In my opinion the High Court were in error on this point, as the appellants' agents were not in a position to make a fully informed choice. I would hold that sufficient grounds for holding that there was an unequivocal waiver of the Convention right have not been made out and that, subject to the argument to which I now turn, the appellants must succeed in these appeals.

The Consequences

61. The Solicitor General said that the facts and circumstances did not disclose any infringement of the appellants' right to an independent and impartial *53 tribunal amounting to an incompatibility with art 6(1) of the Convention. In the absence of such an incompatibility there was no ‘act’ of the Lord Advocate which he had no power to do in terms of sec 57(2) of the Act. Even if there was such an incompatibility, there was nevertheless no unlawful act. He maintained that sec 57(2) was disapplied by sec 57(3) in this case, as he was giving effect to the primary legislation under which the temporary sheriffs had been appointed and were authorised to sit in the sheriff court.

62. The essential point on which he based his main argument was that the question as to whether the Lord Advocate's act was unlawful had to be tested at the date when the challenge was made. This had to be done in the light of all the facts

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and circumstances which were known to exist at that time. All there was in this case was a perception that the temporary sheriffs lacked independence. But the reality was that they did not lack independence in fact. Their judgement was unaffected, and there were no grounds for saying that the verdicts of guilty were unsafe or the sentences imposed were excessive. The appellants were unable to show that they would derive any real benefit from being retired or sentenced again. He invited us to hold that the decisive factor in these cases was not that the right to an independent and impartial judge had been waived because no plea in bar of trial had been taken at the outset, but that the use of temporary sheriffs in these cases made to difference in fact to the result.

63. In my opinion this argument overlooks the fundamental importance of the Convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality: *McGonnell* **v** *United Kingdom* at p 306 , para 48 quoting *Findlay* **v** *United Kingdom* pp 245 , para 73. As Lord Clarke said in *Rimmer* **v** *HM Advocate* , the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings.

64. There is ample authority in our domestic law to support these propositions. In *Bradford* **v** *McLeod* , the convictions and sentences were suspended on the ground of a suspicion that the sheriff was biased even although, as the Lord Justice-Clerk (Ross) said at p 248F , there was no reason to think that the complainers did not in fact receive fair trials. Lord Dunpark said at p 249A that the question was not whether the complainers received fair trials but whether what the sheriff said was enough to create a suspicion that he might not be impartial. The same result followed in *Doherty* **v** *McGlennan* , where there was a suspicion about the sheriff's impartiality. These decisions were based on the rule which Eve J described in *Law* **v** *Chartered Institute of Patent Agents* , at p 289 that, if circumstances exist which give rise to a suspicion about the judge's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists. It is also worth noting that the same rule was applied in *R* **v** *Bow Street Metropolitan Stipendiary Magistrate , Ex parte Pinochet Ugarte (No 2)* ***54*** where, as Lord Browne-Wilkinson made clear at pp 129E – F and 135H , the result was in no way dependent on the judge personally holding any view or having any objective regarding the question whether Senator Pinochet should be extradited. The fairness of the proceedings was not in question, but that was not the issue which the House had to decide.

65. The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice: see *Dimes* **v** *Properties of Grand Junction Canal* ; *R* **v** *Gough* at p 661 per Lord Goff of Chieveley. It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand. The Solicitor General's submission that the matter, if raised after the event, should be considered in the light of all the facts bearing on the question whether there was a fair trial is contradicted by this line of authority.

66. There is no reason to believe that the position is any different in the jurisprudence of the Strasbourg Court. The Solicitor General said that he had not found any case where that court, having held that a tribunal was not an independent and impartial tribunal within the meaning of art 6(1) of the Convention and that there had been no waiver of that Convention right, nevertheless held that there had in the event been no breach of art 6(1) . In *McGonnell* **v** *United Kingdom* the court said at p 308 in para 57 that the applicant had legitimate grounds for fearing that the Bailiff had been influenced by his prior participation in the adoption of the development plan which was in issue in the case, and that the doubt which this raised, however slight its justification, was sufficient in itself to vitiate the impartiality of the Royal Court. It is plain from this

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decision that there is no room for the argument that the question whether there was a breach of this Convention right can be tested after the event by asking whether the proceedings overall were fair.

67. The decision in *Starrs v Ruxton* leads therefore to this result. Temporary sheriffs, viewed objectively, lacked the quality of independence and impartiality to which all accused persons are entitled under art 6(1) of the Convention. This lack of independence and impartiality, however slight, was sufficient to disqualify temporary sheriffs from taking any part in the determination of criminal charges at the instance of prosecutors acting under the authority of the Lord Advocate. It also made it unlawful for prosecutors to conduct proceedings in the sheriff court under the authority of the Lord Advocate with a view to the determination of criminal charges by temporary sheriffs in that court. The Lord Advocate had no power to conduct those proceedings before them in that court, as this was incompatible with the accused's Convention right: sec 57(2) of the 1998 Act. The proceedings were thus vitiated from the moment when they were brought before the temporary sheriffs for their determination. The Convention right and the statutory fetter which the 1993 Act has imposed on the powers of the Lord Advocate thus march hand in hand. Under the devolved system the disqualification of a tribunal whose objective independence or impartiality is vitiated gives raise, at once and at the same time, to a lack of competence on the part of the Lord Advocate.

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68. As for the argument that sec 57(2) was disapplied in regard to proceedings before temporary sheriffs by sec 57(3) , I think that this question is sufficiently closely linked to the question whether the Lord Advocate's exercise of his function as prosecutor was incompatible with the appellants' Convention rights to come within the scope of the devolution issue. But I do not think that there is anything in the argument.

69. In *Starrs v Ruxton the High Court* rejected a submission which was made under reference to sec 6(2)(a) of the Human Rights Act 1998 that the Lord Advocate could not have acted differently: see the Lord Justice-Clerk at p 231B – C ; Lord Reed at p 256A . The Solicitor sought this case to rely instead on sec 6(2)(b) , but in my opinion this submission too is unsound. The Lord Advocate was not giving effect to sec 11 of the Sheriff Courts (Scotland) Act 1971 within the meaning of sec 6(2)(b) of the Human Rights Act 1998 when these proceedings were being conducted before the temporary sheriffs by the procurator fiscal acting on his authority. Section 11 of the 1971 Act dealt with the appointment of temporary sheriffs. It did not define the circumstances in which they were to be used. Their appointment was not in itself incompatible with any of the Convention rights. Everything depended upon the use that was made of them as to whether there was an incompatibility. But no rules for their use were laid down by the statue, so it cannot be said that there was anything in sec 11 to which effect was being given by the prosecutor.

Conclusion

70. For these reasons, and those given by my noble and learned friend Lord Bingham of Cornhill with which I agree, I would allow these appeals. I would leave it to the High Court to make such orders as fall to be made in consequence of this judgement in order to dispose of the various bills of advocation and suspension which the appellants presented to that court: see r 40.11 of the Act of Adjournal (Criminal Procedure Rules) 1996 .

Lord Clyde—

71. —On 20 May 1999 the holder of the office of Lord Advocate in Scotland became a member of the new Scottish Executive by virtue of the arrangements for devolution introduced by the Scotland Act 1998 . On 11 November 1999 judgement was given by the High Court of Justiciary in *Starrs v Ruxton* . In that case it was held that the continuation of a trial which was in course before a temporary sheriff constituted a violation of the right of the accused under art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to a trial before an ‘independent and impartial tribunal’.

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Section 11 of the Sheriff Courts (Scotland) Act 1971 empowers the Secretary of State to appoint a temporary sheriff to act in a sheriffdom in certain circumstances. While the appointments were made by the Secretary of State, the Lord Advocate had in recent years come to play an important part in the finding of candidates for the office, in considering applications, in consulting and obtaining opinions on the suitability of candidates, and eventually forwarding a finalised list to the Scottish Courts Administration for the appointments to be made. Appointments were in practice made for a period of one year only and the Lord Advocate also played a significant part in the re-appointments of current temporary sheriffs. By sec 11(4) of the 1971 Act the office of temporary sheriff was open to recall. That factor together with the one *56 year limit were the two critical considerations which led the court in *Starrs* to hold that the temporary sheriff in that case did not possess and did not appear to possess the independence required by art 6(1) . The lack of a security of tenure of the office was seen to be fatal to his independence.

72. The appellants in three of the four appeals before us have been convicted and sentenced by temporary sheriffs during the period between 20 May 1999 and 11 November 1999. In the fourth case (Stewart) the proceedings began and the conviction occurred before 20 May 1999 but the proceedings continued after that date and the sentence was imposed on 28 June 1999. In one case (**Millar**) the proceedings were on indictment, while the other three cases were summary proceedings. In Payne the accused pled guilty and was subsequently sentenced. In Tracey the accused was found guilty after trial and subsequently sentenced. The four cases represent different situations but all give rise to the same problem. Following on the ruling in *Starrs* the appellants sought to have the effect of that decision applied to their own cases. They raised their appeals by way of Bills of Suspension, or in the case of **Millar** a Bill of Advocation. The High Court of Justiciary refused the Bills, principally on grounds of Waiver.

73. It was common ground between the parties before us that the appeals raised a 'devolution issue' within the meaning of para 1(d) of pt I of sched 6 to the Scotland Act 1998 . It is accepted that although it was the procurator fiscal who was purportedly exercising the function it was still to be treated as an exercise by the Lord Advocate. There was some discussion about the precise identity of the function in issue. 'Functions' is defined in sec 126(1) as including powers and duties. In sec 57(2) it is provided that a member of the Scottish Executive has no power to do any act so far as it is incompatible with any of the Convention rights. But it was not suggested that there was any distinction to be made for the purpose of these provisions between the purported exercise of a function by the Lord Advocate and an act by him.

74. For present purposes it is useful to identify what was the purported function or the act. The suggestion was made that it might be the calling of the case before the temporary sheriff, but even although the prosecutor may take an initiative in that matter, that approach seems to me to be too narrow. In my view in the circumstances of the present appeals this is not a matter to be analysed into a detailed study of every step which he took. The function which he was purporting to exercise in each case was that of conducting a prosecution. That was the act which he was doing on every occasion when the case came before the temporary sheriff. The question then is whether in conducting and continuing to conduct these cases before a temporary sheriff, his acts were incompatible with the appellants' Convention rights.

75. It was not submitted that the decision in *Starrs* was wrong. We were not invited to overrule it. The Solicitor General sought to distinguish it on the basis that the challenge was raised in *Starrs* while the proceedings were still current, while in the present cases the point has been raised by way of appeal some time after the dates of the conclusion of the cased. This difference enabled him to argue that in the present cases the whole circumstances could be viewed in the round in a way which was not possible and was not attempted in *Starrs* , and in a way which would accord with the global approach generally taken by the European Court of Human Rights. But while it is possible in that way to view the present cases in light of the whole course which they have taken, one is still faced with the decision in *Starrs* that a temporary sheriff is not an independent *57 tribunal. What the Solicitor General sought to do was to argue that on the global view available in the present cases it can be held that the appellants have in the totality of the circumstances, and notwithstanding the lack of independence of the tribunal, nevertheless had a fair trial.

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76. This was a somewhat different argument from the one which was advanced before the High Court and accepted by them. No longer was the Solicitor General basing his case on waiver. He accepted that the focus of the argument had changed. The appellants had put at the forefront of their case a submission that the acts of the procurator fiscal were in light of sec 57(2) *ultra vires* and accordingly that they were null and void. It was in response to this argument that the Solicitor General submitted that on a global view of the whole facts and circumstances in each of the four cases it could still be held that they had each enjoyed a fair trial and that there was nothing in the acting of the procurator fiscal which ran counter to art 6(1) . Thus as the case developed before us it became evident that the battle was now joined on a quite different field than that on which the parties had been engaged before.

77. Before leaving the former scene of combat I should say that I find it difficult to accept the argument on waiver on which the High Court proceeded. There is a question, to which I shall return later, whether in the context of criminal proceedings the right to an independent and impartial tribunal can always be waived, but, even assuming that it can be, I have not been persuaded that a case of waiver has been established in the present cases. No doubt the accused, or at least their legal advisers, will have known of the opportunity afforded by the Scotland Act to challenge acts by the Lord Advocate which were incompatible with a Convention right. No doubt they will have been aware that under the Convention their clients were entitled to trial before an independent and impartial tribunal. They may well have known that the sheriff before whom the case was being conducted was a temporary sheriff. But it has not been shown that they knew of the lack of security of tenure of the temporary sheriffs in general nor of the involvement of the Lord Advocate in their appointment. The way in which they were appointed and used, at least since May 1997, was, as the Lord Justice-Clerk (Cullen) observed in *Starrs* (p 215), not a matter of general public knowledge. Without knowing the factual background to the appointment of temporary sheriffs and the close participation of the Lord Advocate in the process it would not be possible to make any waiver of the objection to the case proceeding before such a tribunal. Waiver must essentially depend upon a knowledge of the relevant facts on which the right to object is based. In the present cases there is no evidence to support the proposition that the accused, or their representatives, knew or even suspected that there might be grounds for objection. Without evidence to demonstrate such knowledge I made some submissions on the matter of waiver but his principal concern was to treat the possibility of waiver as an ingredient in the global view which he sought to promote and the submissions which he made in regard to waiver were to an extent at least directed to the significance of that possibility in the context of an overall view.

78. The new approach to the case requires some consideration of art 6(1) and I now turn to that article. It is critical for the respondent's argument that the requirement for an independent and impartial tribunal should be seen as simply as aspect of the governing requirements for fairness, so that it would be possible ***58** to sustain the validity of a criminal conviction on grounds of fairness even although the tribunal lacked independence and impartiality. The approach which he advocates makes fairness the ultimate test, so that if on a review of the whole circumstances the trial can be found to be fair the lack of an independent and impartial tribunal can be held not to be fatal.

79. I would accept that on a board view of art 6 the ultimate essential is that a fair trial should be secured. In *Deweer v Belgium* at p 460 , para 49 it was recognised that the 'right to court' is a constituent element of the right to a fair trial. But how the goal of a fair trial is achieved is a matter of the particular circumstances of each case so that general propositions cannot always be usefully or safely prescribed. The hearing to which everyone is entitled in terms of art 6(1) is a hearing which is fair, which is public, which is held within a reasonable time, and which is held by an independent and impartial tribunal established by law. The concept of fairness may, as was recognised in *Brown* the implied right not to incriminate oneself was seen as subsumed under the governing requirement for fairness. But that case was not concerned with the issue of an independent and impartial tribunal. The requirement that the hearing be in public is expressly qualified in the article itself, so it is not a universal necessity and it can be waived (eg *Zumtobel v Austria* p 133 , para 34; *Hakansson and Sturesson v Sweden* p 16 ; *H v Belgium*). The hearing must be within a reasonable time. But while that may in itself be categorised as an absolute requirement, the application of the concept, like the concept of fairness, is matter of consideration in light of the facts and circumstances of the particular case. No doubt the particular rights set out in art 6(2) and (3) are all aspects of the general requirements of fairness.

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80. There remains the requirement that the tribunal be independent and impartial and established by law. Freedom from bias may be analysed into distinct considerations of structural independence and objective impartiality, but the two concepts are closely linked and it may be sufficient to speak simply of independence. Judicial independence is of fundamental constitutional importance. It is an indispensable condition for the preservation of the rule of law. It is a principle which has been stoutly protected by the Scottish judges for centuries(Mitchell, *Constitutional Law*). We are fortunate in this country that for a very considerable length of time this principle has never been lost, although through the annals of history there may have been times when its light burned less brightly. But the complaisance which some forms of government may impose upon it. In my view the requirement that a tribunal be independent and impartial is of such fundamental importance that it should not lightly be subordinated to other considerations of fairness.

81. As matter of generality a lack of independence in the tribunal may not necessarily be fatal to the validity of a hearing. The recent decision of the *House of Lords in R v Secretary of State for the Environment, Transport and the Regions ex parte Alconbury Developments Ltd* provides one example where in the particular context of town and country planning an overall fairness in the process may be achieved despite a lack of independence in one of the stages. In such cases the global view of the whole proceedings may make it possible to conclude that overall there was a fair trial. But it is important to notice that the impartiality of the ***59*** tribunal in criminal cases is not a matter which can be cured by the existence of a right of appeal to a court which itself satisfies the requirements of art 6(1) (*De Cubber v Belgium*). In *Findlay v United Kingdom* the Court held that the lack of independence of the tribunal in court-martial proceedings was not remedied by the presence of safeguards, which included on oath taken by the court-martial board, and stated at p 246 (para 79): 'Nor could be defects… be corrected by any subsequent review proceedings. Since the applicant's hearing was concerned with serious charges classified as "criminal" under both domestic and Convention law, he was entitled to a first instance tribunal which fully met the requirements of article 6(1) .

It is clear that as matter of generality it is possible to waive a Convention right. It has been repeatedly affirmed that to be effective a waiver must be established in an unequivocal manner and there must be 'minimum guarantees commensurate to its importance' (*Pfeifer and Plankl v Austria* , p 712, para 37). But the critical question here is whether a waiver is possible where the matter is one of a lack of independence and the case is a criminal one. I have not been persuaded from the material put before us that an objection to the lack of independence and impartiality 'such as the one presented by the appellants here' has been recognised by the European Court of Human Rights as one which can be waived. In *Deweer v Belgium* , pp 460-461 (para 49) the Court recognised that waivers could be made in civil matters in the form of arbitration clauses and in criminal cases in the form of fines paid by way of composition. The Court stated that 'The waiver, which has undeniable advantages for the individual concerned as well as for the administration of justice, does not in principle offend against the Convention'. But that is a very different kind of situation from that which is before us in the present cases. In *Pfeifer and Plankl v Austria* the court held that the decision in question was invalid 'even supposing that the rights in question can be waived by a defendant' p 713 (para 39). In *Bulut v Austria* two opportunities were given to the accused's lawyer to challenge one of the judges on the ground of his previous involvement in the case. On the first occasion the lawyer did not reply to the note asking whether he wished to make a challenge. On the second occasion, at the outset of the trial, the record of the court was to the effect that the parties had waived the right to raise the point. The European Court of Human Rights held that the fear of impartiality lacked objective justification, adding at p 101 (para 34) that in any event: 'it is not open to the applicant to complain that he had legitimate reasons to doubt the impartiality of the court which tried him, when he had the right to challenge its composition but refrained from doing so.' The court did not decide whether a waiver could be made. Judge Morenilla, at pp 117 – 118 , para 5, in his partly dissenting opinion thought the right to an impartial tribunal was an absolute right which could not be waived and he pointed out that the court had an opportunity to decide the issue but had not considered it appropriate to do so. I note that in Scotland it has even been doubted whether a declinature by a judge who was a shareholder in one of the parties to a criminal proceeding could be waived by consent of the parties (*Caledonian Railway Co v Ramsay*).

82. In light of this consideration of the fundamental importance of the right to an independent tribunal in criminal cases I turn to consider the Solicitor General's proposition that if a global view is taken of the whole proceedings in each of these four cases it should be held that in each case there has been a fair trial. The Solicitor General listed several factors which he argued supported the fairness of the proceedings. All the appellants had been found or had pled ***60*** guilty. There was nothing to show that the verdicts were unsafe or that a fulltime sheriff would have done anything different from what was done, so

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that there was no real purpose to be served by requiring the appellants to undergo a second trial. The appellants had not made any challenge to the proceedings until after the proceedings were concluded. No criticism was made that the particular sheriffs in fact lacked independence or impartiality. Nor was it said that the system by which they had been appointed in fact lacked independence.

83. But even if one was to adopt the global approach put forward by the Solicitor General and test the matter by the criterion of fairness, it seems to me that there are other considerations to be taken into account. What is required here is a consideration of all the circumstances and the forming of a view in the light of all of them. The decision in *Starrs* was pronounced as one of general application to temporary sheriffs. The Lord Justice-Clerk stated (p 213): 'The point is of general importance, not only for its potential effect in individual cases but also for any future consideration of the terms of the relevant legislation and any appointments made thereunder.' So one has the situation of the appellants having been tried, convicted and sentenced by a tribunal which was not independent. In the absence of any defence of waiver it seems to me far from fair to them that they should not have the benefit of a decision which plainly would have been applicable to their cases. The appearance that justice is being done is as important as the actual doing of justice. The independence of the judiciary is not an empty principle which can be forgotten simply because one thinks that a correct conclusion has been reached. Rightly or wrongly there is always room for an uneasy fear that there might have been some improper influence affecting the mind of the judge where he lacks independence. The principle is far too important to allow it to be passed over in the way which the respondent suggested.

84. The Solicitor General's final argument was that even if the actings in question were incompatible with art 6(1) nevertheless they should not be held to be outside his powers in terms of sec 57(2) because they fell within the scope of sec 57(3) . That section provides that subsec (2) is not to apply to an act of the Lord Advocate in prosecuting any offence which because of sec 6(2) of the Human Rights Act 1998 is not unlawful under sec 6(1) . Section 6(2) excepts the unlawfulness of an act incompatible with the Convention in two circumstances. The first is where because of some provision of primary legislation he could not have acted differently. That does not apply here and it was on the second that the Solicitor General sought to found his argument. It provides: '(b) in the case of one or more provisions of… primary legislation which cannot be read or given effect in a way which is compatible with Convention rights, the authority given effect in a way which is compatible with Convention rights, the authority was acting so as to give effect to or enforce those provisions.' The argument then is that sec 11 of the Sheriff Courts (Scotland) Act 1971 is incompatible with the Convention and the procurator fiscal in conducting the prosecution was 'giving effect' to that provision. In my view it is too strained a construction of sec 57(3) to say that proceeding with a case before a temporary sheriff is giving effect to the power to appoint temporary sheriffs.

85. It should not need to be said that these cases cast no reflection at all on the character or conduct of the temporary sheriffs engaged on them, nor indeed on any other of the temporary sheriffs. Their personal integrity and independence of mind are not in doubt and it is not suggested that there was any conscious or unconscious bias or any subjective partiality felt or displayed in their work. But ***61** it is as important that the appearance of justice be safeguarded as well as the actual doing of justice and it is on that account that I am driven to the conclusion that the convictions in these four cases cannot be held to be fair. Now that it has been held that temporary sheriffs lack independence, a decision which has not been questioned in these appeals, and in the absence of an effective plea of waiver, I see no alternative to a finding that the acts of the prosecutors in each of these four cases were unlawful for the same reasons as those which applied in *Starrs* . The principle of independence and impartiality of the tribunal particularly in criminal cases' is too precious to be put at any risk. I should be sorry if in a case like the present we were to allow any derogation from that principle, even if the consequences of holding to it involve the invalidation of convictions which from every other angle were safe and unimpeachable.

86. I would accordingly allow these appeals.

Lord Scott of Foscote—

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87. —I agree that for the reasons given by my noble and learned friends, Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Clyde, these appeals should be allowed.

Representation

Patrick Wheatley - Purdie & Co - Crown Agent

The Judicial Committee allowed the appeals

(c) Scottish Council of Law Reporting

Man O'War Station Ltd v Auckland City Council [2002] UKPC 28

PRIVY COUNCIL

LORDS, STEYN, MACKAY OF CLASHFERN, MILLETT, PHILIPS OF WORTH MATRAVERS, SCOTT OF FOSCOTE

7, 29 MAY 2002

29 MAY 2002

Natural justice — Judge — Bias — Disqualification of judge on grounds of bias — Appearance of bias — Whether judge disqualified from sitting by reason of undisclosed acquaintance and association with first Respondent's principal witness

R Craddock QC, M Muir, M Ockleston (All New Zealand Bar) for the Appellants

A Galbraith, R Hindle, J Anderson (All New Zealand Bar) for the Respondents

DLA; Gregory Rowcliffe and Milners

LORD STEYN

(reading the Judgment of the Court): **[1]** There are two appeals against judgments of the New Zealand Court of Appeal before the Privy Council. The principal judgment under appeal is dated 11 April 2000. The second judgment under appeal is dated 27 November 2000. In the second judgment the Court of Appeal rejected a motion to recall the first judgment on the ground that Blanchard J, who gave the principal judgment, was disqualified by apparent bias. Logically, it was necessary for the Privy Council to consider separately and first the appeal against the second judgment of the Court of Appeal. That is how the Board invited counsel to proceed. Having heard the Appellants' counsel's argument on the matter and without calling on counsel for the Respondent their Lordships were satisfied that the judgment of the Court of Appeal of 27 November 2000 was correct and announced that they would humbly advise Her Majesty that the appeal against that judgment should be dismissed with costs. These are the reasons for that advice.

[2] In outline the forensic background is as follows. By judgments dated 19 August 1997 and 31 July 1998 Anderson J in the High Court of New Zealand upheld on the basis of the implied dedication doctrine the public status of certain roads at the eastern end of Waiheke Island. The two Appellant companies, who were identified in the proceedings with a Mr Spencer, appealed to the Court of Appeal. The Auckland City Council cross appealed against a part of the High Court judgment in which Anderson J held that a further section of the roads at issue was not a public road. In a judgment dated 11 April 2000 the Court of Appeal (Gault, Henry, Keith, Blanchard and Tipping JJ) dismissed the appeal of the Appellants. In the same judgment the Court of Appeal allowed a cross appeal of the Council and confirmed on the basis of the implied dedication doctrine the public character of the further section of road. Blanchard J delivered the judgment of the Court of Appeal.

[3] The unsuccessful Appellants applied to the Court of Appeal for an order setting aside or, in the alternative, recalling the principal judgment. In an amended notice dated 19 July 2000 the ground of the application was stated to be as follows:

> "One of the members of the Court, the Rt Hon Justice Blanchard, was disqualified from so sitting by reason of his undisclosed acquaintance and association with the first Respondent's principal witness and the resulting appearance of bias . . ."

The witness in question had been Mr Ian Grierson, a surveyor. He was the son of Mr Max Grierson, who had been the judge's former employer, long term partner and mentor for some 30 years. Mr Ian Grierson was the brother of Mr Bruce Grierson who had been a partner of the judge for some 11 years.

[4] Before and at the hearing of the motion to recall the principal judgment counsel for the Appellants submitted that the court hearing the application should exclude all members of the court who decided the appeal. Blanchard J obviously could not sit. Henry J had retired. In the result the Court of Appeal decided that Gault, Keith and Tipping JJ would hear the application. It was within their power to hear and determine the application. Nothing was said before the Privy Council which could throw any doubt on the legality, regularity or appropriateness of the proceedings of the Court of Appeal so constituted in hearing and deciding the application. In a judgment of the court Gault J dismissed the motion.

[5] The issue is whether the Court of Appeal erred in ruling against the submission that Blanchard J had been disqualified, by reason of his acquaintance and association with Mr Ian Grierson, from sitting in the case. There is no suggestion that the judge had been biased. The case is that there was an appearance of bias.

[6] The Appellants advanced that case both on the basis of the relationship between Blanchard J and Mr Ian Grierson's father, which has been described above, and of the relationship of Blanchard J with Mr Ian Grierson himself. As to the latter, the broad picture, as revealed in the evidence before the Court of Appeal, was as follows:

(i) The judge and Mr Ian Grierson were not personal friends.

(ii) Although the two men had met from time to time at gatherings (usually those marking notable events in Mr Max Grierson's life), they did not belong to the same sporting clubs or business associations, and had nothing much in common.

(iii) Mr Ian Grierson had not spoken to the judge since his appointment to the High Court bench some 8 years before the appeal was heard.

(iv) The firms of which the judge was a partner before he was appointed to the bench had acted for the firm of which Mr Ian Grierson was a partner before its incorporation as a company. The judge had never acted for Mr Ian Grierson personally.

(v) The judge had acted as a trustee in respect of retirement arrangements for the partners of Mr Grierson's firm prior to incorporation of that partnership in around 1984. However, there was apparently no direct contact between the judge and Mr Ian Grierson on a professional basis.

(vi) The broad picture is that the two men had known of each other for a long time and had some sporadic contact over the years, but had no contact at all since the judge was appointed to the High Court Bench.

While this brief summary is necessarily imprecise it is unnecessary to set out the effect of the evidence in greater detail.

[7] Gault J considered the importance of Mr Ian Grierson's role in the trial. He said that Mr Ian Grierson was not

only a witness as to technical survey work but also as to “events and the roles of key people involved at the relevant times”. The Court of Appeal treated him as an important witness.

[8] Against this background Gault J approached the matter on the basis of legal principles established in New Zealand law. In accordance with the speech of Lord Goff of Chieveley in *R v Gough* [1993] AC 646, [1993] 2 All ER 724, which had been followed by the New Zealand Court of Appeal in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142, Gault J addressed the question whether there was a real danger of bias on the part of Blanchard J He also took into account the guidance of the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, and observations by the Constitutional Court of South Africa in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147, 177.

[9] Gault J rejected the contention that there was an appearance of bias. He explained the position as follows:

> “The submission is of appearance of bias by a Judge of some eight years standing. He participated in the hearing of the appeal in a civil case on a dispute between landowners and a local authority. He had occasional association before appointment with a surveyor witness essentially in unrelated business circumstances. Even taking full account of the relationship both Judge and witness had with Mr Max Grierson we do not consider this gives rise to concern for a real danger or possibility of bias. The fact of a solicitor-client relationship which terminated eight years earlier does not add to that. To take any other view would be unrealistic in the New Zealand situation; even in Auckland. Senior legal practitioners with busy commercial and conveyancing practices must come into contact and establish business associations with a considerable proportion of the professional practitioners in related fields such as surveying and civil engineering. The proposition that because of such an association they should be regarded as in danger of failure to carry out judicial functions impartially eight years after retiring from practice is unreal.”

This was the basis on which the reconstituted Court of Appeal unanimously dismissed the motion.

[10] On appeal to the Privy Council the Appellants invited the Board to adopt for New Zealand the adjustment of the test in *Gough* enunciated by Lord Hope of Craighead in *Magill v Porter and Weeks* [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 WLR 37, namely that “the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased” (para 103). This adjustment is consistent with European and Scottish jurisprudence, and is broadly in line with Australian jurisprudence. Both tests proceed from the point of view of an informed view of the facts, and both concentrate on the possibility of bias. But the adjusted test emphasises the perspective of the fair-minded observer rather than the view of the court. The Board does not have the benefit of the view of the Court of Appeal on the point whether the law in New Zealand should be so altered. In these circumstances their Lordships are not persuaded that it would be right to restate the law for New Zealand as requested. In any event, the distinction is a fine one, notably since even on the *Gough* test the court undoubtedly had to take account of public perception and confidence. On the facts of the present case the difference between the two tests cannot arguably influence the outcome.

[11] This is a corner of the law in which the context, and the particular circumstances, are of supreme importance. In their Lordships' view an intense focus on the essential facts of the case, as highlighted by Gault J, convincingly shows that there was no danger or possibility of apparent bias. The same is true on the *Magill* test. Much was made by counsel for the Appellants of the analogy of a judge being disqualified from sitting on a case involving the son of his brother or best friend. No doubt this proposition would usually be correct. But such disembodied analogies, stripped from their context, are not helpful. They do not answer the specific reasoning of the Court of Appeal on the particular facts of the present case. The lengthy written arguments, and sustained oral argument of counsel for the Appellants, have in their Lordships' view in no way dented the reasoning of the Court of Appeal. On the contrary, their Lordships are satisfied that no fair-minded observer could possibly have doubted the neutrality and objectivity of Blanchard J.

Appeal dismissed.

End of Document

Lawal v Northern Spirit Limited

Positive/Neutral Judicial Consideration

Court
House of Lords

Judgment Date
19 June 2003

House of Lords

[2003] UKHL 35, 2003 WL 21353226

Before: L. Bingham of Cornhill, L. Millett , L. Nicholls of Birkenhead, L. Rodger of Earlsferry, L. Steyn

Thursday 19th June, 2003

Session 2002–03 on appeal from: [2001] EWCA Civ 1218]

ORDERS OF REFERENCE, ETC.

DIE MERCURII 13, NOVEMBRIS 2002.

Appellate Committees—Two Appellate Committees were appointed pursuant to Standing Order.

DIE MARTIS 18, FEBRUARII 2003.

Lawal *(Appellant)* ***v. Northern Spirit*** *Limited* (England)—The appeal of Adekunle Adejare **Lawal** was presented. The respondents having notified their intention not to enter appearance, it was ordered that Standing Order **V** (*Security for costs*) be dispensed with. It was further ordered that the statement and appendix be prepared in consultation with the appellant by the *amicus curi* nominated by Her Majesty's Attorney General; and that, in accordance with Standing Order VI, the statement and appendix be lodged on or before 1st April next.

DIE MARTIS 1, APRILIS 2003.

Lawal *(Appellant)* ***v. Northern Spirit*** *Limited* —The appeal was set down for hearing and referred to an Appellate Committee.

DIE MARTIS 29, APRILIS 2003.

Lawal *(Appellant)* ***v. Northern Spirit*** *Limited* —The petition of the Lord Chancellor's Department praying for leave to intervene in the said appeal was presented and referred to an Appeal Committee.

Appeal Committee—The 43rd Report from the Appeal Committee was agreed to and the following Order was made—.

Lawal *(Appellant)* ***v. Northern Spirit*** *Limited* —That the petition of the Lord Chancellor's Department that they might be heard or otherwise intervene in the said appeal be allowed.

MINUTES OF PROCEEDINGS.

DIE JOVIS 8, MAII 2003.

Present :

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L. Bingham of Cornhill.

L. Millett.

L. Nicholls of Birkenhead.

L. Rodger of Earlsferry.

L. Steyn.

The Lord Bingham of Cornhill in the Chair.

The Orders of Reference are read.

The Committee deliberate.

Counsel and Parties are called in.

Mr A. **Lawal** appears in person as the appellant.

Mr J. Cavanagh QC appears for the Lord Chancellor's Department, in intervention.

Miss Sarah Moore appears on behalf of Her Majesty's Attorney General as *amicus curi* .

Mr **Lawal** indicates that he is content that Miss Moore should address the Committee.

Miss Moore heard.

Mr **Lawal** heard.

Mr Cavanagh heard.

Miss Moore heard in reply.

Mr **Lawal** further heard.

Further and fully heard.

Bar cleared; and the Committee deliberate.

A draft Report is laid before the Committee by the Lord Steyn.

The Report is considered and agreed to, *nemine dissentiente* .

Ordered , That the Lord Steyn do make the Report to the House.

Ordered , That the Committee be adjourned *sine die* .

41st REPORT .

from the Appellate Committee.

[19 June 2003]

ORDERED TO REPORT.

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The Committee (Lord Bingham of Cornhill (Chairman), Lord Nicholls of Birkenhead, Lord Steyn, Lord Millett and Lord Rodger of Earlsferry) have met and have considered the cause ***Lawal*** ***v***. ***Northern*** ***Spirit*** *Limited* . We have heard the appellant in person and counsel on behalf of the Lord Chancellor's Department in intervention. We have heard counsel on behalf of Her Majesty's Attorney General as *amicus curi* .

JUDGMENT

1.. This is the considered opinion of the Committee.

I. The Issue

2.. The issue in this appeal is whether, in circumstances in which a Queen's Counsel appearing on an appeal before the Employment Appeal Tribunal ("EAT") had sat as a part-time judge in the EAT with one or both of the lay members (called the "wing members") hearing that appeal, the hearing before the EAT was compatible with Article 6 of the European Convention on Human Rights and the common law test of bias. It is not suggested that there was actual bias. The question is whether in the view of a fair-minded and informed observer there was a real possibility of subconscious bias on the part of the lay member or lay members.

3.. The question is important because the current practice of the Lord Chancellor's Department is to appoint leading counsel, who are Recorders and who have experience of employment law, to sit as part-time judges in the EAT. They undertake to sit at least 20 days a year. Until called in question in the present case, it was thought that there were no restrictions on the freedom of such individuals to appear as counsel before the Tribunal of which they are part-time members. The challenge before the House, as it was before the EAT and the Court of Appeal, is not tied to the particular circumstances of the case. Indeed, the House has before it only the bare facts as incorporated in the issue outlined. The attack is on the system. If it is well founded the current practice must come to an end.

II. The case before the Employment Tribunal

4.. Given the systemic issue involved, it is possible to summarise the background briefly. The appellant brought a claim for racial discrimination on the ground of the failure of his employers to produce a reference following the termination of his employment. The employers put forward a substantive defence. The Employment Tribunal dismissed the case on the grounds that the Race Relations Act 1976 only gives rights to *current* employees. In so deciding the Employment Tribunal followed a decision of the *Court of Appeal in Adekeye* ***v*** *Post Office (No. 2) [1997] IRLR 105* , the correctness of which was subsequently the subject of an appeal heard by the *House of Lords in D'Souza* ***v*** *London Borough of Lambeth [2003] UKHL 33* .

III. The case before the EAT.

5.. Initially the appellant raised before the EAT the broader contention that it was objectionable in principle for the EAT to hear argument from one of its own members. Once it became clear that the Recorder had previously sat with one of the wing members the broader question was no longer pursued before the EAT and the Court of Appeal. The issue became confined to the particular systemic challenge described.

6.. On 10 October 2001 the appeal came before the EAT. The Recorder, who had previously sat with one of the lay members of the EAT then sitting, appeared as counsel for one of the parties. The appellant raised the so-called Recorder objection. Without ruling on the objection the tribunal adjourned the appeal to be heard before a tribunal differently constituted. On 18 December 2001 a tribunal chaired by Lindsay J heard the appeal. He sat with two wing members with whom the Recorder had not sat. Strictly, the Recorder objection no longer arose. But the tribunal was rightly anxious to determine the point of procedural principle. The tribunal heard the procedural issue first. It reserved its decision on this point. But the tribunal proceeded to hear the substantive appeal. In a reserved decision the EAT dismissed the procedural objection on the ground that in the eyes of a fair-minded observer who had considered the facts "there is no real possibility that the Employment Appeal Tribunal is biased where the only objection is that either one or both of the lay members hearing an appeal have previously sat with a Recorder who, as counsel, is appearing for a party in that appeal": *[2002] IRLR 228* , 235 at para 34. In respect of the substantive appeal the tribunal held that it was bound by the decisions of the *Court of Appeal in D'Souza* and *Adekeye* and accordingly dismissed the appeal.

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IV. The Court of Appeal

7.. On appeal to the Court of Appeal it was agreed to hear the Recorder objection first. The reason for this course was that the case of *D'Souza was then pending in the House of Lords* : the decision in that case was likely to be determinative of the substantive issue. (The House has recently given its decision in *D'Souza [2003] UKHL 33*). By a majority the Court of Appeal dismissed the appeal on the Recorder objection: *[2002] EWCA Civ 1218* ; *[2002] ICR 1507* . Lord Phillips of Worth Matravers MR and Mummery LJ gave the judgments of the majority. Pill LJ gave a dissenting judgment.

8.. The essential thrust of the reasoning in the Court of Appeal must be identified. Giving the first judgment, Mummery LJ concluded (para 20):

> "The Recorder objection amounts to no more than an assertion that a lay member might possibly be more disposed to accept the submissions of one party's legal representative than those of the other side, as a result of the professional experience of having sat on the tribunal with him in his capacity as a part-time judge. That is merely a speculative and remote possibility based on an unfounded and, some might think, condescending assumption that a lay member sitting with another judge on the hearing of an appeal cannot tell the difference between the impartial decision-making role played by a tribunal panel of a judge and two lay members and the adversarial role of the partisan advocates appearing for the parties."

The Master of the Rolls expressed his agreement with this view as follows (para 50):

> "… there are no grounds for doubting the capacity of a lay member of an Employment Appeal Tribunal to reach a decision uninfluenced by the fact that he has, on a previous occasion, sat with the advocate for one of the parties, in a judicial capacity. Lay members normally serve on the Tribunal for many years, once appointed. They will have experience of some of those who appear before them, and they are likely to be those who appear often in that forum, occasionally sitting as judges. They will rightly perceive them as advocates who occasionally sit as judges, not as judges who occasionally stand down to act as advocates. It is not reasonable to apprehend that the lay member will, even subconsciously, react more favourably to such an advocate than to one who does not sit part-time in the Tribunal."

The Master of the Rolls added a qualification. He said [para 52]:

> "… A recorder agrees to sit at least 20 days in the year. There is no maximum to the days that he can sit, if so requested. I consider that there would be more substance to the concerns raised by Mr **Lawal** if, in this specialised Tribunal, advocates were requested to sit with a frequency that might lead lay members to view them as judges, appearing part-time as advocates, rather than the reverse."

9.. Pill LJ thought that a part-time judge who subsequently appears as an advocate "is likely to be treated by lay members with an additional degree of authority" (para 36). He explained (para 39):

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> "The fair-minded and informed lay observer will readily perceive, I have no doubt, the collegiate **spirit** in which the Appeal Tribunal operates and the degree of trust which lay members repose in the presiding judge. It is in my judgment likely to diminish public confidence in the administration of justice if a judge who enjoys that relationship with lay members, with the degree of reliance placed on his view of the law, subsequently appears before them as an advocate. The fair-minded observer might well reasonably perceive that the litigant opposed by an advocate who is a member of the Tribunal and has sat with its lay members is at a disadvantage as a result of that association. A litigant's doubt about impartiality … would, for the reasons given, be a legitimate doubt. In my view, the procedure does not inspire public confidence."

These contrasting views reflect the essential terrain of the debate before the House.

V. The Appeal to the House

10.. By leave given by an Appeal Committee the appellant appealed to the House of Lords. As before the EAT (chaired by Lindsay J), and in the Court of Appeal, counsel acting as *amicus curi* argued the case for the appellant, and counsel for the Lord Chancellor's Department put forward the case for maintaining the status quo. The appellant added brief supplementary observations. The respondent had no interest in the proceedings and was not represented. But in the result the House has had the advantage of full adversarial argument by counsel appearing as *amicus curi* and counsel for the Lord Chancellor's Department.

VI. Part-time Judges and Lay Members of the EAT

11.. In order to make a judgment on the issues the way in which the system operates must be described. In 2000 the Lord Chancellor, pursuant to section 24 of the Employment Tribunals Act 1996 , appointed five Queen's Counsel, who were already Recorders, to be part-time judges of the EAT. The present position is that there are nine such part-time judges. They all have experience of employment law. As in the case of full-time judges of the EAT, part-time judges normally sit with two lay members both at preliminary hearings and on full appeals. At present the terms of appointment of part-time judges do not place any restriction on them appearing as counsel in the EAT. No criticism is made, or can be made, of the conduct of the Recorders who relied on the view, supported by the Lord Chancellor's Department, that they were under no restriction. They were all entitled to act on the current understanding.

12.. The function of the EAT is to hear appeals on questions of law from Employment Tribunals: section 21(1) of the Employment Tribunals Act 1996 . What may amount to a question of law in this context is not narrowly circumscribed. For example, the question whether there was evidence on which an Employment Tribunal could have come to a certain conclusion may depending on the setting be a question of law: *Harvey on Industrial Relations and Employment Law* , Vol. 5, para 1630. On all matters which may properly come before it the EAT acts by a majority: the judge may be outvoted by the two lay members on the question of law involved.

13.. The laymen sitting on a particular tribunal are all experienced in industrial relations. The judge, or part-time judge is normally assisted by two lay members: one from a panel drawn from employers and one drawn from a panel drawn from employees: see section 22(2) and section 25 of the Employment Tribunals Act 1996 . The wing members are never lawyers and have no legal training. On the other hand, their standing is high: it is currently the highest judicial appointment open to a person who holds no legal qualification.

VII. The test for bias.

14.. In *Porter* **v** *Magill [2002] 2 AC 357 the House of Lords* approved a modification of the common law test of bias enunciated in *R* **v** *Gough [1993] AC 646* . This modification was first put forward in *In re Medicaments and Related Classes of Goods*

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(No. 2) [2001] 1 WLR 700 . The purpose and effect of the modification was to bring the common law rule into line with the Strasbourg jurisprudence. In *Porter* v *Magill* Lord Hope of Craighead explained:

> "102 … The Court of Appeal took the opportunity in *In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700* to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711A–B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R* v *Gough* had not commanded universal approval. At p 711B–C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R* v *Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726–727:
>
> > '85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R* v *Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'
>
> 103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R* v *Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under Article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in *Magill* v *Porter* has at its core the need for "the confidence which must be inspired by the courts in a democratic society": *Belilos* v *Switzerland (1988) 10 EHRR 466* , at para 67; *Wettstein* v *Switzerland (Application No. 33958/96)* para. 44; *In Re Medicaments* , at para 83. Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson* v *Johnson (2000) 200 CLR 488* , 509, at para 53, by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious".

X. The analogies and their weight

15.. One does not come to the issue with a clean slate. On the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem. For present purposes three analogies in ascending order of importance

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can be considered. First, the current Terms and Conditions governing the appointment of Recorders, published in December 2002, contains the following restriction (para 26):

> "A Recorder who is an MP, Parliamentary candidate or local Councillor should not sit as a Recorder within their own constituency or the area covered by the council."

While such a case is very different from the one before the House, the reason for the restriction is instructive. The rationale must be to protect public confidence in the integrity of the administration of justice. Section 38(1) of the Solicitors Act 1974 is also instructive. It provides that "it shall not be lawful for any solicitor who is one of the justices of the peace for any area … to act in connection with proceedings before any of those justices as solicitor … of any person concerned in those proceedings." Where the area is divided into petty sessional divisions the restriction does not apply to proceedings before justices acting for a petty sessional division for which the solicitor does not ordinarily act. Again, the purpose must be to guard against the erosion of public confidence in the administration of justice.

16.. The second analogy is somewhat closer to what is under consideration in the present case. Paragraph 30 of the Policy, Procedure & Terms and Conditions of Service of Recorders published in April 2002 provides:

> "… In particular, [a barrister or solicitor advocate] should not in any circumstances appear in any court before a jury which includes persons who were members of a jury panel serving at that court when they sat there as a Recorder, or vice versa."

Paragraph 23 of the Recorder Terms and Conditions published in December 2002 fleshed out this specific restriction into a more general principle. It reads as follows:

> "The governing principle is that no person should sit in a judicial capacity in any circumstances, which would lead an objective onlooker with knowledge of all the material facts reasonably to suspect that the person might be biased. As a general rule, therefore, a barrister or solicitor advocate ought not to sit as a Recorder or to appear in a Magistrates' Court, County Court or a High Court or Crown Court centre if he or she is liable to be embarrassed in either capacity by doing so."

It is, however, not in doubt that the specific prohibition previously published is comprehended under the general principle and remains in full force. This prohibition appears to contemplate the possibility that a member of a jury who has served at a court at which the Recorder was the presiding judge would have looked to him for directions (including directions on the law) and viewed him with a degree of deference and respect, and that that previous relationship may cause such a jury member to accord to the Recorder's submissions, when he subsequently appears before him as an advocate, with an additional degree of influence.

17.. The comparison between, on the one hand, a member of the jury and a presiding judge and, on the other hand, a lay member of the EAT and the presiding judge is clearly far from exact. Yet there are similarities between the two, namely, that neither the jury member nor the wing member is legally qualified and that both necessarily look to the judge for guidance on the law when adjudicating on the case before them. The rule of practice applicable in criminal trials is designed to avoid a situation similar to that which exists in the present case, namely that lay individuals participating in the administration of justice should not have the added burden of having individuals whom they have come to regard as judges appear before them as advocates advancing arguments on behalf of a particular party. It is true, of course, that unlike the relationship between the jury member and the presiding judge, the lay member and the judge of the EAT are colleagues sharing a professional relationship. Counsel

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appearing as *amicus curi* has, however, pointed out that this factor may cut both ways: whilst it may lessen the impact of the influence exerted by the EAT judge over a wing member it creates a collegiate relationship between them, which is not present in the relationship between the jury member and the presiding judge, and which may be no less worrying in the eyes of the fair-minded observer. Finally, this rule of practice cannot be dismissed as a rule adopted out of an abundance of caution. In *R v Hoyland-Thornton [1984] Crim LR 561 the Court of Appeal Criminal Division* (Lord Lane LCJ, Mustill and Otton JJ) treated a breach of the rule as a material irregularity in a criminal trial and declined to apply the proviso. The conviction was quashed. The court took the view that the position where prosecuting counsel was addressing jurors whom in the past he had directed on matters of law in his capacity as a part-time judge must never be allowed to occur.

18.. The third analogy is the most important. It relates to the Terms and Conditions of Service and Terms of Appointment of Part-Time Chairmen of Employment Tribunals. The edition of October 2000 provides (para 16):

> "… in order to ensure that there are no allegations of bias, no part-time Chairman may … appear as an advocate before any employment tribunal in the whole of [the] region [to which they have been assigned to sit as a Chairman]."

A similar restriction appears in the edition of September 2001, at para 16, and the edition of March 2003, at para 15. The restriction applies equally to barristers and solicitors appointed as Chairmen of Employment Tribunals. Counsel for the Lord Chancellor's Department sought to counter the persuasive force of this analogy in two ways. He suggested that the rule was simply adopted out of abundance of caution. This contention is not supported by the language of the documents and the settled general restrictive rule which it imposes. Counsel also relied on an observation of Lindsay J (EAT judgment, at para 33(8)) that the rule was made applicable to barristers because it was thought "invidious to have different rules for the two branches of the profession". This is an unconvincing explanation: it is more likely that the general rule was introduced because it was considered necessary.

XI. Conclusions

19.. Counsel for the Lord Chancellor's Department argued that the central fallacy in the argument of the *amicus curi* ' on unconscious bias is that the wing members are unable to differentiate between the neutral judicial function and the partisan advocacy function. That is, however, to put her argument higher than she in fact put it: the threshold is only a real possibility of unconscious bias. Counsel for the Lord Chancellor's Department acknowledged that a legally qualified judge, when sitting judicially, is likely to have particular influence upon the lay members because the role of the EAT is to determine questions of law. But counsel submitted that it does not mean that the wing member will assume that any submissions made by the part-time judge are necessarily right. Again, that is putting the test higher than it need be put. Counsel emphasised in detail the very high calibre and standing of wing members of the EAT. On this aspect his submissions can readily be accepted. He also submitted that, if the appeal is allowed, Recorders may decline to serve as part-time judges in the EAT, and that the EAT may lose the services of part-time judges who are expert in the field of employment law. This is a realistic possibility. But counsel readily accepted that, if the present practice is in breach of the principle laid down in *Porter v Magill* , it cannot continue.

20.. The correct analysis is as follows. One starts by identifying the circumstances which are said to give rise to bias. In the present case the evidence is limited to the facts set out at the beginning of this opinion, namely that a Queen's Counsel appearing on an appeal before the EAT had sat as a part-time judge in the EAT with one or both lay members hearing the appeal. In such cases there may be substantial variations in the extent to which the part-time judge and the wing members had sat together in the EAT and how recently. These differences are, however, not material. The House must concentrate on a systemic challenge and apply a principled approach to the facts on which it is called to rule.

21.. The principle to be applied is that stated in *Porter v Magill* , namely whether a fair minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. Concretely, would such an observer consider that it was reasonably possible that the wing member may be subconsciously biased? The observer is likely to approach the matter on the basis that the lay members look to the judge for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the judge. The observer may also be credited with knowledge that a Recorder, who in a criminal case has sat with jurors, may not subsequently appear as counsel in a case in which one

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or more of those jurors serve. Despite the differences between the two cases, the observer is likely to attach some relevance to the analogy because in both cases the judge gives guidance on the law to lay men. But the observer is likely to regard the practice forbidding part-time judges in the Employment Tribunal from appearing as counsel before an Employment Tribunal which includes lay members with whom they had previously sat as very much in point. The Editor of the Industrial Relations Law Review has argued "that a rule to the same effect is even more necessary in the *EAT": [2002] IRLR 225* . In favour of this view there is the fact that the EAT hears only appeals on questions of law while in the Employment Tribunal the preponderance of disputes involve matters of fact. The observer would not necessarily take this view. But he is likely to take the view that the same principle ought also to apply to the EAT.

22.. In the EAT Lindsay J was alive to the possibly that "some … practices will fall prey to increasing sensitivity" (para 33(10)). What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago. The informed observer of today can perhaps "be expected to be aware of the legal traditions and culture of this jurisdiction" as was said in *Taylor and Another* **v** *Lawrence and Another [2003] QB 528* , per Lord Woolf CJ, at pp 548–549, at paras 61–64. But he may not be wholly uncritical of this culture. It is more likely that in the words of Kirby J he would be "neither complacent nor unduly sensitive or suspicious": compare also *[2002] IRLR 225* (second col.).

23.. The current President of the EAT (Lindsay J), a former President of the EAT (Mummery LJ) and the Master of the Rolls, a judge with special knowledge of the judicial system, took a different view. Nevertheless, on this point we find ourselves in agreement with Pill LJ, who also has great experience in the EAT. Like Pill LJ in the Court of Appeal we consider that the present practice in the EAT tends to undermine public confidence in the system. It should be discontinued. It follows that the present practice in the EAT should be assimilated to that in the Employment Tribunal by introducing a restriction on part-time judges appearing as counsel before a panel of the EAT consisting of one or two lay members with whom they had previously sat.

XI. The outcome

24.. On the facts of the present case the rule was not breached. The EAT presided over by Lindsay J contained no lay members with whom the Queen's Counsel had sat. On the other hand, Mr **Lawal** has succeeded on the issue of principle raised by the Recorder objection.

Recommendation

25.. In these circumstances we would allow the appeal to the extent of declaring that the appellant was entitled to succeed on the Recorder objection and remit the matter to the Court of Appeal to rule on the substantive issue taking into account the decision of the House in *D'Souza [2003] UKHL 33* . We so recommend.

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Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 1515

CA, CIVIL DIVISION

SIR TERENCE ETHERTON, HALLETT, SHARP LJJ

25 NOVEMBER 2013

25 NOVEMBER 2013

Practice — Civil litigation — Case management — Recusal — Claimant company bringing claim against defendant company seeking revocation of supplementary protection certificate — Judge A being listed as trial judge during directions stage — Claimant informing defendant of intention to call expert witness, JB — Defendant applying for A to recuse himself from case on account of previous association with A and apparent bias — Whether 'fair-minded and informed observer' would conclude that real possibility of A being subconsciously biased in assessment of JB's evidence by reason of past association

R Gordon QC, M Copeland and E MacKenzie for the Appellant/Defendant

H Tomlinson QC for the Claimant/Respondent

Wragge & Co; Olswang LLP

SIR TERENCE ETHERTON:

[1] In these proceedings the Claimant, Resolution Chemicals Ltd ("Resolution"), seeks revocation of the Supplementary Protection Certificate SPC/GB02/049 ("the SPC") for escitalopram in the name of the Defendant, H Lundbeck A/S ("Lundbeck"), on the grounds of the alleged invalidity of the basic patent on which the SPC is based, namely, European Patent (UK) No 0 347 066 ("the Patent").

[2] This is an appeal against an order dated 22 October 2013 of Arnold J, the effect of which in substance was to refuse an application by Lundbeck that he recuse himself from hearing the trial of the action which was due to commence in a window commencing on 11 November 2013.

[3] The essence of Lundbeck's recusal application is that a fair-minded and informed observer would conclude that there is a real possibility that Arnold J would be subconsciously biased in his assessment of the evidence of Professor Sir Jack Baldwin FRS, formerly Waynflete Professor of Chemistry at Oxford University, who is to act as one of Resolution's expert witnesses addressing the issue of the validity of the Patent. Lundbeck maintains that the appearance of bias arises out of the association between the Judge and Professor Baldwin when Professor Baldwin became the Judge's research supervisor in Pt II of the Judge's undergraduate degree studies in Natural Sciences (Chemistry) at Oxford University between October 1982 and May 1983.

[4] In view of the proximity of the trial date, we announced our decision to dismiss Lundbeck's appeal immediately following the oral submissions of Mr Richard Gordon QC, for Lundbeck, and Mr Hugh Tomlinson QC, for Resolution, on 31 October 2013. We said that our reasoned judgments would follow in due course.

BACKGROUND

The Attack On The Patent

[5] The general background to the current proceedings is set out in an earlier judgment of Arnold J on various applications in these proceedings given on 12 April 2013 ([2013] EWHC 739 (Pat)) (an appeal from part of which was dismissed by the Court of Appeal on 29 July 2013: [2013] EWCA Civ 924) and in a judgment of Kitchin J in another set of proceedings for revocation of the Patent – G*enerics (UK) Ltd v H Lundbeck* [2007] EWHC 1040 (Pat), [2007] RPC 729.

[6] In short, Resolution attacks the validity of the Patent on two grounds. The first ground is obviousness in the light of United States Patent No 4,650,884. The second ground is obviousness in the light of an article entitled "Quantitative structure – activity in a series of selective 5-HT uptake inhibitors" by Allan J Bigler ***et al*** published in the May-June 1977 edition of the European Journal of Medicinal Chemistry.

[7] In determining those issues the court will have to consider whether certain steps were obvious to the notional "skilled person". The "man skilled in the art" is a hypothetical skilled technician who has a very good background technical knowledge – the so-called common general knowledge – but he or she is uninventive: see generally the description by Jacob LJ in *Technip France SA's Patent* [2004] EWCA Civ 381, [2004] RPC 919, [2005] IP & T 304, especially at 6 to 15. Expert evidence is adduced in cases on the validity of a patent to educate the court in the technology but also to assist the court on whether or not the relevant step would have been obvious to the notional skilled person having regard to the state of the art: *Mölnlycke AB v Proctor & Gamble Ltd (No 5)* [1994] RPC 49 at 113(Sir Donald Nicholls VC).

[8] One of the matters in issue in the present case is what the skilled person would have thought about the applicability of "Baldwin's Rules". These are named after two papers written by Professor Baldwin. There is disagreement between the experts on that issue.

THE PROCEDURAL BACKGROUND

[9] The present proceedings were commenced on 7 November 2012. On 24 January 2013 Roth J made an order which, among other things, gave directions for the trial of the claim. Paragraph 30 of his order provided as follows:

> "30 The trial of this action shall be listed on an expedited basis before Arnold J if available on the earliest possible date after 11 November 2013, with a time estimate of eight days and pre-reading estimate of two days with a technical complexity rating of 4."

[10] Patent actions are listed for trial in accordance with their technical complexity rated on a scale from 1 (simplest) to 5 (most complex). Cases with a technical complexity rating of four or five are listed before one of the two judges of the Patents Court who have science degrees and have specialised in intellectual property law throughout their career. Cases with a technical complexity rating of 1 – 3 may be listed before one of the other judges of the Chancery Division who have been assigned to the Patents Court who do not have that academic and professional background. At the time of Roth J's order there were two specialist patent judges, Floyd J and Arnold J Floyd J was precluded from hearing the case because, when in practice at the Bar, he had represented one of the parties at the trial of the previous claim for revocation of the Patent which was heard by Kitchin J. It was for that reason that Roth J's order provided for the trial to be listed before Arnold J Birss J was subsequently appointed a High Court Judge of the Chancery Division and is qualified to try patent actions with a technical rating of four or five. He is, however, unable to hear the case due to a conflict of interests.

THE RECUSAL APPLICATION

[11] During the course of the hearing before Arnold J of certain applications on 14 March 2013 Resolution's counsel stated that Resolution had an expert opinion of Professor Baldwin. Arnold J commented that Professor Baldwin was his Pt II supervisor. Counsel for Resolution stated that, at that stage, he could not say whether

Resolution would be calling for Professor Baldwin, adding: "but I have no reason to think that he would not be prepared to give evidence". There was correspondence between the solicitors for the parties in July 2013, in which Resolution's solicitors stated that Resolution had been assisted by two experts, one of whom was Professor Baldwin, and that Resolution proposed to call a third expert to give evidence. On 19 July 2013 Resolution made an application for permission to call a third expert. That application was supported by a witness statement in which Resolution's solicitor referred to experimental protocols which Resolution had obtained from Professor Baldwin and Professor Gerard Coquerel and stating that it would be necessary to call both those experts to give evidence at the trial and that Resolution needed to call a further expert. On 30 July 2013 Norris J made an order by consent giving Resolution permission to call a third expert.

[12] On 6 September 2013, pursuant to the directions order of Roth J dated 24 January 2013, Resolution formally notified Lundbeck of the names of its expert witnesses, one of whom was Professor Baldwin.

[13] On 11 September 2013 Lundbeck's solicitors wrote to Arnold J requesting that he recuse himself from hearing the trial of the claim on the ground that his past connection with Professor Baldwin gave rise to a real possibility of apparent bias. That request was opposed by Resolution both on the merits and on the ground of waiver.

[14] Accordingly, Lundbeck issued an application notice dated 30 September 2013 for a direction that the order of Roth J of 24 January 2013 be varied so as to provide that the trial of the action shall not be listed before Arnold J

[15] The principal evidence relied upon by Lundbeck in support of its application comprised:

(a) the Judge's disclosure at the hearing on 14 November 2013 that Professor Baldwin had been his Pt II supervisor,

(b) some publicly available information about the curriculum vitae of Arnold J,

(c) some general information concerning Oxford University's chemistry course, explaining that Pt II of the course consists of an academic year of research leading to an examined thesis,

(d) a copy of the published Paper co-authored by Professor Baldwin and the Judge referred to below and

(e) a copy of the rules for the appointment of DPhil examiners at Oxford University.

Resolution's evidence in reply included a letter from Professor Baldwin stating that he had no specific recollection of Arnold J and setting out his general practices with regard to the Pt II students he supervised and his comments on the Paper.

THE HEARING OF THE RECUSAL APPLICATION

[16] In advance of the hearing of the recusal application the Judge noted the following observations of Patten LJ in *Re L-B (Children)* [2010] EWCA Civ 1118, [2011] 1 FLR 889, [2011] Fam Law 132:

> "22 Where a judge is faced with an application that he should recuse himself on the ground of apparent [bias] it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application. The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult if not impossible properly to apply the informed bystander test set out by Lord Hope in his speech in *Helow v Home Secretary* [2008] 1 WLR 2416."

[17] That caused the Judge to produce a note of his recollections, which he supplied to the parties shortly before the hearing. He reproduced the contents of the note in paras 23 – 32 of his judgment. They are as follows:

> "23 It is difficult accurately to remember the events of more than 30 years ago, and my recollection has already been proved inaccurate in one respect. With the assistance of the evidence filed by the parties, however, I have done my best to recall the nature and extent of my contact with Professor Jack Baldwin FRS (he was knighted subsequently) when I was a student.

24 I studied Natural Sciences (Chemistry) at Magdalen College, Oxford from 1979 to 1983. At that time, Prof Baldwin was the Waynflete Professor of Chemistry, a professorship endowed by Magdalen. I had no contact with Prof Baldwin through the college, since he did not teach there. My first and only contact with Prof Baldwin during Part I of the degree (the first three years) was when I attended a course of lectures on synthetic organic chemistry which he gave in the third year. As I recall it, the main focus of the lectures was upon 'retrosynthetic analysis', that is to say, analysing routes of synthesis by working backwards from the target compound. I found the content of the lectures interesting even though they were poorly delivered, and therefore asked Prof Baldwin to be my Part II supervisor (to the amusement of several of my contempories).

25 The research project to which Prof Baldwin assigned me was a project to synthesise a cyclopentanoid isonitrile called '270' which was a metabolite of *Trichoderma* fungi. This was a project on which two post-doctoral workers in Prof Baldwin's research group, Dr David Kelly and Dr Carl Ziegler, were already engaged. It was a challenging project because of the presence of the sensitive isonitrile group in the target compound. As I recall it, Dr Kelly was pursing one main route to the synthesis, while Dr Ziegler was pursing another. Prof Baldwin assigned me to explore some variants of the route Dr Ziegler was pursuing.

26 My research was undertaken during the period from early October 1982 to early May 1983. At that time, Prof Baldwin had a large research group. My recollection is that, including two other Part II students and myself, there were between 45 and 50 people in the group that year. There were periodic meetings of the whole group to discuss current research, but I do not recollect my research being discussed in that forum. My recollection is that I saw Prof Baldwin about once every four weeks for about half an hour. I think that Dr Ziegler was also present at most of these meetings. During the meetings, I updated Prof Baldwin on what I had done since our last meeting, and he gave me ideas for what to do next. On a day-to-day basis, I was supervised by Dr Ziegler and to a lesser extent by Dr Kelly. This recollection is supported by the fact that, in the acknowledgements to my thesis, I thanked Prof Baldwin for 'his stimulating supervision' and Drs Ziegler and Kelly for 'endless advice'. (I note with sadness that I have discovered from the internet that both Dr Ziegler and Dr Kelly have since passed away, Dr Kelly in 2008 and Dr Ziegler in 2012.)

27 My abiding recollection of that period was that I found it quite demoralising. I did not find the laboratory environment congenial and I was frustrated by the fact that most of my experiments failed. By contrast, I found writing my thesis, which I presented in June 1983, more enjoyable. I have no recollection of asking for Prof Baldwin's comments on a draft of my thesis, or even Dr Ziegler's, but I think that I must have asked for Dr Ziegler's comments.

28 One of the ideas which Prof Baldwin suggested at one point was to try to make an intermediate with a chloro-[3]-cumulene group by a particular method. This was one of the few experiments I undertook which was successful. After I had demonstrated the principle, Dr Ziegler did a series of further experiments to explore the utility of the method. This work was subsequently published as a short paper, 'A facile preparation of chloro-[3]-cumulenes', J *Chem Soc, Chem Comm*, 152-153, 1984. Although the named authors of the paper were myself, Prof Baldwin and Dr Ziegler, so far as I recall, I was not involved in writing or submitting the paper, which I note was received by the journal on 3 November 1983. I presume it was written by Dr Ziegler.

29 My last contact with Prof Baldwin while at Oxford was a short interview to mark the conclusion of my Part II work at around the time I presented my thesis. Prof Baldwin offered me a place as a DPhil student despite the fact that I was predicted to receive (and did receive) a Second Class degree, but I declined this offer. After leaving Oxford in June 1983, I pursued a career in the law.

30 While I was at Oxford, I also attended a course of lectures given by the then Dr Steve Davies, later Prof Baldwin's successor as Waynflete Professor. My recollection is not very clear, but I think that this was in my first year and that the lectures were relatively introductory lectures in organic chemistry. I also believe that at some point during the four years I had some contact with Dr Davies outside the context of those lectures, When the present application was first intimated in mid September, I thought Dr Davies must also have been a member of Prof Baldwin's research group at the time. This has since been corrected by Prof Davies, and I now realise that it could not have been the case. I am unable now to recollect in what context I had contact with Dr Davies (if indeed this memory is accurate at all).

31 It has recently occurred to me that I may have met Prof Baldwin once since leaving Oxford. In September 2005 Magdalen College held a dinner for alumni chemists to celebrate the retirement of Prof Baldwin and of two of the college tutors who had taught me during Part I. I attended the dinner. I am not sure whether I spoke to Prof Baldwin on that occasion, but if I did, it was only briefly during pre-dinner drinks.

> 32 I am aware that Prof Baldwin has given expert evidence in at least two cases in the Patents Court (*Monsanto Co v Merck & Co Inc* [2000] RPC 709 and *SmithKline Beecham plc's Patent (No 2)* [2002] EWHC 2573 (Pat), [2003] RPC 33), but I was not involved in those cases in any capacity."

THE JUDGMENT OF ARNOLD J

[18] In his judgment under appeal the Judge, having set out the background and described the role of expert witnesses in patent actions and the applicable principles for recusal on the basis of apparent bias, turned to the merits of Lundbeck's application. He said (at 54) that he was entirely satisfied in his own mind that his past connection with Professor Baldwin would not affect his assessment of Professor Baldwin's evidence. He said that what matters, however, is not what he thought, but what the fair-minded informed observer would think. He then turned to consider the factors which such an observer would take into account. He addressed those in paras 56 – 68 of his judgment under the following headings: "the overall context", "Professor Baldwin's status as an expert witness", "the importance of Professor Baldwin's evidence", "the nature and extent of [the Judge's] past connection with Professor Baldwin", "the passage of time and [the Judge's] change in status", "the nature and extent of [the Judge's] connection with Professor Davies", "Professor Davies' status as an expert", "specific aspects of the present case", "the judicial approach", "analogies", and "conclusion".

[19] I do not propose to lengthen this judgment unduly by quoting all of those paragraphs. The following is a brief summary of the principal elements of the Judge's reasoning. The Judge observed that Professor Baldwin will be subject to the obligation of an expert witness, under CPR Pt 35, Practice Direction 35 – Experts and Assessors – and the Protocol for the Instruction of Experts to Give Evidence in Civil Claims, to provide objective, unbiased opinions on matters within his expertise, and that the question for the court to assess will be the extent to which Professor Baldwin's opinions reflect the common general knowledge and perceptions of the notional skilled person, not whether they are genuinely held or scientifically correct. He said that Professor Baldwin supervised, but not closely, a research project lasting less than a year which the Judge had conducted as part of his degree course. That research had led to the publication of a short Paper in the joint names of Professor Baldwin, Dr Ziegler and himself but the Judge was not involved in writing or submitting the Paper and most of the work it reported was carried out by Dr Ziegler. The Judge said that the fair-minded and informed observer would note that a little over 30 years have passed since his association with Professor Baldwin and that in that time he had become successively a barrister, Queen's Counsel and a High Court judge. The Judge said, that as a judge assessing a witness, he would have a considerable measure of authority over Professor Baldwin. He observed that he had also been educated as a student by Professor Steve Davies, who is to be called as an expert witness by Lundbeck on the same issue as is to be addressed by Dr Baldwin, and who is Professor Baldwin's successor as the Waynflete Professor of Chemistry at Oxford University. He said that this is not a case in which there is a disparity in the authority of the respective experts.

[20] The Judge said that the fair-minded and informed observer would appreciate that the general training and experience of English judges in the practice of the law and in acting judicially equips them to identify and combat their own cognitive biases. He said that a judge of five years' standing like himself has considerable expertise in objectively assessing the evidence of the witnesses and, specifically, the assessment of evidence of expert witnesses in patent actions. The Judge concluded that, taking into account those and other factors he mentioned in his judgment, he was in no real doubt that a fair-minded and informed observer would not conclude that there was a real possibility of the Judge being subconsciously biased in his assessment of Professor Baldwin's evidence by reason of the Judge's past association with him.

[21] Finally, the Judge rejected Resolution's further contention that Lundbeck had, in any event, waived any objection of apparent bias on the part of the Judge by Resolution's conduct between 14 March and 11 September 2013. He said that, although Lundbeck had all the information it needed by 2 July 2013 and did not raise any objection to the Judge hearing the trial until 11 September 2013, in the end he was not persuaded that Lundbeck's actions were sufficiently unequivocal to amount to a waiver. Resolution has not challenged that part of the Judge's judgment on this appeal.

THE APPEAL

[22] Mr Gordon began his submissions with an acknowledgement that the test of apparent bias is well established, namely whether the fair-minded and informed observer would conclude that there is a real possibility of bias. He submitted that the following four concepts have a particular resonance in the present case:

(1) justice must not only be done but be seen to be done;

(2) that principle trumps any practical difficulties arising from, for example, lack of judicial resources;

(3) if there is any doubt about the appearance of bias, the court must err on the side of caution, particularly where the trial has not yet begun;

(4) apparent bias can take many forms, but the most insidious is subconscious bias.

[23] Mr Gordon submitted that in the present case the critical issue is the link between that precautionary principle and subconscious bias. He submitted that, in examining that link, the important questions are whether there are material factors to suggest to the independent observer that Professor Baldwin exercised influence at any time in the past and, if so, whether other factors will have removed a real possibility of that influence leading to subconscious bias.

[24] Mr Gordon laid considerable weight on the reasoning and decision in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187, [2003] ICR 856. The issue in the House of Lords in that case was whether there was a real possibility of the two lay members of the Employment Appeal Tribunal ("the EAT") being subconsciously biased in favour of the submissions of a barrister, representing the employers, who was also a Recorder and in that capacity had sat as a part-time judge in the EAT with one of the two lay members. The House of Lords, concluded that there was a real possibility of subconscious bias and that the practice permitting such appearance by counsel in such circumstances should be discontinued.

[25] Mr Gordon submitted that *Lawal* is in the same territory as the present appeal, namely as illustrative of the proposition that past "additional authority" exerted by one person over another can raise a real possibility of subconscious bias. More specifically, Mr Gordon contended that *Lawal* is analogous to the present case because both cases concern the possibility of a tribunal being subconsciously biased by virtue of a former relationship with a person to whom the tribunal would be looking for guidance in the subject in question – in *Lawal* the law, and in the present case organic chemistry – such that there is a perception of a risk that the arguments of that person might be preferred over the arguments of others.

[26] Mr Gordon also relied upon the use made of analogies by the House of Lords in *Lawal* 15 to 18 (Lord Steyn giving the judgment of the Appellate Committee). He said there is a useful analogy in the present case, which the Judge had been wrong to reject, namely that Oxford University's Regulations would have prohibited Professor Baldwin from assessing a doctoral thesis of the Judge due to his role as supervisor and their co-authorship of the Paper. Lundbeck's case is that the Regulations suggest that a relationship such as that which existed between the Judge (as a student) and Professor Baldwin would mean that there was insufficient objectivity and apparent fairness for the latter to evaluate the former's work.

[27] Mr Gordon submitted that the present case is stronger than *Lawal* because that was a case concerning the relationship between the members of a tribunal and an advocate whereas the present case concerns the Judge's assessment of the evidence of a witness. Mr Gordon emphasised that such an assessment is not merely related to the Judge's evaluation of the truthfulness of a witness but in the present case also to the cogency of an expert's opinion.

[28] Mr Gordon emphasised that the disqualification of a judge for apparent bias is not a discretionary matter for

the judge, but depends on an assessment which an appellate court is well able to conduct for itself. He cited, in that connection, *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163, at 20 (Mummery LJ).

[29] Mr Gordon said that Baldwin's Rules are central to the issues in this case; and the genuine concern of Lundbeck is that the Judge's view of them may be influenced by his historic relationship with Professor Baldwin. In that connection, Mr Gordon emphasised the following factors. He acknowledged that the attendance of the Judge at lectures delivered by Professor Baldwin was not exceptional. On the other hand, he laid importance on the fact that the Judge made a positive decision to have Professor Baldwin as his Part II supervisor, and so effectively joined Professor Baldwin's research team, just five years after the publication of Baldwin's Rules. Mr Gordon also laid emphasis on the fact that the Judge, as a Pt II student, had conducted a successful experiment that was in due course the subject of the published Paper which I have mentioned and for which his contribution was acknowledged by Professor Baldwin by being named as a co-author. Mr Gordon considered that it was significant that Professor Baldwin offered the Judge a place as a DPhil student and that the Judge had been invited to attend, and did attend, a retirement dinner for Professor Baldwin and two other tutors organised by Magdalen College, Oxford University, in September 2005.

[30] As an indication of the continuing influence of those student years and the possibility of subconscious bias, Mr Gordon pointed to the following comments by the Judge doing the hearing on 15 October 2013, as recorded in the transcript:

> "ARNOLD J: It is a more particularised way of putting what one might label the mentor point because going back to what I was saying earlier, the Baldwin rules are about stereo selectivity in SN2 reactions and one of the key areas of differences in the case is whether – I do not think it is in dispute that the skilled person in the art would have been aware of the Baldwin rules in 1988. They were famous. Everybody knew about them. But the question is, what the notional person skilled in the art, armed with the Baldwin rules and the problem at hand would conclude."

[31] Mr Gordon focused on the Judge's statement that Baldwin's Rules were "famous". Mr Gordon said that was likely to be in dispute. Mr Gordon also submitted that the Judge's observation that Baldwin's Rules were "famous", coupled with his words "armed with Baldwin's Rules", suggested a conclusion that Baldwin's Rules were indeed a basis for some further positive action on the part of the notional skilled person.

[32] Mr Gordon referred to the expert evidence of Professor Davies on this aspect, and specifically the following passages in his report:

> "86 While I believe that the average skilled person would know that stereo-electronics mattered in this reaction . . ., in the context of an experimental project, such as the synthesis of the enantiomers of citalopram, the average skilled person is unlikely to have spent time considering this. Baldwin's Rules and the papers from which they derive are not the sort of information that the average person skilled in 1988 would have in their head – they would not have a recollection of the individual rules themselves, nor would they have thought them worthwhile to review in the context of such a project. In practice, the way the skilled person would work would be to look for analogous reactions reported in the literature and, for reasons set out below in paragraphs 98 to 103 in the Annex to this report, they would find none.
>
> 87 In any event, had the skilled person considered them in the context of the project in hand, they would see that Baldwin's Rules do not even apply to this ring closure. The ring closure in the diol system involves an SN2 nucleophilic substitution reaction at a tetrahedral carbon atom. Only Baldwin's *Rule 1* addresses *tetrahedral* systems, and is therefore the only one of the rules that could apply to SN2 nucleophilic substitution reactions. Baldwin's Rule 1 is clearly intended to apply to saturated systems and not unsaturated systems. If the skilled person was aware of Baldwin's paper, they would know this and not take anything of use to this system from them."

[33] Mr Gordon submitted that there were no factors negativing the persistence of Professor Baldwin's influence over the Judge or, rather, such as to leave no real doubt as to the possibility of such persistent subconscious influence. In that connection, he addressed and countered the Judge's reliance on such matters as the significance of the passage of time, the reversal of the positions of authority of the Judge and Professor Baldwin, Professor Baldwin's personal experience as an expert witness, the specialist nature of patent disputes, the fact that in the field of disputed patent revocation many of the participants are known to each other, the Judge's general training and experience as a judge, and the rules surrounding the giving of expert evidence. Mr Gordon submitted that the fair-

minded observer would not be swayed by the first three of those matters and would regard the last four as irrelevant.

[34] Mr Gordon also emphasised that in the present case the Patent stands or falls by the expert evidence as to the situation in 1988, not long after the Judge ceased to be an undergraduate.

DISCUSSION

[35] The following principles relevant to this application are clear. First, the test of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased: *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 at 103, [2002] 1 All ER 465 (Lord Hope). There is no difference between the common law test of bias and the requirements of an independent and impartial tribunal under art 6(1) of the European Convention of Human Rights ("the Convention"): *Lawal* at 14 (Lord Steyn). Secondly, underlying both art 6 of the Convention and the common law principles is the fundamental consideration that justice should not only be done but should manifestly and undoubtedly be seen to be done: *R (McCarthy) v Sussex Justices* [1924] 1 KB 256, 259, 22 LGR 46, 88 JP 3. Thirdly, the fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2009] 2 All ER 1031, [2008] 1 WLR 2416, at 2 (Lord Hope). Fourthly, the facts and context are critical. Each case turns on an intense focus on the essential facts of the case: *Man O' War Station Ltd v Auckland City Council* [2002] UKPC 28 at 11, [2003] 1 LRC 598 (Lord Steyn). Fifthly, if the fair-minded and informed observer would conclude that there is a real possibility that the tribunal will be biased, the judge is automatically disqualified from hearing the case. The decision to recuse in those circumstances is not a discretionary case management decision reached by weighing various relevant factors in the balance. Considerations of inconvenience, cost and delay are irrelevant: *AWG Group Ltd* at 6 (Mummery LJ).

[36] In addition to those well established points of principle, I would add the following observations. The test is "a real possibility" of bias, whether subconscious or otherwise. Lundbeck's skeleton argument describes that test as "a necessarily low threshold". While the test is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of "any possibility" but of a "real" possibility of bias.

[37] As Lord Steyn observed in *Lawal* at 15, analogies may sometimes be of assistance. On the other hand, they must be viewed with care and caution. Cases of subconscious bias ultimately turn on the particular facts of the case. An analogy will only have value if the factual situation is sufficiently comparable to enable a compelling link to be made with the case in hand.

[38] Mummery LJ in *AWG Group Ltd* at 9 has pointed to the practical difference between an objection to the judge based on facts discovered during the course of, or only at the end of, the hearing and a situation, such as the present one, where the objection is taken before the hearing has begun. In the latter situation, as Mummery LJ observed, there is scope for the sensible application of the precautionary principle, that is to say prudence naturally leans on the side of being safe rather than sorry. Indeed, as was observed in *Locabail (UK) v Bayfield Properties* [2000] QB 451, [2000] 1 All ER 65, [2000] IRLR 96 at 16, judges routinely take care to disqualify themselves in advance of any hearing in any case where a personal interest could be thought to arise. The Judge himself said at 50 of his judgment that he has a strong inclination to accede to an application to recuse himself without further ado. The test, however, remains the same whether the objection of bias or apparent bias is made before or after a trial.

[39] The precautionary principle is a sensible one in view of the obvious practical complications if there is an appeal from a refusal to recuse or if there is a challenge made on the basis of apparent or actual bias at the end of the case. The overriding objective that justice should be seen to be done and of the need to maintain the confidence of society in general, and of the parties in particular, in the administration of justice also promote a disposition of a judge to accede to a recusal application when it is made by a party's legal advisors.

[40] It is important, nonetheless, to distinguish between a pragmatic precautionary approach and the application of the test itself. If a fair-minded and informed observer, having considered the facts, would not conclude that there is

a real possibility that the tribunal will be biased, then the objection to the judge must fail even if that leaves the Applicant dissatisfied and bearing a sense that justice will not or may not be done. The increasing pressure on Ltd judicial resources, aptly reflected in the present case in the shortage of judges suited to try this complex patent action, may mean that the easy option of voluntary recusal, irrespective of the strict application of the legal test, may from time to time have Ltd scope.

[41] The decision made by a judge as to whether or not to accede to an objection based on apparent bias is a multi-factorial decision. It is well established that an appellate court will normally be slow to interfere with a multi-factorial decision made by a judge: *Assicurazioni Generali SpA v Arab Insurance Group*, Practice Note [2002] EWCA Civ 1542, [2003] 1 WLR 577, at 16ff. The same considerations do not apply, however, in the case of a refusal by a judge to disqualify himself or herself for apparent bias. I agree with the comments of Mummery LJ in *AWG Group Ltd* at 20 that, on the issue of disqualification, an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances, and that the appellate court must itself make an assessment of all relevant circumstances and then decide whether there is a real possibility of bias. That approach is entirely appropriate since it is conventional for applications for recusal on the basis of apparent bias to be heard by the very judge in question. Neither side before us commented on the appropriateness of that convention.

[42] As the judge noted, Patten LJ said in *Re L-B (Children)* at 22 that a judge faced with a recusal application on the ground of apparent bias should "explain in sufficient detail the scale and content of the professional and other relationship which is challenged on the application". It is plainly consistent with the policy underlying art 6(1) of the Convention and common law principles that, on such an application, the judge should provide to the parties relevant information. Such information, however, should not go beyond what is strictly necessary for a fair adjudication of the recusal application. I consider that the Judge in the present case went well beyond what was necessary. The consequence of an excessively wide factual disclosure is to enlarge the opportunity for speculative arguments about the inferences to be drawn and the consequences that follow from the facts disclosed. That observation must be borne in mind when I address Mr Gordon's submissions about the factual context of the present case in the following paragraphs.

[43] Against the background of those principles and matters, I turn to the facts of the present case. The first and most obviously striking feature is that the relationship between the Judge and Professor Baldwin was formed when the Judge was a university student and it came to an end when his undergraduate studies were completed some 30 years ago. Mr Gordon's submissions were advanced on the basis that Professor Baldwin was in a position of authority and influence over the Judge in those student days and that such influence should be presumed to continue unless there were factors negativing that inference. That seems to me to be an entirely artificial approach in the present case where the circumstances of the original relationship arose in a specific and Ltd context so very long ago and which bears no comparison whatever with the situation in which the Judge will be trying a High Court action in which Professor Baldwin will be giving expert evidence.

[44] The factual context is critical. Lundbeck accepts that it irrelevant that the Judge attended lectures given by Professor Baldwin. In conducting his Part II research project the Judge was part of a large research group of 45 to 50 people. He sought advice and guidance primarily from two post-doctoral researchers in that group, Dr Kelly and Dr Ziegler. Although the Judge was named as co-author of the Paper mentioned above, he does not recall being involved in writing or submitting the Paper. In the intervening 30 years there has been no personal or professional contact between the Judge and Professor Baldwin other than the Judge's attendance in September 2005 at a retirement dinner for Professor Baldwin and two other college tutors who had taught the Judge during his undergraduate years. The Judge is not even sure whether he spoke to Professor Baldwin on that occasion. Further, the Judge, while an undergraduate, also attended lectures given by Professor Davies, Lundbeck's expert, who succeeded Professor Baldwin as Waynflete Professor and whose eminence the Judge acknowledges.

[45] Mr Gordon relied heavily upon the decision and reasoning in *Lawal* as an analogous example of a situation where there was a real possibility of subconscious bias arising out of a former and different relationship. I do not agree that *Lawal* provides a useful analogy. That case was concerned with the continuing possible influence over

the lay members of a tribunal of an advocate who had previously sat with those lay members as a part-time judge. In the first place, the original relationship of influence in that case was very recent (viz within the previous 12 months). That bears no relationship whatever to the 30 years gap in the present case. Secondly, the persistent potential influence in *Lawal* was of a part-time judge over lay members. In the present case, the real possibility of subconscious bias is said to apply to a High Court judge of five years' standing, who previously sat as a deputy High Court judge and for many years before that was in private practice as a barrister. Mr Gordon submitted that the difference between those situations is irrelevant. I do not agree.

[46] I entirely accept that neither the judicial oath to "do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill-will" nor judicial experience and training, including the pervasive and persistent ethos of the independence of the judiciary, can wholly insulate even the most rigorous and fair-minded judge from subconscious bias. The fair-minded observer would be aware of that possibility: *Helow* at 2 (Lord Hope). That is not to say, however, that the fair-minded and informed observer would wholly discount the matters of judicial training, experience and ethos. Taken to their logical conclusion, Mr Gordon's submission and reliance on *Lawal* would preclude a judge from hearing a case in which his former pupil master or regular instructing solicitors were acting for one of the parties, or a deputy High Court judge from ever hearing a case in which a more senior member of his or her chambers was acting for one of the parties.

[47] The present case might be different if there was some specific continuing link between the Judge's studies under Professor Baldwin at university and the science involved in the present case, but there is none. There is nothing to indicate that the present dispute will turn on the subject matter of Professor Baldwin's lectures attended by the Judge or the Paper co-authored by the Judge mentioned above.

[48] As I have said, Mr Gordon drew attention to the passage in the transcript of the hearing on 15 October 2013, in which the Judge is recorded as saying that it is not in dispute that the notional skilled person would have been aware of Baldwin's Rules in 1988 and that they were famous, and that the question is what the notional person skilled in the art "armed with Baldwin's Rules" and the problem at hand would have concluded. I have also set out the passage in the expert evidence of Professor Davies, for Lundbeck, in relation to that aspect. I pressed Mr Gordon in his reply submissions as to precisely what Lundbeck's point is on this aspect. He said that there is a crucial difference between knowing about Baldwin's Rules and using the Rules for further action and that is the issue which is in contention and on which there is a real possibility of subconscious bias on the part of the Judge.

[49] It is to be noted that there was absolutely no reaction by Lundbeck's counsel in response to the statement of the Judge at the hearing of 15 October 2013 now relied upon. Mr Gordon submitted that what the Judge said on that occasion would give rise to "a non fanciful concern on the part of the informed observer". I do not consider that to be the same as the test of "real possibility of bias". Whether or not it is, I do not consider that the Judge's comments could possibly give rise to any concern on the part of the fair-minded and informed observer.

[50] It is common ground that Baldwin's Rules were well known at the relevant time. In *Generics (UK) Ltd v H Lundbeck AS* [2007] EWHC 1040 (Pat), [2007] RPC 729, which I have mentioned earlier, and in which Professor Davies again acted as the expert witness for Lundbeck, Kitchin J said at 85 "Finally, the existence of what had become known as Baldwin's rules were well known to organic chemists in 1988. How the skilled person would apply those rules was, however, hotly disputed." That seems to me to be no different from what the Judge said on 15 October 2013. I do not regard the word "famous" as being anything other than an appropriate substitute for "well-known". Nor do I agree that the words "armed with Baldwin's Rules" shows a subconscious disposition to give an answer to the question proposed by the Judge favourable to Resolution. It is relevant to note that at 57 of his judgment the Judge emphasises that the question for the court to assess "will be the extent to which Prof Baldwin's opinions reflect the common general knowledge and the perceptions of the notional skilled person, not whether they are genuinely held or even scientifically correct". In the course of his oral submissions Mr Gordon confirmed that was indeed a correct statement of the relevance of Professor Baldwin's evidence. All this is consistent with there having been no immediate reaction by Lundbeck's counsel to what the Judge said on 15 October 2013.

[51] Once those matters are out of the way, there is simply nothing left that could give rise to any real concern on

the part of the fair-minded and informed observer. I do not consider in the circumstances of the present case that the Oxford University Regulation which would have precluded Professor Baldwin from assessing a doctoral thesis of the Judge, in view of their relationship as supervisor/supervisee or their co-authorship of the academic Paper, is of any relevance whatever to the interaction between the Judge and Professor Baldwin as an expert witness some thirty years later.

[52] The Judge has given entirely cogent and persuasive reasons why the fair-minded and informed observer would not consider it significant that the priority date of the Patent, 14 June 1988, was only five years after the Judge presented his Pt II thesis, or that Baldwin's Rules were formulated by Professor Baldwin in papers published about five years before the Judge started his Pt II project, or that stereo chemistry was mentioned in the Paper published jointly by the Judge, Professor Baldwin and Dr Ziegler to which I have referred above: see paras 63, 64 and 65 in the Judge's judgment.

CONCLUSION

[53] For all those reasons, I would refuse the appeal.

HALLETT LJ:

[54] I agree.

SHARP LJ:

[55] I also agree.

Appeal allowed.

End of Document

*322 B. Surinder Singh Kanda Appellant; v Government of the Federation of Malaya Respondent.

Positive/Neutral Judicial Consideration

Court
Privy Council (Federated Malay States)

Judgment Date
2 April 1962

Report Citation
[1962] 2 W.L.R. 1153
[1962] A.C. 322

ICLR

House of Lords

Lord Denning , Lord Hodson and Lord Devlin.

1962 April 2.

On Appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya.

Malaya—Police—Constitution—Power of dismissal—Whether in Commissioner of Police or in Police Service Commission—Conflict between Constitution and existing law—Constitution provisions paramount—Dismissal of inspector by Commissioner of Police void— Police Ordinance (Malaya), 1952, ss. 9 (1), 45 (1) — Constitution of the Federation of Malaya, August 31, 1957, arts. 135 (1) (2), 140 (1), 144 (1), 162 (1) (4) (6) .

Natural Justice—Opportunity to meet charge—Dismissal of public servant—Police disciplinary proceedings—Findings of board of inquiry furnished to adjudicating officer but not to accused police officer—Constitution of the Federation of Malaya, art. 135 (2).

Article 135 (1) of the Constitution of the Federation of Malaya , which came into operation on Merdeka Day (August 31, 1957), provided: "No member of any of the services" - which included the police service - "shall be dismissed ... by an authority subordinate to that which, at the time of the dismissal ... has power to appoint a member of that service of equal rank."

By art. 140 (1) : "There shall be a Police Service Commission, whose jurisdiction shall, subject to article 144 , extend to all persons who are members of the police service."

Article 144 (1) provided: "Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a Commission ... to appoint ... and exercise disciplinary control over members of the service ... to which its jurisdiction extends."

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In July, 1958, the Commissioner of Police in **Malaya** purported to dismiss the appellant, an inspector of police, on the ground that at an inquiry before an adjudicating officer he had been found guilty on a charge of failing to disclose evidence at a criminal trial. While under the law as it existed before Merdeka Day the commissioner had, pursuant to the Police Ordinance, 1952 , power to dismiss an inspector, the appellant contended that after the coming into force of the Constitution that power was only in the Police Service Commission, to which the commissioner was a subordinate authority, and he sought a declaration that his purported dismissal by the commissioner was void and of no effect:-

Held, that the provision in article 144 (1) of the Constitution that the functions of the Police Service Commission were "subject to the provisions of any existing law" meant only such **323* provisions as were consistent with the commission carrying out the duty entrusted to it. Where, however, as here, there was a conflict between the existing law and the Constitution the former would have to be modified so as to accord with the latter, and the court itself, where the Head of the **Federation** of **Malaya** had not done so under article 162 (4) of the Constitution within the prescribed time limit, could and would under article 162 (6) make the necessary modification in the powers of the Commissioner of Police. There could not, at one and the same time, be two authorities with concurrent power to appoint members of the police service. The Constitution must prevail and the existing law must be applied with such modification as might be necessary to bring it into accord with it. Accordingly, since Merdeka Day the commission and not the commissioner had power to appoint and dismiss members of the police service and the dismissal of the appellant by the commissioner was therefore void.

Held, secondly, that the failure to supply the appellant with a copy of the report of the board of inquiry, which contained matter highly prejudicial to him and which had been sent to and read by the adjudicating officer before he sat to inquire into the charge, amounted to a failure to afford the appellant "a reasonable opportunity of being heard" in answer to the charge within the meaning of article 135 (2) of the Constitution and to a denial of natural justice (post, p. 338).

Order of the Court of Appeal of the Supreme Court of the **Federation** of **Malaya** reversed.

APPEAL (No. 9 of 1961) from an order of the Court of Appeal of the **Federation** of **Malaya** (December 9, 1960) setting aside a judgment of the High Court at Penang (March 24, 1960).

The following introductory statement is taken from the judgment of the Judicial Committee: The appellant, B. Surinder Singh **Kanda**, was an inspector of police in the Royal **Federation** of **Malaya** Police. On July 7, 1958, he was dismissed by the Commissioner of Police on the ground that he had been guilty of an offence against discipline. Inspector **Kanda** brought an action in the High Court challenging that dismissal. Rigby J. declared that his dismissal was void and of no effect. The **Government** appealed. The Court of Appeal by a majority (Thomson C.J. and Hill J.A., with Neal J. dissenting) allowed the appeal and held that inspector **Kanda** was validly dismissed. He now appealed to their Lordships' Board.

The appeal raised two questions: (1) The first question was whether the Commissioner of Police had any power to dismiss him. Inspector **Kanda** said that under the Constitution the power rested only with the Police Service Commission: (2) The second **324* question was whether the proceedings which resulted in his dismissal were conducted in accordance with natural justice. Inspector **Kanda** said they were not.

The **Federation** of **Malaya** came into being on Merdeka Day, that was, August 31, 1957. Thenceforward the Constitution was the supreme law of the **Federation** (article 4). The Supreme Head of the **Federation** was the Yang di-Pertuan Agong (article 32). Great changes were made in the structure of **government**. In particular the public services were placed under commissions. Thus a Police Service Commission was set up with jurisdiction over all members of the police service (article 140). But the persons serving in the police force continued in general to have the same powers and functions as before (article 176). And for the most part the existing laws were continued unchanged (article 162).

In September, 1957, after Merdeka Day, two men were charged in the Supreme Court at Penang with uttering forged lottery tickets. The prosecution failed. The reason was because the prosecution called a number of witnesses, including police officers, whose evidence was palpably false. The two accused men were acquitted. The Commissioner of Police ordered an inquiry to

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be held. The board of inquiry was presided over by Mr. D. W. Yates, a very senior police officer. It reported that false evidence had been fabricated for use at the trial.

After considering the report the Commissioner of Police decided that proceedings should be taken against inspector **Kanda**. Not criminal proceedings before the courts of law, but disciplinary proceedings under what the Police Regulations called "Orderly Room Procedure." The commissioner appointed Mr. Strathairn to be the adjudicating officer to inquire into the charges. Mr. Strathairn was junior to Mr. Yates who had conducted the inquiry. Mr. Yates drafted a specimen charge, but Mr. Strathairn preferred his own. He drafted another. The charge, as eventually laid against inspector **Kanda**, was that he had failed to disclose evidence which to his knowledge could be given for the two accused men: or alternatively, that he had been guilty of conduct to the prejudice of good order and discipline in that he had submitted investigation papers to his superior officer knowing the same to be false. Another charge was afterwards added that he wilfully disobeyed a lawful command to subpoena a witness.

In April and May, 1958, the charges were heard by Mr. Strathairn, the adjudicating officer. He found inspector **Kanda** guilty on the original charge of failing to disclose evidence and **325* recommended that he be dismissed from the Force. He also found him guilty on the added charge of disobeying a lawful command and recommended an award of a severe reprimand. The Commissioner of Police approved the recommendations: and on his direction, on July 7, 1958, inspector **Kanda** was formally notified that he was dismissed from the Force. On July 14, 1958, inspector **Kanda** appealed to the Ministry of Defence and also to the Police Service Commission. (He did that because he was not sure which was the right authority to hear his appeal.) Over a year later, on July 19, 1959, the secretary to the Police Service Commission informed him that his appeal was dismissed. It was not contended that, by that internal appeal within the administration, he in any way waived his right to apply to the courts.

On October 1, 1959, inspector **Kanda** brought this action against the **Government** of the **Federation** of **Malaya** claiming a declaration that his dismissal was void, inoperative and of no effect. He put it on two grounds: (1) His dismissal was effected by an authority which had no power to dismiss him, contrary to article 135 (1) of the Constitution; (2) he was not given a reasonable opportunity of being heard, contrary to article 135 (2) of the Constitution.

1962. Feb. 8, 12, 13, 14. *Rodney Bax* for the appellant. The main and short point is that the purported dismissal of the appellant by the Commissioner of Police on July 7, 1958, was, as the trial judge found, invalid because the commissioner on that date no longer had power to dismiss him. Article 4 of the Federal Constitution provides that the Constitution "is the supreme law of the **Federation**." Article 135 (1), which is absolutely vital and has no qualification whatever, enacts that "No member of any of the services" - which includes the police - "shall be dismissed ... by an authority subordinate to that which, at the time of the dismissal ... has power to appoint a member of that service of equal rank." Article 140 (1) established a Police Service Commission, and article 144 (1) provided that "Subject to the provisions of any existing law and to the provisions of this Constitution, it shall be the duty of a commission to appoint ... and exercise disciplinary control over members of the service ..." The submission is that, relating that to article 135 (1), the Police Service Commission had the power and duty to appoint, and therefore no subordinate authority - and the commissioner is an authority subordinate to the commission - **326* shall dismiss. The power previously vested in the commissioner by virtue of the provisions of the Police Ordinance, 1952, to dismiss a superior police officer was impliedly revoked by articles 135 (1), 140 and 144 of the Constitution and was thereby transferred to the commission as from Merdeka Day. The power of dismissal has thus clearly been transmitted to the commission and the court must apply the existing law. All that the appellant has to show is that the commission at the relevant date had power to appoint a member of the police force of his grade, and that is enough, because admittedly he was dismissed by a subordinate authority.

Article 162 (6) of the Constitution provides that "Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution," and the alternative submission is that the provisions of the Police Ordinance, 1952, must, after Merdeka Day, be modified, that is to say repealed, by the court applying the same, pursuant to article 162 (6), so as to give effect to article 144. The effect of article 162 (6) is to bring any provisions of any existing law into accord with the Constitution. The provisions of the Constitution in that context mean the express provisions to set up bodies and functions themselves. If that is right, then it is plain that the Police Service Commission had the power and, indeed, the duty to appoint. The pre-existing law gives the power to one authority and the Constitution to another, and if the effect of the provisions is to leave the pre-existing law in force, then the Constitution power is merely theoretical.

The second point is that the purported dismissal of the appellant was in any event invalid because he was not given a reasonable opportunity of being heard, in accordance with the provisions of article 135 (2) of the Constitution, in that the terms of the findings of the board of inquiry were before the adjudicating officer but unknown to the appellant, who never had any knowledge of the contents of the report until about the fourth day of the trial of the action. The trial judge rightly found on the evidence that

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the proceedings before the adjudicating officer were, by reason of the appellant's lack of knowledge, held in a manner contrary to natural justice. If there was in the report of the board of inquiry, as in fact there was, matter to the appellant's disadvantage, strongly prejudicial to him, the existence of which he did not know and with which he had no chance to deal, then it cannot *327 be said that he was given a reasonable opportunity of being heard. Thomson C.J. in his judgment in the Court of Appeal said that "the charges themselves must have conveyed to him [the appellant] the view regarding himself which the board of inquiry had formed. The only thing he was not aware of was the precise words in which these views were expressed ... the actual words, however, are of little importance." It is submitted that the actual words used in the report here are of the utmost importance. The trial judge said that "the very fact he [the adjudicating officer] was furnished with, and read, the findings of the board must, in my view, to put it at its lowest, have created a very real likelihood that he would have a pre-determined bias or - to use the words of Lord O'Brien L.C.J. in the case of *Rex v. Justices of Queen's County* [1] - 'an operative prejudice, whether conscious or unconscious,' against the plaintiff in respect of the disciplinary charges upon which he was to adjudicate." Those words of Lord O'Brien L.C.J. were adopted by Lord Parker C.J. in *Reg. v. Duffy, Ex parte Nash.* [2] At the very least the appellant should have been told what was in the report. It is also submitted that the proceedings were not in conformity with the Police Regulations , and as Hill J.A. said in his judgment in the Court of Appeal: "Such proceedings could invariably result in unconscious bias in the mind of any or all adjudicating officers as a result of knowledge of the proceedings before and the findings of boards of inquiry." There are two cases on bias which may be of assistance: *Cooper v. Wilson* [3] ; *Reg. v. Grimsby Borough Quarter Sessions, Ex parte Fuller* [4] ; the present is a stronger case. The judgment of the trial judge was right and should be restored.

Lord Bledisloe Q.C. and *Philip Clough* for the respondent. There are two questions: first, a point of construction, whether the power to appoint and dismiss a superior police officer, which was conferred under the Police Ordinance, 1952, on the Commissioner of Police, remained vested in him after Merdeka Day when the Federal Constitution came into force, or whether the relevant provisions of the Constitution are to be construed as having divested the commissioner of that power and as having conferred *328 it on the Police Service Commission. Secondly, whether or not in the course of the disciplinary proceedings the appellant was given a reasonable opportunity of being heard in compliance with article 135 (2) of the Constitution. It is clear that under the pre-existing law the commissioner had power to appoint and dismiss. It has been conceded, rightly or wrongly, that the commissioner is subordinate in rank to the commission. If he had power to appoint, there must be power to dismiss.

The initial jurisdiction of the commission is conferred by article 140 (1) of the Constitution "subject to article 144," which itself is a general provision and is "subject to the provisions of any existing law and to the provisions of this Constitution." "Existing law" is defined in article 160 (2) as meaning "any law in operation in the **Federation** ... immediately before Merdeka Day." That definition must be applied, "unless the context otherwise requires," throughout the Constitution. Reading article 144 (1) with that definition in it, it reads: "Subject to the provisions of any law in operation in the **Federation** immediately before Merdeka Day ... it shall be the duty of" the commission, etc. Under article 162 (1) the existing law shall be continued in force, but it may be modified by the Head of the **Federation** as provided in article 162 (4). In the present case it is common ground that the pre-existing law has not been modified under sub-article (4), and the court should not apply the rather curious power under article 162 (6) to import a modification unless it is absolutely necessary - not merely expedient - to do so, and the submission is that it is not necessary or even desirable. Further, article 176 (1) supports the argument that all existing law in force was to continue and that the same persons should have the same functions. The commissioner's powers have been preserved under article 144 and have not been taken away by legislative modification, and, unless the court thinks it absolutely necessary to modify under article 162 (6), the power remains. If it results that there are two persons with the power, that cannot take away the plain meaning of the words - that power is vested in the commissioner.

The process of appointing the Police Service Commission must necessarily take some time. There was no commission in existence on July 7, 1958 (the date of dismissal). If the appellant's contention that the power of the commissioner came to an abrupt end on Merdeka Day is correct, then there would be an interval of time between that date and when the Police Service Commission was appointed. If that is right, chaos would reign in that *329 interval, and that illustrates the difficulties which would arise. The matter is a pure question of construction, but reference may be made to *Rex v. Churchwardens of St. James, Westminster* [5] - it is rather a long way from the present case. See also *Akisatan Apena of Iporo v. Akinwande Thomas.* [6] In *Smith v. London Transport Executive* [7] Lord Simonds said: "The words 'subject to the provisions of this Act' ... are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found." *Suresh Chandra v. Himangshu* [8] has no real bearing on this ease - the dismissal there was by an officer subordinate in rank. It may be that, as a practical result of the construction contended for, the Police Service Commission looks after the executive officers and the commissioner looks after the junior officers.

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In summary on the point of construction: (1) The jurisdiction of the Police Service Commission was from its very inception expressly made subject to existing law: articles 140, 144 . (2) The jurisdiction of the commission was also made subject to the provisions of the Constitution: article 144 (1). (3) "Existing law" is widely defined in article 160 (2) and can be modified. "Existing law" clearly includes the Police Ordinance, 1952, and its meaning cannot be restricted to mere legal procedure or machinery. (4) "Subject to the provisions of the Constitution" refers to provisions such as article 144 (3), (4) and (5) and article 135 (2) , and in particular to article 162 (1)-(4), which provided machinery for the modification or amendment of existing law. (5) Article 176 (1) preserves the powers and functions of the pre-Merdeka Day officials, including the commissioner of police. (6) The respondent's construction simply results in the Police Service Commission inheriting the powers of the High Commissioner to deal with gazetted police officers, leaving the power to deal with junior ranks in the Commissioner of Police, and that is a very sensible division of functions. (7) If the Ruler and the **Government** had wished to alter this state of affairs they would have made an order under article 162 (4). (8) The power of the court or tribunal under article 162 (6) is a power to apply existing law in a particular way, and is only exercisable in a particular where it is necessary - the word "necessary" is stressed; ***330*** there is no such necessity here. (9) There is nothing indefinite about the period during which the existing law must continue in force. If it is not already modified under article 162 (4) it can still be amended under article 162 (1). (10) Article 176 (1) renders it impossible to adopt Neal J.'s view in the court below of the meaning of existing law that it merely relates to procedure or machinery.

With regard to the second point - whether the appellant was in the course of the disciplinary proceedings given a reasonable opportunity of being heard in compliance with article 135 (2) - the principle stated by Blackburn J. in *Reg. v. Rand* [9] is applicable in all cases where there is bias or prejudice or poisoned mind - where there is "a real likelihood" of bias. *Frome United Breweries Co. Ltd. v. Bath Justices* [10] applies Blackburn J.'s test of real likelihood of bias. The cases are all reviewed in *Reg. v. Camborne Justices, Ex parte Pearce,* [11] which is the last word on this subject and makes the principle very clear. Here it comes down to whether there was any real likelihood that the adjudicating officer's mind was in any way poisoned by the fact that he knew the contents of the report of the board of inquiry. In applying the general principle it was assumed in certain of the cases that there was a real likelihood of bias - where, e.g., there was a financial interest. Here the adjudicating officer *had* to read the report; it contained unquestioned statements of witnesses. It may be that there was an outside possibility of bias, but it was not a case of likelihood. If there was bias, and it is submitted that there was not, it could not be put right by supplying the document to the appellant. In *Cooper's* case, [12] which is very near the present case, conflicting views were taken. [Reference was also made to *Byrne v. Kinematograph Renters Society Ltd.,* [13] *University of Ceylon v. Fernando,* [14] *Russell v. Duke of Norfolk,* [15] *Goold v. Evans* , [16] *In re an Arbitration between Gregson and Armstrong* , [17] *Ridge v. Baldwin* [18] and *Reg. v. Duffy, Ex parte Nash.* [19]] The principle to be culled from those cases is that it must be determined whether there is a real likelihood of bias or ***331*** prejudice; each case depends on its own circumstances and no general rule can be laid down to cover every case. The underlying principle is that nothing should be done in the name of justice which would strike a reasonable man as unjust. It is more important that justice should be done than that it should be seen to be done. In the present case the adjudicating officer was in fact carrying out the duties of both judge and prosecuting counsel. He was really conducting an investigation, and must necessarily be supplied with all the material which would be available to prosecuting counsel; that is inevitable and one should not shut one's eyes to the reality of the situation. It is unfortunate, but that is the procedure laid down in the regulations. One has to make up one's mind whether there is a reasonable likelihood of bias; the trial judge found in favour of the appellant on this point; the three judges in the Court of Appeal were against him.

Bax in reply. There is no evidence on whether there was a gap before the commission came into existence - it should not be assumed that there was. "Subject to the provisions of any existing law" is not intending to sweep away existing law, but to apply the provisions of the Constitution to existing law mutatis mutandis, that is, to retain the existing law so far as it can be applied in conformity with the provisions of the Constitution. The Constitution intends to create a new machinery of **government**. In other words, the police force and other services remain unchanged, but the persons to administer those bodies are henceforth to be the commissions and not whatever other authority it may have been. The Police Regulations which applied before Merdeka Day were thereafter to be applied by the Police Service Commission.

With regard to article 162 (6), if the Ruler of the **Federation** has not seen fit to make any modification other than that made by the Constitution itself, then the court is entitled to look at the existing law and apply it as provided by the Constitution, and to say here that the commission is the authority to appoint or dismiss. Under the existing law the powers of the commissioner are to be preserved, and preserved also subject to the provisions of the Constitution, but that means not necessarily preserved in their entirety, and his functions of appointing and dismissing members of the police force are transferred to the commission. That is, he held on the same terms as before, but subject to the provisions of the Constitution.

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There was here a breach of natural justice. Examination as to previous bad conduct would have been forbidden, and that very *332 thing came into the possession of the adjudicating officer by other means - he saw the report. [Rex v. Justices of Bodmin, Ex parte McEwen [20] was referred to.]

April 2. The judgment of their Lordships was delivered by LORD DENNING

, who stated the facts set out above and continued: Their Lordships will consider the two grounds of appeal separately.

First. The power of the commissioner to dismiss.

The governing article of the Constitution on this point is article 135 (1) , which came into operation at once on Merdeka Day (August 31, 1957): "135 (1): No member of any of the services mentioned [the police service is one of these] shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank."

Inspector **Kanda** was dismissed on July 7, 1958, nearly a year after Merdeka Day. In order to see who had power to dismiss him, it is necessary under article 135 (1) to ask who had power at that time to *appoint* an officer of his rank: for no one could dismiss who could not appoint.

Under the law as it existed prior to Merdeka Day the Commissioner of Police could appoint superior police officers, including inspectors of police, see section 9 (1) of the Police Ordinance, 1952 ; and if an inspector had been found guilty of an offence against discipline, the Commissioner of Police could dismiss him, see section 45 (1) of that Ordinance. Did this law continue to exist after Merdeka Day? In particular, did it continue to exist on July 7, 1958?

Inspector **Kanda** says that that law did not continue to exist. It was replaced, he says, by the articles of the Constitution which set up the Police Service Commission and entrusted to them the power to appoint members of the police service. The power of appointment was, he says, in the commission. The Commissioner of Police was an authority subordinate to the commission. He could not therefore dismiss him, because he could not appoint him.

Inspector **Kanda** relies for this contention on articles 140 (1) and 144 (1) of the Constitution which read as follows:

"140 (1). There shall be a Police Service Commission, whose jurisdiction shall, subject to article 144 , extend to all persons who are members of the police service.

"144 (1). Subject to the provisions of any existing law and to *333 the provisions of this Constitution, it shall be the duty of a Commission ... to appoint, confirm ... promote, transfer and exercise disciplinary control over members of the service ... to which its jurisdiction extends."

In answer to this contention, the **Government** of **Malaya** point to the words "subject to" in both articles 140 (1) and 144 (1). Those words give priority, they say, to the existing law and preserve it intact, including the power of the commissioner to appoint superior police officers.

The **Government** admit that after Merdeka Day a Police Service Commission was established and that since Merdeka Day all superior police officers, including police inspectors, have been appointed by the Police Service Commission. They admit, too, that on July 7, 1958, the Commissioner of Police was an authority subordinate to the Police Service Commission. But, despite these admissions, they say that the existing law as to appointment and dismissal was preserved by the opening words of article 144 (1) which says that the duty of the commission is "subject to the provisions of any existing law." This gives priority, they say, to the existing law. The Constitution is subject to the existing law, and not vice versa. The words "subject to the provisions of this Constitution" can be amply satisfied, they say, by reference to article 144 (3) (4) (which refers to special posts) and 135 (2) (which gives a right to be heard).

This argument found favour with Thomson C.J. and Hill J.A.: but their Lordships find themselves unable to accept it. Their Lordships realise that it is a difficult point but they prefer the view taken by Rigby J. and Neal J. It appears to their Lordships that, as soon as the Yang di-Pertuan Agong appointed the Police Service Commission, that commission gained jurisdiction over all members of the police service and had the power to appoint and dismiss them. It is true that under article 144 (1) the functions of the Police Service Commission were "subject to the provisions of any existing law": but this meant only such provisions as were

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consistent with the Police Service Commission carrying out the duty entrusted to it. If there was in any respect a conflict between the existing law and the Constitution (such as to impede the functioning of the Police Service Commission in accordance with the Constitution) then the existing law would have to be modified so as to accord with the Constitution. There are elaborate provisions for modification contained in article 162 which run as follows:

"162 (1) Subject to the following provisions of this article ... *334 the existing laws shall ... continue in force on and after Merdeka Day, with such modifications as may be made therein under this article ... (4) The Yang di-Pertuan Agong may, within a period of two years beginning with Merdeka Day, by order make such modifications in any existing law ... as appear to him necessary or expedient for the purpose of bringing the provisions of that law into accord with the provisions of this Constitution ... (6) Any court or tribunal applying the provision of any existing law (which has not been modified on or after Merdeka Day under this article or otherwise) may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution. (7) In this article 'modification' includes amendment, adaptation, and repeal."

It appears to their Lordships that, in view of the conflict between the existing law (as to the powers of the Commissioner of Police) and the provisions of the Constitution (as to the duties of the Police Service Commission) the Yang di-Pertuan Agong could himself (under article 162 (4)), have made modifications in the existing law within the first two years after Merdeka Day. (The attention of their Lordships was drawn to modifications he had made in the existing law relating to the railway service and the prison service.) But the Yang di-Pertuan Agong did not make any modifications in the powers of the Commissioner of Police, and it is too late for him now to do so. In these circumstances, their Lordships think it is necessary for the court to do so under article 162 (6) . It appears to their Lordships that there cannot, at one and the same time, be two authorities, each of whom has a concurrent power to appoint members of the police service. One or other must be entrusted with the power to appoint. In a conflict of this kind between the existing law and the Constitution, the Constitution must prevail. The court must apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution. The necessary modification is that since Merdeka Day it is the Police Service Commission (and not the Commissioner of Police) which has the power to appoint members of the police service. and that is just what has happened. The Police Service Commission has in fact made the appointments. and their Lordships are of opinion that they were lawfully made.

Their Lordships do not overlook the argument of the **Government** that there was no conflict. The jurisdiction of the Police Service Commission, they said, would be satisfied by entrusting *335 them with the power to appoint gazetted police officers, leaving the Commissioner of Police to appoint all others. Their Lordships cannot accede to this argument. Under article 140 the jurisdiction of the Police Service Commission extends to *all* persons who are members of the police service: and their functions under article 144 apply to all of them also. The commission has the duty, and therefore the power, to appoint *all* members of the police service, and not merely the gazetted police officers. The Police Service Commission can, of course, delegate any of its functions under article 144 (6) , but still it is its own duty and its own power that it delegates. It remains throughout therefore the authority which has power to appoint, even when it does it by a delegate.

The result is that on July 7, 1958, the Police Service Commission was the authority to appoint an officer of the rank of inspector **Kanda**: and therefore under article 135 (1) it was the authority to dismiss him. The Commissioner of Police had no authority to dismiss inspector **Kanda** as he did. The dismissal was therefore void.

Second. The reasonable opportunity of being heard.

The governing article of the Constitution on this point is article 135 (2) , which came into operation on Merdeka Day (August 31, 1957): "135 (2) No member of such a service as aforesaid [the police service is one of these] shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard."

Several complaints were made by inspector **Kanda** of a failure to comply with this article, but none of them survived for argument before their Lordships except one complaint which related to the report of the board of inquiry. This complaint was not contained in the statement of claim, but this was because inspector **Kanda** did not know the contents of the report until the fourth day of the trial. Their Lordships think that an amendment should have been made even at that stage to permit it, but as the case proceeded before Rigby J. and the Court of Appeal as if an amendment had been made, their Lordships think it would be wrong to shut it out now.

The report of the board of inquiry contained a severe condemnation of inspector **Kanda**. It was sent to the adjudicating officer before he sat to inquire into the charge. He read it and had full knowledge of its contents. But inspector **Kanda** never had it.

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He never had an opportunity of dealing with it. Indeed, he never got it until the fourth day of the hearing of this action, when *336 this took place between the judge and the legal adviser to the **Government**:

"The court to legal adviser:

Am of the opinion that in the interests of justice the findings of the board of inquiry ought to be made available to the court and to the plaintiff and privilege waived thereon. ...

"Legal adviser:

Must be some misunderstanding - they have always been available - and no privilege claimed thereon.

"Court:

It is my clear impression that both in court and throughout earlier proceedings in chambers, privilege has been consistently claimed in respect of the board of inquiry file and the findings thereon."

The report was then made available to inspector **Kanda** and his advisers. It dealt in detail with the evidence of each witness heard by the board, and expressed views as to the credibility of each witness, and the weight to be attached to his statement. It referred to inquiries made by the board itself apart from the evidence given by witnesses. In the result it presented, as Rigby J. said, a most damning indictment against inspector **Kanda** as an unscrupulous scoundrel, who had suborned witnesses, both police and civilian, to commit perjury. It said: "The board are unanimously of opinion that inspector **Kanda** is the 'villain of the piece'. ... The board were forced to the conclusion that inspector **Kanda** is a very ambitious and a thoroughly unscrupulous officer who is prepared to go to any lengths, including the fabrication of false evidence, to add to his reputation as a successful investigator. The board could not help considering how many of his previous successful cases had been achieved by similar methods."

The question is whether the hearing by the adjudicating officer was vitiated by his being furnished with that report without inspector **Kanda** being given any opportunity of correcting or contradicting it. Much of the argument before their Lordships and, indeed, before the courts in **Malaya** proceeded on the footing that this depended on this further question: Was there a "real likelihood of bias," that is, "an operative prejudice, whether conscious or unconscious," on the part of the adjudicating officer, Mr. Strathairn, against inspector **Kanda**? The well-known line of cases was cited from *Reg.* ***v.*** *Rand* [21] to *Reg.* ***v.*** *Camborne Justices, Ex parte Pearce.* [22] Adopting this test, much effort was *337 devoted to showing that Mr. Strathairn was not biased against inspector **Kanda**. Thus he had not adopted the specimen charge drafted for him by his superior officer, Mr. Yates, but had framed lesser charges of his own. and he deliberately refrained from calling the two accused men as witnesses because he realised that their evidence might be very prejudicial to the accused. He only called them at a later stage because Mr. Yates directed him to do so. The trial judge, Rigby J., was not persuaded by these arguments. He held that there was a very real likelihood of bias. But all the members of the Court of Appeal thought otherwise. They held that there was no real likelihood of bias. So inspector **Kanda** failed on that way of looking at the case.

In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case inspector **Kanda** complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn L.C. in *Board of Education* ***v.*** *Rice* [23] down to the decision of their Lordships' Board in *Ceylon University* ***v.*** *Fernando.* [24] It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice, Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it

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is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to *338 the judge without his knowing. Instances which were cited to their Lordships were *In re an Arbitration between Gregson and Armstrong* *Rex v. Bodmin Justices , Ex parte McEwen* , [25] [26] and *Goold v. Evans & Co.,* [27] to which might be added *Rex v. Architects' Registration Tribunal,* [28] and many others.

Applying these principles, their Lordships are of opinion that inspector **Kanda** was not in this case given a reasonable opportunity of being heard. They find themselves in agreement with the view expressed by Rigby J. in these words: "In my view, the furnishing of a copy of the findings of the board of inquiry to the adjudicating officer appointed to hear the disciplinary charges, coupled with the fact that no such copy was furnished to the plaintiff, amounted to such a denial of natural justice as to entitle this court to set aside those proceedings on this ground. It amounted, in my view, to a failure to afford the plaintiff a reasonable opportunity of being heard in answer to the charge preferred against him which resulted in his dismissal." The mistake of the police authorities was no doubt made entirely in good faith. It was quite proper to let the adjudicating officer have the statements of the witnesses. The Regulations show that it is necessary for him to have them. He will then read those out in the presence of the accused. But their Lordships do not think it was correct to let him have the report of the board of inquiry unless the accused also had it so as to be able to correct or contradict the statements in it to his prejudice.

Since their Lordships have already reached the conclusion that the dismissal was void on the ground that the Commissioner of Police had no authority to effect it, it is unnecessary for their Lordships to consider whether the setting aside of the proceedings would result also in avoiding the dismissal or merely in rendering it wrongful. Their Lordships notice that, before Rigby J., it was suggested that the only remedy was by certiorari. But their Lordships agree with him that the remedy by declaration is available also. There was some question at one time as to the scope of the declaration, but it was agreed before their Lordships that it should be limited to the date of the dismissal.

Their Lordships will therefore report to the Head of the **Federation** as their opinion that the appeal should be allowed, *339 the order of the Court of Appeal should be set aside, and that it should be declared that the dismissal of the plaintiff from the **Federation** of **Malaya** Police Force purported to be effected by one W. L. R. Carbonnell, the Commissioner of Police of the **Federation** of **Malaya**, on July 7, 1958, was void, inoperative and of no effect. The respondents should pay the costs of the appellant before their Lordships' Board and in the Court of Appeal and in the High Court.

Representation

Solicitors: Summer & Co. ; Wray, Smith & Co .

(C. C.)

Footnotes

1 *[1908] 2 I.R. 285* , 294.
2 *[1960] 2 Q.B. 188, 200; [1960] 3 W.L.R. 320; [1960] 2 All E.R. 891* , D.C.
3 *[1937] 2 K.B. 309, 322, 342; 53 T.L.R. 623; [1937] 2 All E.R. 726* , C.A.
4 *[1956] 1 Q.B. 36, 41; [1955] 3 W.L.R. 563; [1955] 3 All E.R. 300* , D.C.
5 *(1836) 5 A. & E. 391* .
6 *[1950] A.C. 227* , 233, P.C.
7 *[1951] A.C. 555, 569; [1951] 1 T.L.R. 683; [1951] 1 All E.R. 667* , H.L.
8 (1951) 55 Cal.W.N. 605, 608.
9 *(1866) L.R. 1 Q.B. 230* , 232.
10 *[1926] A.C. 586, 590; 42 T.L.R. 571* , H.L.
11 *[1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850* , D.C.
12 *[1937] 2 K.B. 309* , 357, C.A.
13 *[1958] 1 W.L.R. 762, 784; [1958] 2 All E.R. 579* .

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14 *[1960] 1 W.L.R. 223, 227; [1960] 1 All E.R. 631* , P.C.
15 *(1949) 65 T.L.R. 225; [1949] 1 All E.R. 109* , C.A.
16 *[1951] 2 T.L.R. 1189* .
17 *(1894) 70 L.T. 106* .
18 *[1961] 2 W.L.R. 1054; [1961] 2 All E.R. 523* .
19 *[1960] 2 Q.B. 188* .
20 *[1947] K.B. 321, 325; [1947] 1 All E.R. 109* , D.C.
21 *(1866) L.R. 1 Q.B. 230* .
22 *[1955] 1 Q.B. 41; [1954] 3 W.L.R. 415; [1954] 2 All E.R. 850* , D.C.
23 *[1911] A.C. 179, 182; 27 T.L.R. 378* , H.L.
24 *[1960] 1 W.L.R. 223; [1960] 1 All E.R. 631* , P.C.
25 *(1894) 70 L.T. 106* , D.C.
26 *[1947] K.B. 321; [1947] 1 All E.R. 109* , D.C.
27 *[1951] 2 T.L.R. 1189* , C.A.
28 *(1945) 61 T.L.R. 445; [1945] 2 All E.R. 131* , D.C.

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James Dorman, Caroline Dorman, Kirsty Clode, Andrew Turton v Clinton Devon Farms Partnership

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
7 November 2019

Case No: QA-2019-000222

QA-2019-000269

High Court of Justice Queen's Bench Division

[2019] EWHC 2988 (QB), 2019 WL 05864639

Before: Mr Justice Pushpinder Saini

Date: 07/11/2019

On Appeal from the County Court at Exeter (HHJ Gore QC)

Hearing date: 30 October 2019

Representation

Peter Cowan (instructed by DWF Liverpool) for the Appellant.
Julian Horne (instructed by Gilbert Stephens LLP) for the Respondents.

Approved Judgment

Mr Justice Pushpinder Saini:

This judgment is divided into 9 sections as follows:

I Overview

1. The Appellant (the Defendant below) appeals against two orders ("the Orders") made by His Honour Judge Allan Gore QC ("the Judge") sitting in the County Court at Exeter on 23 May 2019 ("the First Order") and 25 July 2019 ("the Second Order").

2. Permission to appeal against the Orders was granted by Garnham J on 16 July 2019 and 30 September 2019, respectively, with a direction that the appeals be heard together. I will call these appeals "the First Appeal" and "the Second Appeal".

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3. Garnham J made some further important directions and observations on granting permission to appeal on each occasion. I return to these below when I address the nature of the allegations made by the Appellant against the Judge, particularly in the Second Appeal which raises the issue of recusal.

4. In very broad outline, the Orders were made by the Judge in two related claims which arose out of a fatal accident at a farm in **Devon** on 19 May 2014. The two appeals are directly related. The First Appeal is against certain procedural unless orders, indemnity costs orders, and directions for attendance before the Judge of the senior case handler (from the Appellant's firm) dealing with the matter. These were case management orders which the Judge, as he was entitled to do, made of his own motion.

5. The Second Appeal challenges the Judge's refusal to recuse himself from further involvement in the claims on grounds of apparent bias. The recusal application was based on the Appellant's concerns regarding the Judge's decisions and conduct in the proceedings leading to the orders challenged in the First Appeal.

6. I should record an important point at the outset. Proactive case management is expected of judges. One must guard against too readily characterising a judge's conduct of case management hearings as indicating apparent bias. Being robust is not to be equated with apparent bias, and merely deciding certain procedural matters against a party cannot properly (in and of itself) suggest an appearance of bias or actual bias. Proactive case management will often leave one party (and sometimes both parties) unhappy with the outcome. That may particularly be the case where a judge considers parties have agreed a series of directions which the judge decides do not reflect responsible case management. These matters are of relevance to the two appeals.

7. In the appeal the Appellant was represented by Counsel before me but the Respondents (the Claimants below) did not attend the appeals. They did however submit helpful written arguments settled by single Counsel acting for each of them. In short, the Respondents accept that the First Order was wrongly made and do not seek to defend it. As to the Second Order, they essentially take a neutral position, as they did before the Judge below.

8. I should record that even though there was no oral or written opposition to the appeals, Counsel for the Appellant, in accordance with his professional obligations, was scrupulously fair in the argument before me in directing my attention to material (particularly references in the transcript of the hearing at which the First Order was made) which could support and justify the Orders, and which might undermine the Appellant's arguments on appeal. He made his submissions with moderation and respect.

II The Facts and Procedural Chronology

9. Given the nature of the issues in the appeals, I will need to set out the facts and procedural chronology in some detail.

10. On 19 May 2014, there was an accident on the Appellant's farm estate (**Clinton** **Devon** Farm) near Sidmouth in **Devon**. An employee, Kevin **Dorman**, was driving a tractor pulling a 4-wheel trailer loaded with silage. As he descended the slope of a field, the tractor and trailer went off at a bank on the edge of the field and crashed into the lane below. This resulted in fatal injuries to Kevin **Dorman**. The aftermath of the accident was witnessed by a fellow employee, Andrew Turton, who went to the aid of Kevin **Dorman**.

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11. The first claim (Case D83 YJ127, below) was brought by Mr. **Dorman's** parents as his estate's administrators, and by his surviving partner (I will refer to this as "the **Dorman** Action"). The second claim (Case D79YJ288, below) was brought against the Appellant by Mr. Turton, who pleads that he sought to rescue Mr. **Dorman** but found, in what must have been a distressing sight, that he had been crushed to death. Mr. Turton claims damages for post-traumatic stress disorder and personal injury losses (I will refer to this as "the Turton Action").

12. As appears from the more detailed chronology I set out below, the two claims did not come before the Judge for directions until 23 May 2019 (some 5 years after the accident) as a result of two main factors: the passage of time before the Claimants issued proceedings, and then the need to delay the proceedings by way of stay because of criminal proceedings arising out of the accident.

13. The criminal proceedings were for gross negligence manslaughter and health and safety offences. They were brought by the Health and Safety Executive and CPS against the Appellant and a further individual. The Crown Court trial concluded on 11 February 2019 with an acquittal on all charges, save one count where I understand the jury failed to reach a verdict. The prosecution was given 7 days to consider its position and indicated that it would not pursue the matter. There was in due course an acquittal in respect of that count.

14. In the **Dorman** Action, the procedural chronology can be summarised as follows:

19 May 2014	The fatal accident.
30 May 2017	Claim Form stamped as having been issued (there was no point taken on limitation by the Appellant).
1 August 2017	The Claimants applied for an extension of time for service of the Claim Form on the ground that they were unable to ‘draft any meaningful Particulars of Claim’ pending the conclusion of the criminal investigation.
26 September 2018	Further Order staying the proceedings until 20 May 2019.
15 May 2019	The Claimants served Particulars of Claim, Schedule of Loss and medical evidence.
15 May 2019	The Claimants and the Appellant agreed the order which should be made at the CMC on 23 May 2019. The agreement was that the Appellant would serve its Defence by 16 August 2019 and the parties would then file Directions Questionnaires by 13 September 2019. Costs were to be in the case.

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15. I interpolate here to note that as at 23 May 2019, the Appellant was still well within time for service of its Defence in the **Dorman** Action. There had been no default.

16. In the Turton Action, I can summarise the procedural chronology as follows:

19 May 2014	The fatal accident.
22 May 2017	Claim Form stamped as being issued (again no point taken on limitation by the Appellant).
20 September 2017	Claim Form and Particulars of Claim served.
17 November 2017	Defence served. It was pleaded that there should be a stay pending the criminal proceedings.
20 December 2017	The Claimant filed his directions questionnaire asking for a stay of the action “pending the outcome of the criminal proceedings”.
3 April 2018	Order staying the action.
19 September 2018	Further stay, by consent, to 20 May 2019.
14 May 2019	The parties filed a signed Consent Order providing for the Claimant to serve Amended Particulars of Claim, if so advised, by 2 August 2019, for the Appellant to serve an Amended Defence by 5 September 2019, and directions questionnaires to be filed by 17 October 2019. Costs were to be in the case.

17. Again, as in the **Dorman** Action, the Appellant in the Turton Action was not in default of any orders or rules concerning service of the Defence. Its Defence had been served long ago (and indeed, it was in fact the Claimant who wished to consider amending his Particulars of Claim). I should also record, because it becomes relevant later, that this was not simply a "holding" Defence (in the pejorative sense that a party has not properly complied with its pleading obligations). It set out properly arguable points of law on the basis of which the Appellant proposed to defend the Turton Action and made the point that it would not be proper for the Appellant to plead to the facts while serious criminal proceedings were in progress against it and its employees.

18. Aware that a hearing was coming up in both actions, the parties in both claims sent the consent orders referred above to the Court (seeking vacation of the hearing fixed for directions on 23 May 2019) but the Judge required a hearing. That was wholly appropriate given the substantial delay since the accident and the Judge was entitled to ensure that directions were now made to get the claims moving towards trial as soon as possible.

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19. So, that is how matters stood when both claims came on before the Judge on 23 May 2019. On that day, the Judge made (against the Appellant) unless orders for service of Defences, an order for indemnity costs as well as an order for the attendance of the Appellant's senior case handler at the next hearing before the Judge. Each of these orders were made of the Judge's own motion.

20. I will address the hearing on 23 May 2019 in some detail below because it takes centre-stage in these appeals (it being the focus of the Appellant's complaints concerning the Judge's orders and conduct), but I need to first complete the post-hearing procedural chronology.

21. Following the making of the First Order on 23 May 2019, the Appellant appealed by Appellant's Notice dated 10 June 2019. Notably, at that time, the transcript of the hearing of 23 May 2019 had not been received and Counsel who settled the appeal documents (who had not appeared before the Judge) did not advance any complaints about bias in this First Appeal. He did however observe in his skeleton argument that: "[The Judge] made other observations about D's stance in the actions to which further consideration will have to be given when the approved transcript is available". This provides some context to the observations of Garnham J to which I refer below.

22. Although the Appellant had issued the First Appeal (but not yet obtained permission), it had to deal with the fact that it was facing a further directions hearing before the Judge on 25 July 2019. Having received the transcript of 23 May 2019, it made a recusal application by Application Notice issued in the County Court at Exeter on 4 July 2019. Apart from seeking the recusal of the Judge from further involvement in the actions the Appellant sought an order that the actions be transferred to the County Court at Bristol for all further case management and trial.

23. On 16 July 2019, Garnham J granted the Appellant permission to appeal against the First Order. Garnham J would not have been aware of the recusal application but clearly appears to have noted what Counsel had said in his skeleton argument about the Judge's conduct (referred to in para. [21] above). In granting permission to appeal, Garnham J made certain observations and directions as follows (with my underlined emphasis):

> "This appeal is properly arguable for the reasons set out in the Grounds of Appeal and skeleton argument. It is important that this appeal is heard as soon as possible, the underlying action is already becoming elderly. Given the nature of the allegations made against the judge, I have directed that the future management of this case be transferred to Bristol to be heard by a Senior Circuit Judge ."

24. The Judge decided that he would hear the recusal application dated 4 July 2019 himself. He rejected the Appellant's submission that this application should be released to the Senior Circuit Judge in Bristol. The Appellant also argued that (given the transfer directions of Garnham J which I have cited above) the recusal application had in any event become academic. The Judge rejected that submission in his substantive judgment on the recusal application ("the Recusal Judgment") where he said [19]:

> "I do not accept that the recusal application has become academic by virtue of the transfer order [that is, Garnham's J Order at [21] above]. There are several reasons for that conclusion. The first is that the appeal might not succeed. That will be a matter for the High Court Judge. The second is that it is only case management that has been transferred to Bristol. Trial venue has yet to be decided.

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> If, in the fullness of time, the decision is taken for these cases to be tried by a Senior Circuit Judge, leaving aside the specialist judges of the Business and Property Court in Bristol, there are only three such judges on the entire Western Circuit, and, if I recuse myself, only two would be available, which is likely further to restrict the ability to list any necessary trials, thereby increasing delay."

25. The Judge then heard the recusal application and dismissed it for the reasons given in the Recusal Judgment dated 25 July 2019. I will address that judgment in more detail below.

26. The Judge refused permission to appeal against his decision to dismiss the recusal application. He explained that the matter was academic (in terms which appear to contradict what he said shortly before and which I have set out above at para. [24]). He said (my underlined emphasis):

> "I had a decision of fact to decide: whether a fair-minded and informed observer would conclude there was a real possibility of bias on my part. No error of law was alleged or apparent in my approach to this determination. The basis in evidence and argument for deciding the issue of fact is set out in my full judgment. There was no allegation nor was it the case that I took into account irrelevant matters or failed to take into account relevant matters. My decision was not perverse. There are no real prospects of success on appeal. In that by order of Garnham J dated 16th July 2019 the actions and all further case management of them have been transferred to the County Court at Bristol, and it is inconceivable that a party would apply or a court would order transfer of any trials to be reserved to me in Exeter, any appeal would be academic and there are no other compelling reasons why an appeal should be heard ."

27. Be that as it may, the Appellants considered that there was a risk that the Judge would have some further involvement with the actions so they sought to appeal to the High Court against the dismissal of the recusal application; and Garnham J in due course granted permission to appeal on 30 September 2019 making the following observations (with my underlined emphasis):

> "This appeal is properly arguable for the reasons set out in the Grounds of Appeal and skeleton argument. Given the nature of the allegations made against the judge, I have directed that the future management of this, and all related proceedings, be transferred to Bristol to be heard by a Senior Circuit Judge. If I am available to hear these appeals, they can be listed before me. But I do not reserve the matter to myself. The most important consideration is that they are heard as soon as is practicable."

28. I should identify at this stage that in seeking permission to appeal to the High Court in relation to the Recusal Judgment, the Appellant's proposed Grounds of Appeal (and supporting skeleton dated 6 August 2019) did not, as I read them, include any clear allegation of *actual* bias against the Judge. Both the Grounds of Appeal of Appeal and skeleton were confined

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to the *apparent* bias limb. That is not surprising given that the recusal application which the Judge determined was made only on that basis.

29. The Appellants accordingly did not obtain permission to argue the *actual* bias limb (which would have been a new point on appeal) from Garnham J. I will return to this matter below where I record my decision that this point is not open to the Appellant. I now need to return to the events of 23 May 2019 in more detail.

III The Hearing before HHJ Gore QC on 23 May 2019

30. Despite the fact that the parties had agreed consent orders on the terms I have set out in the chronology above, by the end of the hearing on 23 May 2019 the Judge had made, of his own motion, the First Order in the following terms:

> "IT IS ORDERED that:
>
> 1. Claims Nos D83YJ127 and D79YJ288 shall be dealt with together for the purpose of all future costs and/or case management.
>
> 2. Unless the Defendant files and serves a fully pleaded and particularised Defence in each claim by 4pm on 14 June 2019, its Defences in both claims shall be struck out and judgment will be entered for the Claimants for damages to be assessed.
>
> 3. All parties in both claims shall file and serve costs budgets in Precedent H format by 4pm on 7 June 2019.
>
> 4. All parties in both claims shall file and serve responses in Precedent R format by 4pm on 14 June 2019.
>
> 5. All parties in both claims shall exchange their proposed directions for the future case management of the claims, including all proposals if any for a preliminary trial on issues of liability, by 4pm on 5 July 2019.
>
> 6. A Costs and Case Management Conference will be listed at 2pm on 25 July 2019 before HHJ Gore QC, in person (not by telephone), with a time estimate of 90 minutes. The senior file handler for the Defendant shall attend .
>
> 7. The Defendant shall file and serve a paginated hearing bundle by 4pm on 19 July 2019 on behalf of all other parties. This bundle should include a case summary summarising the position in relation to each claim and in particular identifying:
>
> a. The present position on liability in each claim.
>
> b. The extent of agreement and disagreement between the parties as to the proposed directions.

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> c. Any proposals advanced by any party for the trial of preliminary issues as to liability.
>
> 8. In respect of both claims, the Defendant shall pay the respective Claimant's costs of today's hearing on the indemnity basis, to be subject to detailed assessment if not agreed ."

31. I have underlined those parts of the First Order which are the subject of the First Appeal before me. By way of shorthand in the remainder of this judgment I will describe these paragraphs as "the Unless Order" (paragraph 2), "the Attendance Order" (paragraph 6) and "the Indemnity Costs Order" (paragraph 8).

32. The Judge did not give any specific rulings or judgment in making these orders but, as is common and useful in case management hearings, made his rulings in a "rolling" fashion. It is therefore necessary to look at the transcript in some detail and I will set out the material parts of the transcript upon which the Appellant relies in support of its arguments. I have however considered the entirety of the transcript which is about 14 pages and demonstrates that the hearing itself was relatively short (between 10.37am and 11.27am on 23 May 2019).

33. In order for sense to be made of the transcript I need to identify who was appearing before the Judge. There were the following counsel: Mr Horne (for the First and Second Claimants in the **Dorman** Action), Miss Gibson (for the Third Claimant in the **Dorman** Action), Mr. Marwick (attending by telephone for the sole Claimant in the Turton Action), and Miss Clifton (for the Defendant (now Appellant) in both actions).

34. As soon as the hearing began, the Judge made clear that given the accident was in May 2014 he was concerned about the delay (p.1, line 30: "you can imagine my stance, can you not"). Mr. Horne fairly sought to describe the reason for the delay being the criminal prosecution which had recently been completed and the need for all parties to obtain documents from that process.

35. The transcript shows that the Judge was not satisfied with this explanation and that is the frame of mind with which he approached the entire hearing. The Judge made it clear that he held the Appellant responsible for the delay in obtaining the documentation (referring to the fact that their insurers - who currently instructed the Appellant's Solicitors- would also have funded the criminal proceedings and should have been readily able to obtain the documents).

36. Miss Clifton for the Appellant sought to explain the difficulties in obtaining the documents and said the papers were not in her client's control. The Judge's response is relied upon by the Appellant so I need to set out the exchanges in full (underlining specific parts which were relied upon before me).

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37. After a discussion of some listing issues which occupies several pages of the transcript, there was a discussion of directions for there to be a further case management hearing before the Judge:

> "MISS CLIFTON: We are, we are slightly held back by the fact that the papers aren't within our control.
>
> THE JUDGE: You are not. You are held back by not doing your job properly. The answer to my question is an application against a non-party for an order for disclosure that could have been listed in front of me today with the police represented, and they would have the papers within no more than fourteen days. Instead of which, you are bimbling around asking for a stay in respect of a claim that is already five years old, where presumably you are going to deny liability.
>
> MISS CLIFTON: Yes your Honour. I do take the point. I will pass back that to those instructing me.
>
> THE JUDGE: It's outrageous. Outrageous. This civil claim should have been in a position to move seamlessly and quickly forward to a tried conclusion from today. And we have not even got a defence. Outrageous. Then the question arises: budgetary. Where are we on budgets?
>
> MR HORNE: Your Honour, if I could speak from the claimants' perspective? We don't know what the defendants' position is going to be here. They obviously defended the criminal prosecution, but
>
> THE JUDGE: Well, you budget.
>
> MR HORNE: - burdens of proof are different and so on.
>
> THE JUDGE: You budget for the - you budget on the assumption it's going to be defended.
>
> MR HORNE: Well the indication we've had so far is that it will be, but it will obviously be substantially cheaper if they admit liability, so-
>
> THE JUDGE: Well of course it will, but you don't budget for that, you budget for the worst case scenario. Why aren't we in a position to budget this case now?
>
> MR HORNE: Well your Honour, the short answer is because we haven't-
>
> THE JUDGE: And, Miss Clifton, be warned.
>
> MR HORNE: - prepared a budget.
>
> THE JUDGE: I apologise that you're the butt end of this. You should not have been sent here hung out to dry. You are the messenger .
>
> MISS CLIFTON: Yes your Honour.
>
> THE JUDGE: You've done nothing wrong. But who else am I supposed to talk to?
>
> MISS CLIFTON: I appreciate, your Honour. My instructions are that we are awaiting the police report.
>
> THE JUDGE: You need to communicate back to those instructing you, the tone and ire of the court.
>
> MISS CLIFTON: I certainly will.

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THE JUDGE: And I am warning you about another matter: given that you should have been in a position to contemplate your liability navel over the last five years, I am going to take a very dim view indeed of a budget that is not confined to the sort of costs necessary to explore quantum issues, except for the limited purpose of turning the volumes of evidence that you will have in this sad case from criminal proceedings compliant to civil proceedings compliant. But apart from that you are not getting a penny piece out of these people in terms of budgetary, and I'm going to reserve the costs management of this case to myself. Do I make myself clear?

MISS CLIFTON: Yes your Honour.

THE JUDGE: This is outrageous, and this is going to get sorted. Quickly .

MISS CLIFTON: Yes your Honour.

THE JUDGE: So, we're going to get nowhere today are we?

MR HORNE: Well your Honour, I would hope we would have some directions as to filing of defences and to get us to that CCMC. But beyond that, substantively, no.

THE JUDGE: When were the particulars of claim served?

MR HORNE: The fifteenth. So, last week.

THE JUDGE: And Mr Marwick, when were yours served?

MR MARWICK: Early 2018, your Honour.

THE JUDGE: So yours have been served ages ago.

MR MARWICK: Indeed. We have a holding defence.

THE JUDGE: **Dorman** particulars of the- I've seen the holding defence, that's outrageous as well. **Dorman** particulars of claim were served on 15 May, and the Turton particulars of claim in 2018. The claim form having long-since been served, you cannot buy for yourself the extra fourteen days by filing an acknowledgement of service first, can you?

MISS CLIFTON: No your Honour.

THE JUDGE: Is there any good reason why I shouldn't order that unless your defence is filed as it is due, which is four o'clock, 29 May - six days' time - judgment for damages to be assessed will be entered in all of these cases? Is there any good reason why I shouldn't do that?

MISS CLIFTON: Your Honour, the defendant does need time to go through this evidence-

THE JUDGE : Only because you have not done what you're supposed to have done.

MISS CLIFTON: I appreciate the point, your Honour, and I'm also aware that the claimant in the Turton case is also seeking permission to amend their particulars of claim, which also would impact our defence.

THE JUDGE: Have I seen a draft? Mr Marwick?

MR MARWICK: Your Honour, I didn't- I couldn't hear counsel for the defendant very clearly there.

THE JUDGE: Miss Clifton says that you have intimated a desire to amend the particulars of claim. Is there a draft?

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MR MARWICK: It was a-

THE JUDGE: And is there an application?

MR MARWICK: Your Honour, it was in a conditional permission for (inaudible) of a (inaudible) prosecution papers. It can be- I can forgo that and there's no formal application today.

THE JUDGE: You always have the right to apply to amend, but I'm not going to amend in a vacuum without seeing a draft, and there's no application and no draft. So as far as the defendant is concerned

MR MARWICK: (Inaudible).

THE JUDGE: - they have got to meet the currently pleaded case. Is that correct?

MR MARWICK: Indeed your Honour.

THE JUDGE: Why should I give you any latitude? [addressing Miss Clifton]

MISS CLIFTON: Your Honour, six days is a very insufficient amount of time to draft-

THE JUDGE: You've had five years.

MISS CLIFTON: I appreciate that, but considering that we have been waiting for the evidence - I do take your point on the evidence - we are awaiting that-

THE JUDGE: Where is the evidence of what, if any, things you have actually done to put yourself in a position to move this case forward? Or am I right in saying that, from my perspective in terms of what has been disclosed, there is in fact no evidence of you having done anything?

MISS CLIFTON: I appreciate there no evidence before the court at this stage. I am instructed that we have been chasing the relevant parties.

THE JUDGE : Do you agree that that is outrageous?

MISS CLIFTON: I take the point, your Honour. As far as I'm aware, the defendant does need time to draft this defence and six days would just be insufficient. I would ask for longer than six days in order that we can consider both of these claims fully and draft a fully pleaded defence so that we don't have to return.

THE JUDGE: Sorry. As regards liability, except for the point about the secondary victim, which you have already pleaded to but actually got the law wrong because he's not a secondary victim in the sense that you plead, subject to the Alcock criteria, because he's a rescuer, and different rules apply. And at the moment, you'll pardon me for saying this and I can say it diplomatically because of the absence of your clients - particularly yours today - but whether this sad event occurred because of, as you all say, the breach of duty of the defendant for which the defendant is directly responsible, or whether it happened because sadly Mr **Dorman** was negligent in the course of his employment - my provisional view is that the proceedings in the Turton case are indefensible. The only way that they become defensible - which is not the pleaded case - is if you plead inevitable accident or act of God. And you haven't pleaded that. So, at the moment, I don't see that you've got a leg to stand on, on breach of duty in relation to Turton. But that is only a provisional view and I've seen no evidence and I've heard no argument. It's more difficult for you two, I accept, given the nature of what I understand to have been the defence in the criminal proceedings. There are issues that the court may have to resolve in the fullness of time. But you've had five years to investigate that .

MISS CLIFTON: I appreciate, your Honour, and we are waiting for the police report and the engineering evidence, which could be crucial to drafting our defence, and that is the reason we're awaiting

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THE JUDGE: But presumably you had engineering evidence for the criminal proceedings. So, as I say, the only thing that is necessary is the authorisation of its disclosure, its supplementation to ensure compliance with the Civil Procedure Rules as opposed to the Criminal Procedure Rules. And I suspect that there may be the need for a modest supplementary report because the test for criminal liability The farm was charged with gross manslaughter amongst other things wasn't it? Or was it only health and safety?

MR HORNE: No your Honour, there were manslaughter charges.

THE JUDGE: Gross manslaughter. I thought there were. So gross manslaughter by negligence. The standard of the duty is slightly different between criminal proceedings and civil proceedings. That might require an addendum, and the burden of proof of course, the standard of proof is different as well, because the civil standard is a lower standard of proof. But this is topping and tailing. It's not a whole new report.

MISS CLIFTON: Yes your Honour. We're just awaiting a report. We have made the request.

THE JUDGE: Well, what have you done to get it?

MISS CLIFTON: I'm instructed that we have made the request and we are simply waiting at this stage.

THE JUDGE: Well that means nothing. But I have to be fair to them don't I?

MR HORNE: Well your Honour, certainly our position is that we were prepared to allow them a lot longer than 29 May, so I'm not going to back on that. I'm in your Honour's hands.

THE JUDGE: In one sense, professionally, you can't can you?

MR HORNE: No. No.

THE JUDGE: But I am entitled

MR HORNE: Absolutely.

THE JUDGE: - whatever accommodation you may have been willing to concede; I'm not bound by that am I?

MR HORNE: Not at all, your Honour.

THE JUDGE: That's right in law, isn't it?

MISS CLIFTON: Y es your Honour. The claimants have been in agreement with us though and they have consented to it, and it could potentially impact their cases in waiting for this evidence as well.

THE JUDGE: Well then you'd better make up your mind, and you'd better do it quickly. So the defence is nominally due on the twenty-ninth, I'm going to give you an extra fourteen days and round it up to Fridays because I like Fridays, and I am going to order that unless a fully pleaded and particularized defence is filed and served by 4.00 p.m. on 14 June, the defences in both cases will be struck out and judgment will be entered for all claimants for damages to be assessed. Now at the moment I can make little further progress with this litigation can I? Because it has to be budgeted.

MR HORNE: Your Honour, yes. The thing

THE JUDGE: Is there any reason why, from your perspective on the worst case scenario, that budgets cannot be filed and served by 4.00 p.m. 7 June?

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MR HORNE: Your Honour, on the worst case scenario and anticipating a defence denying liability and a very large amount of paperwork - because at the moment we have no idea what we're going to see from them, so it will have to be disclosure budget on the worst case scenario as well - we could do that, yes. We would probably be coming down from a high number at the CCMC rather than going up from a low number.

THE JUDGE: Yeah. And that's the risk to you because you've not done this properly.

MISS CLIFTON: Yes your Honour.

THE JUDGE: They are faced, potentially, with a monumental disclosure exercise, according to what you've warned them, and so I anticipate that the budget is going to be monumental on disclosure. But there's no good reason why budgetary can't be exchanged by then is there? So you will file and serve your Form Hs by then. How long do you need for Form Rs? Your exercise, in terms of Form R, is going to be modest-

MR HORNE: Your Honour, I'm sure that's right.

THE JUDGE: - because I have already warned Miss Clifton that if her clients have the temerity to put in what looks like an eye-watering budget on liability issues when virtually all of their material will have been prepared and contemplated for the defence of the criminal proceedings, they're going to get butchered aren't they ?

MR HORNE: Your Honour, yes. I would imagine we will be able to agree that.

THE JUDGE: So is your time for Form Rs going to need to be long?

MR HORNE: No, not at all.

THE JUDGE: And, Miss Clifton, is there any good reason why I should give your clients any latitude in relation to the Form Rs?

MISS CLIFTON: If the budgets are going to be as monumental as you say, your Honour, we would appreciate some time to go through this for the defendant.

THE JUDGE: Well that's all you keep asking for in this case. Or rather, in fairness to you, all your clients keep asking for; the appreciation of the need for time. I'm sorry, you're not getting it. I asked whether there was a good reason why.

MISS CLIFTON: Your Honour, I think it's also dependant on what is going to be disclosed from the claimants. I'm of the understanding that they are also seeking documents from relevant authorities.

THE JUDGE: Well I bet there are. They're going to seek the paperwork from the Health and Safety Executive and from any third party agencies who would have investigated the claim.

MR HORNE: Your Honour, yes, I think we've taken the view - I can't speak for Miss Gibson - but we've taken the view that probably everything is somehow within the control of the defendant, because they will have seen everything

THE JUDGE: Yes.

MR HORNE: - so ultimately it could come through them, but it might prove quicker

THE JUDGE: They ought to have seen everything because everything that exists ought to have been considered by the prosecution and would have to have been disclosed in the prosecution, whether as material relied upon or as unused material.

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MR HORNE: Your Honour, yes.

THE JUDGE: So the reasonable expectation is that the defence team have in fact got everything from every authority, and the chances are you will not need to be making third party disclosure applications against non-parties who might have investigated this tragic accident.

MR HORNE: Your Honour, yes. We were trying to avoid those on the basis that we would have to pay their costs, whereas we wouldn't have to pay the defendants'.

THE JUDGE: You're not going to have to.

MR HORNE: No, but

THE JUDGE: They have an obligation of disclosure and I'm going to enforce it. This is-

MR HORNE: Oh, your Honour, yes. From the defendants' point of view I agree.

THE JUDGE: - outrageous ."

38. There was then a discussion concerning listing but the Appellants also rely on what the Judge said about costs.

"THE JUDGE: Right. I'm so dismayed by the conduct of the defendants, that the obligation to do what I have just described I am going to direct the defendants to do. I know that is unusual, and you will have to liaise with each of the claimants to facilitate that, Miss Clifton, but you're going to do it.

MISS CLIFTON: Yes your Honour.

THE JUDGE: And you're going to pay for it. And you're going to pay for the costs of today, and you're going to do so on an indemnity basis."

39. Finally, in fairness to the Judge, I should set out his comments on the fact that he was concerned about the justification for three sets of representatives for the Claimants:

"THE JUDGE: - I think there needs to be some consideration as to whether, on liability at least, all parties in the **Dorman** case can be jointly represented.

MR HORNE: Your Honour, yes, and it is something we've discussed.

THE JUDGE: But if they can't be consolidated - and they'll have to be separately represented by solicitors - but

MR HORNE: In effect they are consolidated because they're all within one claim. It's unusual to have another firm of solicitors on record for a dependant.

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THE JUDGE: I need that thought about, and the thinking about that needs to be sooner rather than later because it will impact on the budget.

MR HORNE: Yes.

THE JUDGE: Because despite the ire that I have vented on the defendant, it is a bit unfair for the defendant to face three lots of costs on the same breach of duty issue, which is what it's threatened with at the moment unless some imaginative co-operation can take place between all three sets of representatives on the one hand, and possibly also the defendant. Because what you need to think about is, in order to reduce the potential costs in this case closer towards proportionality, we are going to have to think about what issues can and should be tried as preliminary issues.

MR HORNE: Your Honour, it would certainly be possible if the defendant defended the case and they wanted to defend liability, but was careful about which bits, to have one firm in the **Dorman** case representing all the claimants on liability."

40. The Judge then addressed the nature of the claim made in the Turton Action (which he considered was a "rescuer" situation):

"MR HORNE: Your Honour, it would certainly be possible if the defendant defended the case and they wanted to defend liability, but was careful about which bits, to have one firm in the **Dorman** case representing all the claimants on liability.

THE JUDGE: And if the preliminary issues are carefully drafted that might be true of the Turton case as well, because the issue that is additional in the Turton case only arises if the court concludes at trial that this accident was not caused by the negligence of Mr **Dorman**, in which case an issue may arise as to whether in respect of non-delegable employer's duty the- Actually even then it doesn't arise. He's a rescuer.

MR HORNE: Yes your Honour, I haven't seen the pleadings in that case but it does sound like a difficult

THE JUDGE: I mean I've got that right haven't I Mr Marwick?

MR HORNE: - case to answer.

THE JUDGE: He was a fellow employee, who rushed to the scene to try and look out for Mr **Dorman**. That's right isn't it?

MR MARWICK: Yes, he was working out on the same field. He witnesses the accident. He was participating (inaudible) rescues.

THE JUDGE: Right. So he's not properly characterised as a secondary victim at all. He's a rescuer, and that's a special category. So I do ask, not rhetorically, whether there is in fact a degree of conflict between the three sets of representatives for the various claimants in this case that requires separate representation at trial, or whether, by careful drafting of the preliminary issues to be tried, we can have all claimants represented on breach of duty issues by one representative, which will reduce costs and shorten the trial. And that needs to be explored by you all, and positions adopted, before the resumed CMC. Do I make myself clear?

MR HORNE: Yes your Honour. I think-

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> THE JUDGE: Mr Marwick?
>
> MR MARWICK: Yes (inaudible) your Honour.
>
> THE JUDGE: Because, you know, let's get a grip of this. Anyone want to argue against that?
>
> MR HORNE: No your Honour, it will make budgeting - even on a worst case scenario - more difficult because we won't have seen the defence's at that point. So, I'm- it will be hard to know
>
> THE JUDGE: Well you'll have to be pessimistic in the budget and they [the Appellants] will reap the consequences of that .
>
> MR HORNE: Yes. But we'll have- I think we'll have to budget
>
> THE JUDGE: And the only way you [the Appellant] wriggle out of this is get your act together quickly and properly, and if the bottom line of that is a concession of liability you rescue your position.
>
> MISS CLIFTON: Yes your Honour.
>
> THE JUDGE: If you don't you're going to get visited with the consequences of this, because this is too long ."

41. Finally, the Judge acknowledged that he was aware that the need to complete the criminal proceedings was a cause of the delay:

> "THE JUDGE: I am entirely sensitive to the need to allow the criminal proceedings to conclude before the civil proceedings progress. It is a source of very considerable regret and disturbance to me that it took four-and-a-half-years for the criminal proceedings to conclude. And I might want some explanation of why that took so long, because at the moment I don't see why it should have.
>
> But I certainly don't see why the claimants should suffer prejudice because of that, and if you deny liability now, five years down the line, they will suffer prejudice because the burden of proof is on them to prove the relevant facts starting five years after the event, when, with the most robust case management that I can marshal, it's highly unlikely that I get this case on for trial on liability before the end of this year, if not before Easter next year, in which case I will have to - because it will probably be me trying it - have to determine liability based on witness recollection of events six years ago. That isn't fair. And the parties to whom it is not fair are the claimants, on who the burden of proof lies .
>
> And I'm going to do my utmost to minimise that prejudice: that's the only way I can comply with the equality of arms requirement of the overriding objective. And if anyone wants to say anything on the defendants' part about this, with the greatest of respect to you Miss Clifton, I suggest that the organ grinder is instructed to appear on the next occasion: that is the senior file handler of the defendants. Nothing less will do. Do I make myself clear?
>
> MISS CLIFTON: Yes your Honour."

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42. I have underlined above those parts of the transcript to which Counsel drew particular attention. I have quoted the transcript at some length because of the seriousness of the allegations made and because fairness requires the full context in which the Judge made his comments to be properly understood. I will need to return to parts of the transcript below when I deal with the merits of each appeal.

IV The First Appeal

43. I begin with the relevant legal principles governing appeals against case management decisions. There is clearly a substantial hurdle facing any appellant and this is established by a number of decisions of high authority.

44. In *BPP Holdings* **v** *HMRC [2017] 1 WLR 2945* at [33] Lord Neuberger stated that there was what he described as a "high hurdle" to overcome before an appellate court could interfere with a case management decision. The Supreme Court endorsed the approach of Lawrence Collins LJ in *Walbrook Trustees (Jersey) Limited* **v** *Fattal [2008] EWCA Civ 427* at [33]:

> "An appellate court should not interfere with a case management decision by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

45. These principles were recently emphasised and applied by the Court of Appeal in *R (on the application of Liberty)* **v** *Prime Minister [2019] EWCA Civ 1761* at [11]. I have also had regard to the guidance given in the White Book, Vol. 1 at para. 52.3.9, citing *Abdulle* **v** *Commissioner of Police of the Metropolis [2015] EWCA Civ 1260; [2016] 1 WLR 898 (CA)* .

46. I am accordingly mindful of the substantial latitude which an appellate court must afford to a judge's case management decisions. However, I have no hesitation in concluding that the First Appeal is well-founded and the Judge's orders were wrong and unjust on the basis of the procedural history and facts before him.

47. I accept that a judge is not bound by consent orders and must always ensure there are effective case management orders, and that the overriding objective is respected. Part of that objective is however dealing with cases justly.

48. I will now set out my more detailed reasons for allowing the appeal in respect of the Unless Order, the Attendance Order and the Indemnity Costs Order.

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49. One overarching point that needs to be emphasised is that the Judge was motivated in his concerns by his belief that the delay in the proceedings being progressed was to be laid at the door of the Appellant. The language used by him demonstrates that he was angered by this and that this anger seems to have moved him to make each of the orders to which the Appellant objects. My reading of the transcript is that the Judge concluded that robust case management (supported by sanctions and penal costs orders) was needed to "kick" the Appellant into action and that the Appellant was effectively dragging its heels in not throwing in the towel on liability.

50. However, as the procedural chronology I have summarised above shows, the Judge's belief about responsibility for delay was based on a number of errors of fact. The longest periods of delay were due to the Respondents' delay (some 3 years) in commencing each action and then the agreed (and plainly sensible) delays while the criminal proceedings were concluded (on 11 February 2019).

51. That error on the part of the Judge is enough to undermine each of the sub-orders within the First Order. That is because the Appellant had done nothing to justify imposition of an Unless Order or the Indemnity Costs Order. There had been no breach of earlier court orders or directions or defaults in respect of pleadings.

52. Further, the Attendance Order seems to have been motivated by a desire to get the "organ grinder" (the Senior Case Handler) before the Court to explain some perceived failures on the part of the Appellant. Putting aside this unfortunate use of language (which impliedly but clearly refers to Counsel - Miss Clifton - as the organ grinder's "monkey"), there were no relevant failures. Disclosure had not yet been ordered and all parties were awaiting prosecution material from the recently completed trial.

53. In my judgment, there was also a problem with the process leading to the First Order. The Judge gave Counsel no opportunity to address him on any of the orders before making them. They were simply announced. In my judgment that was plainly unfair at the most basic level. At the minimum, the Judge should have indicated a provisional view and asked counsel to address that view. However, Miss Clifton, Counsel for the Appellant below, was unfortunately simply presented with a fait accompli.

54. One might argue that Miss Clifton should have asked the Judge for an opportunity to persuade him to change his mind. However, given the nature of the Judge's comments and overall approach, I think that is unrealistic. It is easier said than done when faced with a Judge who has expressed his views forcefully. It was the Judge's duty (even if he had a provisional view) to invite submissions rather than simply announce what were in effect a series of penal sanctions against Miss Clifton's clients.

55. I will allow the appeal against the First Order.

V Real and Apparent Bias: the Law

56. On this issue, I have found substantial assistance in the judgment of Fraser J in *Alan Bates v Post Office Limited [2019] EWHC 871 (QB)* at [27]-[77] which contains a comprehensive review of the case law.

57. The following specific principles (which I respectfully adopt from Fraser J's survey) are of particular relevance to the present appeal:

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(i) The basic test as regards apparent bias is whether:

> "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Porter ***v*** *Magill [2002] 2 AC 357* at [103]. I will refer to this "the *Porter* test" below.
(ii) Apparent bias includes giving the impression of having pre-judged any issue. Pre-judgment is also the mark of actual bias. In *Otkritie International Investment Management Ltd and* ***others*** ***v*** *Urumov [2014] EWCA Civ 1315* , Longmore LJ explained at [1] and [2]:

> "[1] It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see *Porter* ***v*** *Magill [2002] 2 AC 357* para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case. "

58. The case law also makes it clear that the fair-minded observer is not unduly sensitive or suspicious, but that where there are real grounds for doubt as to a lack of bias, the doubt must be resolved in favour of recusal.

59. Finally, disqualification for apparent bias is not a matter of discretion. There is either a real possibility of bias, or there is not. If a fair-minded and informed observer would conclude that there is a real possibility that the tribunal is biased, the judge must recuse himself.

VI Apparent Bias: the arguments and decision on the Second Appeal

60. In oral argument before me, the foundations for the apparent bias argument were essentially built upon the oral observations of the Judge (and his orders) which are the subject of the First Appeal. I have set out the relevant parts of the transcript above and will not repeat them save insofar as I need to refer to specific matters emphasised by the Appellant.

61. In summary, the Appellant relies upon three aspects of the events on 23 May 2019: (a) the outcome of the hearing; (b) the Judge's comments about his approach to future costs and case management; and (c) the Judge's comments about liability.

62. In my judgment, the Appellant's complaints are well-founded. Taking each of the three aspects in *combination* the facts would to my mind lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the Judge was biased in accordance with the *Porter* test.

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63. I will now set out my more detailed reasons by reference to each of the three aspects relied upon and will of necessity need to repeat some transcript quotations.

(a) The outcome of the hearing

64. It is well-established and indeed a matter of commonsense that the act of merely deciding a point against a party in an earlier stage of proceedings (particularly procedural hearings) cannot be enough to create an impression of bias. I refer here to the summary of the case law by Fraser J in *Alan Bates v Post Office Limited [2019] EWHC 871 (QB)* at [37]-[48]. The question in this aspect of the First Appeal is whether the fact of the orders the Judge made, and the comments of the Judge leading to them, satisfied the *Porter* test.

65. The First Order was made by the Judge in surprising circumstances. The Claimants (represented by three sets of lawyers) and the Appellant had agreed Consent Orders for further pleadings followed by a CCMC, with costs in the case. The outcome of the hearing, which was not sought by any party and which was imposed by the Judge entirely of his own volition, was the Unless Order, Attendance Order and Indemnity Costs Order. That is an odd outcome on any view but it may have been justifiable. If, however, it was not justifiable, it raises at least an argument on the real possibility ofbias. In my view, for the reasons already given on the First Appeal, there was no justification for the Judge's orders. I will however elaborate given the seriousness of this matter.

66. First, in the **Dorman** Action, the Claimants had only served their Particulars of Claim on 15 May 2019. The Appellant was, on 23 May 2019, still within the time allowed by CPR Rule 15.4(1)(a) for service of its Defence. Furthermore, the Claimants had agreed to an extension of time for the service of the Defence beyond that 14 day period. In those circumstances the Unless Order and the Indemnity Costs Order (or indeed any adverse costs order) were unjustified.

67. The same point applies in the Turton Action where the Appellant had served its Defence in November 2017. The Claimant did not take any further step until May 2019 when it indicated an intention to consider serving Amended Particulars of Claim. The Claimant had agreed an Order which permitted him to do so, following which the Appellant would serve an Amended Defence. In those circumstances, once again, the Unless Order and the Indemnity Costs Order were in my judgment unjustified.

68. Why did this happen? Insofar as I can see any reason, the Judge indicated that he was motivated to make those orders because of his *'ire'* and ' *outrage* ' (his language) at the overall delay in the progress of the cases and in particular by what he perceived as delay on the part of Appellant in obtaining and disclosing documentation from the criminal proceedings which concluded in February 2019. The Judge's outrage was directed exclusively at the Appellant.

69. I consider that the outrage was misplaced for the following principal reasons. The Claimants waited 3 years before issuing proceedings and they themselves sought and obtained stays of their actions which remained in place until 20 May 2019 (the hearing before the Judge was just 3 days later). Further, the stage for disclosure of documents had not been reached. In the **Dorman** Action the Particulars of Claim were not even served until 15 May 2019 so there had been no identification of the issues, which would inform the process of disclosure. Consistently with that, there was nothing before the Judge to suggest that any of Claimants had been pressing the Appellant to give disclosure or considered that the Appellant had been tardy in relation to its disclosure obligations.

70. The disparity between the Judge's outrage directed at the Appellant and apparent sympathy towards the Claimants is striking.

(b) The Judge's Comments About His Approach to Future Costs and Case Management

71. In my view, the Judge commented unjustifiably and used intemperate language in relation to the Appellant's conduct to date; and he made what seem to me to be inappropriate comments which I can only describe as "threats" about his approach to future costs and case management, thereby giving rise to the appearance of bias.

72. I have underlined above the specific parts of the transcript which were drawn to my attention and I will quote from the parts of those extracts which gave me particular concern.

73. At page 3 line 20 the Judge stated (to Miss Clifton):

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> "Instead of which, you are bimbling around asking for a stay in respect of a claim that is already 5 years old, where presumably you are going to deny liability."

74. It was in fact the Claimants who had previously obtained stays. The Appellant was not seeking any further stay. Nor was it fair to describe it as "bimbling around".

75. At page 3 line 25 the Judge continued:

> "It is outrageous. Outrageous…and we have not even got a defence. Outrageous."

76. Again, the Judge seems to have ignored the fact that the actions had been stayed at the *Claimants'* requests and that the stays had applied until 3 days prior to the hearing. In the **Dorman** Action the Particulars of Claim had been served only 8 days previously so it was unfair to suggest that it was 'outrageous' that Appellant had not served a Defence. In the *Turton* case a Defence had been served 18 months earlier. I do not consider it was simply a "holding" Defence with no positive case being advanced as a basis for defending the proceedings. Although the Defence made clear that a fuller response would need to await the outcome of criminal proceedings, it did advance a number of legal reasons for denying the claim. In short, there was nothing to be "outraged" about, particularly in circumstances where the Claimant in that action wanted the proceedings stayed pending the criminal process and sought no particularisation of the Defence; nor had the Claimant made any other complaint regarding the Defence.

77. At page 4 lines 17 to 26 the Judge stated in unequivocal terms that he was reserving costs management to himself, with what I can only read as an implication of adverse consequences for the Appellant. He said that, apart from the cost of turning 'criminal proceedings evidence' into evidence compliant for civil proceedings,

> "…[D] are not getting a penny piece out of these people [i.e. Cs] in terms of budgetary [sic] and I am going to reserve the costs management of this case to myself. Do I make myself clear?…This is outrageous, and this is going to get sorted. Quickly."

78. With respect to the Judge, in my view it is hard to avoid the conclusion that a reasonable person might consider that by this language the Judge indicated a closed mind as regards the future issue of budgeting of the Appellant's costs in relation to liability issues.

79. Immediately prior to that, at page 4 line 18, the Judge had sought to justify his expressed intended approach to the costs budgeting of the Appellant's liability costs in the observation:

> "And I am warning you about another matter: given that you should have been in a position to contemplate your liability navel over the last 5 years, I am going to take a very dim view indeed of a budget that is not confined to the sort of costs necessary to explore quantum issues, except for the limited purpose [of turning 'criminal proceedings evidence' into evidence compliant for civil proceedings]"

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80. The Judge does not seem to have given any weight to the fact that for 3 years there were no proceedings and for the remaining period there was no Particulars of Claim in one action, and a stay on proceedings in both actions. There was, in my judgment, no basis for the comment about 5 years being spent contemplating D's 'liability navel' and no basis for the threat about future liability costs.

81. At page 8 lines 20 to 23 the Judge again referred to the issue of costs, stating that:

> "…if [D] have the temerity to put in what looks like an eye watering budget on liability issues when virtually all of their material will have been prepared and contemplated for the defence of the criminal proceedings, they are going to get butchered aren't they?"

82. At page 9 lines 22-24 the Judge stated:

> "They have an obligation of disclosure and I am going to enforce it. This is…outrageous."

83. But, as will by now be obvious, the stage for disclosure had not been reached. The actions had been stayed. Unsurprisingly, there was therefore no evidence that any of the Claimants had sought disclosure. None of the Claimants complained to the Judge about a lack of, or a delay in, disclosure. The proposed consent orders did not deal with disclosure - they contemplated further pleadings and then a CCMC. The Judge's language was again in my view unjustified and intemperate.

84. At page 11 lines 1-3 the Judge stated:

> "I am so dismayed by the conduct of the Defendants that the obligation to do what I have just described [prepare the bundle and case summary for the next CCMC] I am going to direct the Defendants to do. I know that is unusual."

85. It is hard to avoid the conclusion that this is the Judge meting out 'punishment' (using the language of Counsel for the Appellant) to the Appellant for perceived misconduct.

86. Further 'punishment' is meted out at line 6 on page 11 when the Judge said to Miss Clifton:

> "And you're going to pay for it. And you're going to pay for the costs of today, and you're going to do so on an indemnity basis."

87. This is a remarkable approach when none of the Claimants had at any stage had sought a costs order. The Judge gave Miss Clifton no opportunity at all to make any submission about costs before (or after) announcing that decision. I have

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addressed that matter in the context of the First Appeal but such conduct is of particular importance in the context of the Second Appeal in relation to apparent bias.

88. The Judge returned to the theme of punishing the Appellant when, at line 13 on page 14 he stated to Miss Clifton:

> "Your people are going to pay for all of this because this is all, from my perspective, of your doing."

89. At page 13 lines 19 to 23 the Judge stated:

> "And the only way you wriggle out of this is get your act together quickly and properly, and if the bottom line of that is a concession of liability you rescue your position. [Miss Clifton: Yes, Your Honour]. If you don't you're going to get visited with the consequences of this, because this is too long."

90. Here the Judge is yet again unfairly blaming the Appellant for the delay in the action and is implying that unless the Appellant admits liability, future costs and case management decisions will go against it because of this delay.

91. At page 14 lines 25 to 29 the Judge stated to Miss Clifton:

> "I am dismayed, and I am going to get a grip on this. If you want any latitude from now on you are going to have to file evidence and explain what latitude it is, and why you want it, and what you've done to avoid the need for it. Because from my perspective at the moment, in the absence of any evidence, I do not see good reason to give you any latitude whatsoever. Understood?
>
> MISS CLIFTON: Yes your Honour.
>
> THE JUDGE: Apologies. But they need knowing…they need to know."

92. The Judge was courteous here but I agree with the Appellant that this is partisan treatment. An onlooker would observe that the Appellant is being told in terms that prima facie it deserves no latitude whatsoever in future case management decisions. The same stricture is not levelled at the Claimants, who one might observe were perhaps more to blame for the 5 year delay (although in fact much of the delay was due to the lengthy criminal proceedings which in turn was due to the conduct of the HSE).

(c) The Judge's Comments About Liability

93. In addition to the comments above, at line 3 on page 5 the Judge described the Defence served in the *Turton* action as ' *outrageous* '. He did not qualify this remark at all. This remark was unjustified. Notably the Claimant had not raised any issue with the Defence, despite having been served with it 18 months earlier. If it was indeed 'outrageous ' one might have expected the legally represented Claimant to seek further information or an order striking it out.

94. Similarly, on page 6 line 15 the Judge asserts, in unqualified terms, that in its Defence the Appellant has "got the law wrong". He did however go on to state that it was his "provisional view" that "the proceedings in the Turton case are indefensible…at the moment I don't see that you've get a leg to stand on, on breach of duty in relation to Turton. But that is

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only a provisional view and I have seen no evidence and I have heard no argument". Although it is not for me to express any concluded or indeed provisional views, it was far from clear that the Appellant had got the law wrong.

95. In my judgment, having regard to the strength of the language used, and in the context of the Judge's overall conduct of the hearing, a fair-minded observer would be concerned that the belated reference to the Judge's views on the merits being only 'provisional' was not sufficient to give one assurance that the Judge would be approaching the trial in a fair-minded way. It will have been noted that the Judge's first comment about the Defence in the *Turton* action was that it is "outrageous" without any qualification or statement that this is a provisional view.

96. Further, on page 13 line 31 the Judge said:

> "But I certainly don't see why the Claimants should suffer prejudice because of that [the length of time taken for the criminal proceedings], and if you deny liability now, 5 years down the line, they will suffer prejudice because the burden of proof is on them to prove the relevant facts."

97. And he continued on page 14 line 2 that:

> "[I will] have to determine liability based on witness recollection of events six years ago. That isn't fair. And the parties to whom it is not fair are the Claimants, on who the burden of proof lies. And I am going to do my utmost to minimise that prejudice…And if anyone wants to say anything on the Defendant's part about this, with the greatest of respect to you Miss Clifton [D's Counsel], I suggest that the organ grinder is instructed to appear on the next occasion: that is the senior file handler of the Defendants. Nothing less will do. Do I make myself clear?"

98. Putting to one side what seems to me to be a rather unfair and inaccurate caricature (to the effect that the Appellant is suddenly and unexpectedly, for the first time, denying liability after 5 years) these remarks clearly suggest that the Judge considered that it was the Appellant who had prejudiced the Claimants and that he would approach their position more favourably both during costs and case management stages and at trial.

Conclusion on apparent bias

99. Standing back and putting the three aspects of complaint together, I regret to say that, applying the *Porter* test, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge was biased. Counsel for the Appellant put it aptly in his submissions when he described the Appellants as having had their "card marked" by the Judge.

VII The Recusal Judgment

100. Given the nature of the *Porter* test, I considered it appropriate to approach the Second Appeal by focusing on the events and orders of 23 May 2019 and standing back to ask the question posed by the test. I did that without reference to the Recusal Judgment by which the Judge dismissed the recusal application.

101. I have however considered the Recusal Judgment in some detail and it was the subject of detailed submissions before me by Counsel for the Appellant. That was appropriate given that the Second Appeal is against that judgment. However, as I set out below, in my view the Recusal Judgment was vitiated by a number of errors which meant that I had to consider the application of the *Porter* test afresh.

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102. As indicated above, the Judge insisted on hearing the application that he be recused himself. Although he was right to observe in the Recusal Judgment at [16] that there is no rule which precludes a judge from hearing such an application it does seem to me that in this case that would have been a more appropriate course.

103. I very much doubt that Garnham J (see his observations and directions I have set out above at paras. [23] and [27]) would have intended that the Judge would hear the application given Garnham J's direction that future management of the cases be transferred to the Senior Circuit Judge in Bristol.

104. The Judge concluded in [16] of the Recusal Judgment that only the judge whose recusal was sought could hear such an application. I do not agree. While it is often the case that this judge hears such applications, there is no principle that such an application cannot be made to another judge. Indeed, it is not hard to contemplate circumstances where that would be the more appropriate course.

105. Be that as it may, I need to address the Judge's reasons for dismissing the recusal application. The Recusal Judgment is a careful and lengthy judgment but its main feature is that it does not limit itself to application of the *Porter* test to the events of 23 May 2019.

106. Instead, in large part, the Judge has used the Recusal Judgment to explain his reasons, after the event, for making the orders and comments he made on that day. That cannot be appropriate. The bias challenge either succeeded or failed on the basis of the events of 23 May 2019 and could indeed have been heard (and perhaps should have been heard) by a different judge with no history in the case. That judge would not have known of the personal observations of the original judge.

107. I recognise that the Judge did, however, address each of the three areas of complaint which are relied upon before me. I conclude however that he misdirected himself by not considering the matters in *combination* when applying the *Porter* test. For example, in isolation, the fact that certain provisional views have been expressed on liability would not, in and of itself, create an appearance of bias. But that is not what happened here for the reasons I have set out above. There were multiple issues which need to be considered together.

108. Aside from this misdirection, the Judge also erred in his Recusal Judgment at [13] in justifying the Unless Orders and Indemnity Costs Order by reference to claimed serious and unexplained procedural defaults (at [12]-[13] of the Recusal Judgment). These seem to be defaults by *all* parties (not just the Appellant) and could not justify the partial treatment. The Judge also did not confront the fact that these orders (aside from being one-sided) were not justified on the facts (for the reasons I have given in the First Appeal) and this fact was suggestive (with other matters) of apparent bias.

109. However, the more fundamental point is that, contrary to the Judge's impression, there were in fact no relevant procedural defaults in the form identified by the Judge. There were simply no defaults in the **Dorman** Action; and none of the defaults asserted by the Judge existed in the Turton action (save, as Counsel fairly identified to me, that there was arguably a technical default as regards Form Rs (by all parties) but this was not mentioned by the Judge). The Judge was under the impression that some form of relief from sanctions needed to be sought or explained. That was simply wrong.

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110. The Judge also failed adequately to address the point in his Recusal Judgment that the nature and type of language when making the First Order was inappropriate; and that (as described above) a fair minded and informed observer might conclude that he appeared to wish to punish the Appellant and threaten future adverse actions.

111. Finally, on the issue of the views which the Judge expressed on liability issues, the Judge did not confine himself in the Recusal Judgment to considering whether those views suggested some form of prejudgment. Instead, as Counsel for the Appellant identified at the hearing before me, the Judge did his own independent additional legal research (in advance of the recusal hearing) to justify why he had expressed certain views as to the merits on 23 May 2019. So, at [41] he explained:

> "…I do not accept that a fair-minded and informed observer would regard my remarks on the issue of liability in the personal injury action as giving rise to a real possibility that I would not approach the trial of either action in a fair manner, and that is the application and allegation made by the defendant in this application. Firstly, I explicitly qualified the views that I expressed by saying that they were "provisional" and there is no evidence in support of the contention that doing so was "mere lip service" as opposed to proper judicial recognition that, at that stage, evidence and argument had not been heard. Secondly, *Greatorex,* as a first instance decision, albeit of a High Court Judge, for several reasons may neither support the contention relied upon nor determine it authoritatively. No consideration arose in that case of the vicarious liability of an employer for the self-infliction of risk upon himself by a fellow employee giving rise to a rescue. Moreover, the decision to contrary effect was made in *Harrison* ***v*** *British Railways Board [1928] 3 All ER 679* and the persuasive opinion of the Supreme Court of Canada in *Horsley* ***v*** *McLaren (The 'Ogopogo') 1970, 2 Lloyd's Reps 410* were not cited or dealt with either by Cazalet J in *Greatorex* itself, nor in the speech of Lord Ackner in *Alcock* ***v*** *chief Constable of South Yorkshire [1922] 1 AC 310* on which he relied. Thirdly, the remark relied upon related only to the personal injury action and cannot, on any view, indicate a real possibility of approach to the trial in the fatal accident claim that would not be fair-minded."

112. The Judge's further legal researches as set out above on the issues of vicarious liability and rescue situations were, with respect, not relevant or appropriate. The issue was whether what he had said on 23 May 2019 engaged the *Porter* test, not whether there might have been sound additional legal reasons for the views he expressed on that day.

VIII Actual Bias

113. Counsel for the Appellant put his case on the basis of both apparent and actual bias, recognising the seriousness of the latter allegation. He did however make clear that he was not seeking any finding of actual bias.

114. In my judgment, the argument of actual bias is not open to the Appellant. That is because of the nature of the permission to appeal granted by Garnham J (which I consider was granted on the basis of grounds of appeal and skeleton confined to apparent bias) and also because this was not the case advanced below.

115. I accept that some comments in the skeleton may have gone further than an allegation of just apparent bias (using the language of "animus" against the Appellant) but I do not regard, considering the terms of the Appellant's Notice as a whole,

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that a clear case of actual basis was pleaded. Had it been pleaded, and had I permitted argument, the shape and nature of the appeal would have been different.

IX Conclusion

116. I will allow the appeals against the First Order and the Second Order. The material parts of the First Order will be set aside and I will make an order for recusal of the Judge as sought in the Appellant's Notice in relation to the Second Order.

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Sir Alexander Morrison & Anr v AWG Group Limited & Anr

Positive/Neutral Judicial Consideration

Court
Court of Appeal (Civil Division)

Judgment Date
20 January 2006

A3/2005/2736

Court of Appeal (Civil Division)

[2006] EWCA Civ 6, 2006 WL 63654

Before: Lord Justice Mummery Lord Justice Latham and Lord Justice Carnwath

Friday 20th January, 2006

On Appeal from the High Court of Justice Chancery Division Mr Justice Evans-Lombe

[2005] EWHC 2786 (Ch)

Representation

Miss Amanda Harington (instructed by Dechert) for the First Appellant.
Mr Philip Marshall QC & Mr Deepak Nambisan (instructed by Olswangs for the Second Appellant.
Mr Charles Aldous QC and Mr Charles Bear QC (instructed by Herbert Smith) for the Respondent.

Judgment

Lord Justice Mummery :

The appeal

1. This is an appeal against the decision of Evans-Lombe J on 1 December 2005 not to recuse himself from trying an action in the Chancery Division. He granted permission to appeal.

2. As the trial of the action was due to start on 6 December 2005 and is estimated to last for about 6 months, arrangements were made for the appeal to be heard urgently on 5 December. The case was very well argued at short notice by Mr Philip Marshall QC for the appellant, Mr Stephen McBrierty, and Ms Amanda Harington for the other appellant, Sir Alexander Morrison, (they are the defendants in the action) and by Mr Charles Aldous QC and Mr Charles Bear QC for the respondents (the two companies, who are the claimants in the action). After considering the written and oral submissions the court announced its decision that the appeal would be allowed. The judge was directed to recuse himself from hearing the trial. It was stated that reasons would be given in judgments to be handed down in due course.

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Background facts

3. The circumstances of the application and the nature of the proceedings were helpfully summarised by the judge in the opening paragraphs of his judgment, which I quote verbatim. The summary is accepted by the parties as broadly accurate for present purposes, although Mr Marshall and Ms Harington had certain reservations about the accuracy of some of the details in paragraph 2 which are not material for present purposes:

> "1. I have to deal with an application made by the defendants Sir Alexander Fraser **Morrison** ("FM") the 1st defendant and Stephen John McBrierty ("SM") the 2nd defendant, made on Wednesday the 30th November the week immediately preceding the intended commencement of the trial on the 5th December, that I should recuse myself from trying the case. The application arises in this way: in the course of my pre-reading into the case I noticed that it was intended to call as a witness for **AWG Group Ltd** ("**AWG**") Mr Richard Jewson ("Mr Jewson") who, at all material times until March 2002 was a director of **AWG** and chairman of the audit sub-committee of its board. Alerted by the name I then discovered that Mr Jewson is well known to me of which fact I then alerted the parties on the 29th November. The response of the claimants was to indicate that, rather than risk my withdrawal and the consequent delay in obtaining another judge and his completing the pre-reading process on which I had already spent a week, they would not call him to give evidence since they did not regard him as other than a relatively peripheral witness. The response of the defendants is contained in a letter from Messrs Dechert LLP of the 30th November the conclusion of which was to ask me to withdraw.
>
> 2. The case arises from the takeover by **AWG** of **Morrison** plc ("**Morrison**") in which FM and SM were respectively the chairman, and, in effect, the chief executive officer. They also held between them a substantial proportion of **AWG's** shares. In August 2000 **AWG** made an approach to **Morrison** with a view to bidding for the whole of the issued share capital of that company. In due course a bid was made which **AWG** declared to have gone unconditional on the 21st September 2000. It is **AWG's** case that it was procured to make the bid and to declare it unconditional as a result of a representation that **Morrison's** profits in the full year to March 2001 would be £30.5m, that that representation was made to the board of **AWG** by the defendants at a time when they had no bona fide belief that such a level of profit would be achieved, and that, in making the representation, the defendants fraudulently procured **Morrison** to conceal from **AWG's** "due diligence" inquiries, material facts from which **AWG** might well have concluded that that level of profit was unachievable and that they should withdraw their bid.
>
> 3. At the outset of the hearing of the defendants' application I described my connection with **AWG** and with Mr Jewson in the following terms: **AWG** is a company whose primary business is supplying water to industry and the public in East Anglia and in particular in Norfolk. My family are farmers/landowners in Norfolk and so in the area of operation of **AWG**. I have had dealings with **AWG**, not always harmonious, over the years on such subjects as access for the purpose of sinking boreholes and running pipelines. Mr Jewson lives in the next village to the village where I and my family live being approximately 1 mile distant. Our families have known each other for at least 30 years. Our children are friends and we have dined with each other on a number of occasions. Mr Jewson and I in the past were tennis players. Mr Jewson has recently been appointed Lord Lieutenant of Norfolk. I would have the greatest difficulty in dealing with a case in which Mr Jewson was a witness where a challenge was to be made as to the truthfulness of his evidence.
>
> 4. As is apparent the case which the claimants seek to make out against the defendants involves serious allegations against prominent businessmen for whom, if those allegations are found proved, most serious consequences would follow both in the damages which they might be required to pay and in the consequences that such findings would have for their future careers.

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The test for apparent bias

4. As Mr Marshall made clear, his client's sole objection to Evans-Lombe J trying the case was the real possibility of apparent bias. There was not, it should be emphasised, any suggestion of actual bias or personal interest. The judge had no personal interest, pecuniary or otherwise, in the outcome of the litigation. In no sense would he be a judge in his own cause. The detailed objections in Dechert's letter of 30 November 2005 (referred to in paragraph 1 of the judgment) were based entirely on an apprehension of the real possibility of apparent bias.

5. Upholding the bias objection on the eve of the trial would cause considerable disruption: the trial would have to be adjourned, as there would be practical problems in finding a new trial judge at such short notice; the parties would suffer additional costs resulting from the adjournment; and there would be delay in fixing a new trial date.

6. Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice, both at common law and under Article 6 of the European Convention for the Protection of Human Rights . If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance.

7. The test for apparent bias now settled by a line of recent decisions of this court and of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask "whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased" : *Taylor v. Lawrence [2003] QB 528* at paragraph 60. See also *R v. Gough [1993] AC 646* ; *Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700* ; *Porter v. Magill [2002] 2 AC 357* ; and *Lawal v. Northern Spirit Ltd [2004] 1 All ER 187* .

8. As to the kind of circumstances in which there would be a real possibility of bias, the judge cited a pertinent passage from another leading case, *Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451* at 480:

> "25. By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case … or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him … In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

9. Most of the leading authorities were appeals arising from hearings that had already taken place or were under way and an objection to the judge was based on facts discovered during the course of, or only after the end of, the hearing. Although this is a different case, as the hearing has not yet started, the same principle applies. Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle. If, as here, the court has to predict what might

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happen if the hearing goes ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising, prudence naturally leans on the side of being safe rather than sorry.

Mr Jewson

10. Moving from the statement of general principle to its application to the particular case, the precise question is whether a fair-minded and informed observer of the circumstances of this forthcoming trial would conclude that there was a real possibility that Evans-Lombe J might be subconsciously biased by his long acquaintance with Mr Jewson: see *Lawal* (also a case in which the objection was taken in advance of the hearing) at paragraph 21 per Lord Steyn, who had stated in paragraph 14 that "Public perception of the possibility of unconscious bias is the key." Lord Steyn also emphasised that high standards are set by the "indispensable requirement of public confidence in the administration of justice."(paragraph 22 of *Lawal*).

11. The defendants' principal point was that aspects of Mr Jewson's evidence are contentious, or might become so in the course of the hearing. The judge would then be confronted with having to decide whether his evidence was reliable. He recognised that he would have "the greatest difficulty" in dealing with that situation.

12. **AWG's** response was that the judge's potential problem with Mr Jewson's evidence was completely resolved by their decision, taken in order to avoid the judge's embarrassment, not to call Mr Jewson to give evidence. Instead they would call fellow executive directors, who were also members of the audit committee of **AWG's** board at all material times. Evidence would also be given by the executive chairman, Mr Gourlay. It was submitted that, by removing Mr Jewson as a witness at the trial, the risk of the judge's embarrassment at having to decide directly whether Mr Jewson's evidence was reliable would no longer be a real possibility.

13. The defendants did not agree with **AWG's** assessment of the situation. They ventilated a number of specific objections. As a result of the risk of embarrassment to the judge, which was the only reason for the claimants' decision not to call Mr Jewson, they would be denied the opportunity to cross examine Mr Jewson; they would be unable to ask the judge to draw inferences from his failure to give evidence; as he was chairman of the audit committee, any criticism of his fellow directors to discharge their duties was likely to constitute a criticism of Mr Jewson; and the defendants might even wish to call him as a witness, even if **AWG** did not.

14. In dealing with the scenario of a trial without Mr Jewson as a witness the judge referred to the test of apparent bias:

> "11. In deciding whether I should recuse myself from the case I have first to decide, applying the test derived from the authorities which I have set out above whether all circumstances which have a bearing on the suggestion that I might arrive at a conclusion in the case through bias would lead "a fair-minded and informed observer to conclude that there was a real possibility" that that might be the result of my failure to withdraw."

15. The judge then concluded that his continuation as trial judge would not fail the test. He explained the position as follows:

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"12. I have come to the conclusion that my continuation as judge in the case will not fail the test. Mr Jewson's witness statement is mainly directed to the issue of causation of loss and to the impression made on the board of **AWG** of the representations made by the defendants in the course of **AWG's** "due diligence" inquiries. I can see no reason why the proposed new witnesses will not be able to give the evidence which Mr Jewson would have given. The fact that they are giving it in his place should not constitute an unfair advantage to the defendants. The same is true of the evidence given by Mr Jewson of the impact of the letter of 11th September 2000 on the **AWG** board; see item (ii) in Messrs Dechert's letter of the 30th November. It does not seem to me that Mr Jewson's supervisory role as chairman of the audit committee and any recommendations that he may have given as to the treatment of financial information from **Morrison** in the accounts of the new **AWG Group** can have be relevant to any judgment that I give. It will be for me to decide, if necessary, whether the accounts properly record such information applying my view of the appropriate accounting principles which may or may not agree with the view of the audit committee of precisely the terms in which the financial information was provided to the auditors, or to the committee itself, the new proposed new witnesses are just as able to give that evidence as Mr Jewson.

13. It has always been within the discretion of the claimants as to which **AWG** board members to call to give evidence and it is not prima facie unfair to the defendants that late in the day they may elect not to call a witness who has given a witness statement but substitute other witnesses, provided proper notice is given of what those replacement witnesses are going to say. It will be open to the defendants to criticise the claimants' case if a comparison between the evidence given by the replacement witnesses diverges from the witness statement which has been delivered by Mr Jewson. In those circumstances my role will be whether any such divergence undermines the evidence of the replacement witnesses. I observe that if this happens the reliability of Mr Jewson's witness statement will come into question but I do not regard this as presenting a significant problem.

14. It is point (iv) of Messrs Dechert's letter which seems to me to be the high point of the argument that I should recuse myself. However I have come to the conclusion that it does not drive me to do so. Mr Jewson was not an executive member of the board responsible for the day to day trading decisions of **Morrison** after the acquisition. The question will not be whether particular trading decisions were ill judged but whether or not they caused relevant loss. I do not think that "a fair minded and informed observer" would conclude that I was less likely to decide that trading decisions of **AWG** during the post acquisition period were mistaken and causative of loss because at the time Mr Jewson was a non-executive member. In any event I am assured by counsel for the claimants that there is no record and no other evidence that Mr Jewson was party to any of the post acquisition trading decisions of **AWG**.

16. The judge went on to consider what he described as "a second stage" of the exercise (paragraph 15 of his judgment). There was a possibility in a complex case with substantial disclosure of documents and large numbers of witnesses that new facts and a changed picture would emerge unexpectedly during the course of the trial, leading the judge to conclude that he ought not to carry on with a trial in which he would have to decide whether serious allegations made by the claimants were made out. He concluded:

"15 … I have to balance whether the apparent role of Mr Jewson in the overall circumstances of the case leads to a risk that such a changed picture might emerge. I have to balance such risk against the undoubted disruption of the administration of justice generally caused by having to find a new judge to try a case of this length at short notice and also the inevitable further cost imposed on the parties resulting from the ensuing delay. I have come to the conclusion that such a risk, which must

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always be present, is too small to drive me to the conclusion that I should recuse myself. For these reasons I must dismiss the application."

Discussion

17. This very experienced judge was faced with an unwelcome dilemma on the eve of a major trial, for which costly arrangements had been made. In his consideration of the objections to his trying the case and in his decision to grant permission to appeal he was sensitive to the situation of the parties and to the problems involved both in proceeding with the trial and in withdrawing from it at a late stage.

18. I appreciate that, having started to read into the case, he was in a good position to make an assessment of the circumstances. On the one hand, it was certain that his withdrawal from the trial would have serious consequences for the parties and for the administration of justice: delay, costs, listing problems. On the other hand, there were risks in his not withdrawing, which he fully recognised in his admission that his acquaintance with Mr Jewson would cause "the greatest difficulty", if there was a challenge to the truthfulness of his evidence. He came down in favour of remaining in the case.

19. What is the position of this court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.

20. As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.

Conclusion

21. In my judgment, the judge ought to have recused himself in the unfortunate circumstances in which, through no fault of his own or of anyone else, he was placed. This was the conclusion I reached at the hearing on 5 December 2005. My assessment of the circumstances bearing on the issue of apparent judicial bias is as follows.

22. First, the judge knew Mr Jewson and Mr Jewson knew the judge. It was not a fleeting acquaintance. They had known each other for 30 years. The judge recognised that this fact alone was potentially a valid ground of objection to his trying the case when he acknowledged that he would have "the greatest difficulty" if he had to deal with a challenge to Mr Jewson's evidence.

23. Secondly, Mr Jewson, in his capacity as a long serving and senior non-executive director (from 1991 to 2002), as deputy chairman of the **AWG** board at the time of and after the acquisition of **Morrisons** and as chairman of **AWG's** Audit Committee, was connected or associated with **AWG** at the time of the events, which have given rise to **AWG's** very serious allegations that the defendants are guilty of defrauding **AWG**. Whether or not he was to give evidence at the trial, Mr Jewson was, in terms of *Locabail* , "involved in the case."

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24. Thirdly, the action by **AWG** against the defendants is very substantial and complex. It may take 6 months to hear. The documentation is voluminous (250 trial bundles). There are many witnesses. There is a great deal at stake on each side in terms of money and personal reputation. In those circumstances it is extremely difficult for anyone to predict with confidence at this stage what may, or may not, happen during the trial concerning, in particular, evidence of the role of Mr Jewson relating to relevant pre-and post-acquisition events.

25. Fourthly, Mr Jewson's position with **AWG** at the material time was such that it was considered that he could give relevant evidence at the trial. This was certainly the position up to the time when objection was made to the trial judge. Mr Jewson's evidence was potentially relevant to two issues: (a) reliance, that is whether **AWG** relied on the fraudulent representations alleged to have been made by the defendants about profit forecasts or whether **AWG's** decision to acquire **Morrison** was made for "strategic reasons" on the basis of independent research and not in reliance on the defendants' profit forecasts and calculations; and (b) causation, that is whether the losses which **AWG** allege that they have suffered were in consequence of the alleged fraud by the defendants or in consequence of **AWG's** post-acquisition mismanagement decisions, the integration of **Morrison's** construction business within **AWG** and other events unconnected with the alleged fraud of the defendants. **AWG's** counsel do not think much of the defendants' case on these issues and asserted that it was not necessary for Mr Jewson to give evidence at all. The fact is, however, that Mr Jewson made a witness statement, which the judge has read in full. But for the embarrassment of the judge's personal position, Mr Jewson would give evidence on behalf of **AWG** and would be available for cross examination by the defendants' counsel on the above issues.

26. Fifthly, I am not persuaded, although the judge was, that the problem of the real possibility of bias, which would arise from the above circumstances, can be completely resolved if **AWG** call other witnesses, instead of Mr Jewson, to give the evidence which he would have given. **AWG's** decision not to call Mr Jewson is itself a recognition by them that there would be a real possibility of apparent bias if Mr Jewson gave evidence, even if only in a corroborative role. The decision indicates that, at the very least, trial arrangements have already been affected by the perceived problem of the judge's difficulties stemming from his long acquaintance with Mr Jewson.

27. Indeed, it is my view that, even in the absence of Mr Jewson from the witness box, the real possibility of bias would remain. Mr Aldous and Mr Bear did not agree. They argued that Mr Jewson was not an essential witness for **AWG**; that, as a non-executive director, he was not involved in management decisions; that he could not give relevant evidence on any key matters, either in respect of pre- or post-acquisition matters relating to the defendants' liability to **AWG**; that, once Mr Jewson was removed as a witness, there was no real possibility of bias; that the judge could put out of his mind what he had read in the witness statement; that, if Mr Jewson did not give evidence, there was no risk of the judge having to resolve an issue which could reflect adversely on Mr Jewson's veracity or on him as a person. He would not have to make a judgment on Mr Jewson.

28. In my judgment, however, the calling of substitute or replacement witnesses (such as Mr Challon, Mr Morris and Mr Cronin) would not resolve the perception of a real possibility of apparent bias. Simply not calling Mr Jewson to give evidence would not remove him from the events which have taken place, in which he was, or might have been, involved and about which evidence will, or might, be given by others in chief and under cross examination. The replacement witnesses were members of the same audit committee of which Mr Jewson was the non-executive chairman at the material time. It is said that they could give the evidence which he would have given. If the evidence of fellow members of the committee were challenged and the veracity of their evidence became an issue, the judge might have to make a finding about the reliability or credibility of their evidence. If their evidence is the evidence which Mr Jewson would have given, there is a real possibility that the judge would be placed in an embarrassing position similar to that which he would have been in, if Mr Jewson had actually been called to give evidence. In that eventuality, from the vantage point of the fair-minded and informed observer, a real possibility of unconscious bias remains.

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29. Sixthly, while I fully understand the judge's concerns (see paragraph 15 of his judgment quoted above) about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having.

30. Seventhly, even at the judge's so-called “second stage”, I would not assess the possibility of apparent bias as so small that the court would be justified in taking the risk of allowing this judge to try the action. Adjourning the trial now is bad enough for all concerned, but an even worse disaster, such as having to abort the trial several months into the hearing and to start all over again, may be waiting to happen. That would be inefficient, as well as unjust. It is a potential disaster that can be avoided. A decision must be made now one way or the other. By far the safer course is to remove all possibility of apparent bias by the recusal of the judge before the trial even begins. There will be other judges available to try this case and there will be other cases available for this judge to try.

Result

31. With the greatest possible respect, the judge's well intentioned decision not to recuse himself was wrong. It is in the interests of all concerned that he does not hear this case. As already indicated, the appeal was allowed on 5 December 2005 and the judge was directed to recuse himself from the trial of this action. I hope that suitable arrangements can be made as soon as possible to find another judge to try the case early in 2006.

Lord Justice Latham:

32. I agree.

Lord Justice Carnwath:

33. I also agree.

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