IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 162 OF 2019 (RPJ)

BETWEEN:

RAIFFEISEN BANK INTERNATIONAL AG
(a company incorporated in the Republic of Austria)

PLAINTIFF/RESPONDENT

AND:

(1) SCULLY ROYALTY LTD.
(a company incorporated in the Cayman Islands)

FIRST DEFENDANT

(2) LTC PHARMA (INT) LTD.
(a company incorporated in the Republic of the Marshall Islands)

SECOND DEFENDANT

(3) MERKANTI HOLDING P.L.C.
(formerly MFC Holding Ltd, a company incorporated in the Republic of Malta)

THIRD DEFENDANT

(4) 1178936 B.C. LTD.
(a company incorporated in British Columbia, Canada)

FOURTH DEFENDANT

(5) GARDAWORLD, CN. LTD
(a company incorporated in the Republic of the Marshal Islands)

FIFTH DEFENDANT

(6) 1128349 B.C. Ltd.
(a company incorporated in British Columbia, Canada)

SIXTH DEFENDANT

(7) IEM Services Co. Ltd.
(a company incorporated in the Republic of the Marshall Islands)

SEVENTH DEFENDANT

(8) LTCM ASSETS PRIVATE LIMITED
(a company incorporated in the Republic of Liberia)

EIGHTH DEFENDANT

(9) MICHAEL JOHN SMITH

NINTH DEFENDANT/APPLICANT

Before:	The Hon. Justice Raj Parker
Appearances:	Mr Tim Penny KC of counsel instructed by Mr Christopher Levers and Mr Jordan Constable of Ogier on behalf of the Plaintiff Mr Alex Potts KC of counsel instructed by Mr Jonathon Milne and Ms Alecia Johns of Conyers Dill Pearman LLP on behalf of the Ninth Defendant Mr Mark Russell and Mr Rupert Wheeler on behalf of the KSG Defendants
Heard:	28 February 2024
Draft Ruling circulated	11 March 2024
Ruling Delivered:	19 March 2024

HEADNOTE

Application for recusal by person pending challenge to the jurisdiction -whether fair minded well informed observer would conclude that there was a real possibility of bias or predetermination-evidence-law

RULING

Introduction

1. Mr Smith (or D9) applies by paragraph 1 of his Summons dated 27 September 2023 for an Order without prejudice as to his pending challenge to the jurisdiction of this Court, that I (the Judge) should recuse myself from hearing the balance of the applications contained in his Summons dated 27 September 2023 and/or from hearing any further applications involving claims being made by the Plaintiff (RBI) against him, on the basis of 'apparent bias' and 'predetermination' (for the

reasons set out in the First Affidavit of Michael John Smith (Smith 1)[1] and the Second Affidavit of Michael John Smith (Smith 2) [2].

2. By the same Summons, Mr Smith seeks at paragraphs 3-10 to set aside the permission given by the June 2023 Order (following a hearing on that date attended by RBI and the KSG Defendants and *ex parte* concerning Mr Smith) for Mr Smith to be joined to these proceedings and served out of the jurisdiction in Hong Kong (the "Jurisdiction Application").

3. This litigation has been ongoing for over 4 years and there have been many interlocutory hearings. There have also been appeals to the Court of Appeal. Mr. Smith has not been hitherto an individual named defendant to the litigation. He is a director and the Chairman of D1 (which is the ultimate parent company of each of the KSG Defendants), having until around May 2021 been the President and CEO of D1.

4. It is to be noted that KSG continue to act for the First and Third to Seventh Defendants ("D1" and "D3-D7", collectively the "KSG Defendants"), whose position is that the Recusal Application "*is a matter between RBI and Mr Smith*" and they have filed no evidence[3].

5. Mr Potts KC acts for Mr Smith on this application and Mr Penny KC for RBI. I raised at the outset of the hearing that RBI and Mr Smith were proceeding on the basis that I myself was the Judge who would hear argument, review the evidence and determine the recusal application although it was open to Mr Smith to have the matter determined by another first instance Judge. Mr Potts KC said that his client, Mr Smith, took the view that it was appropriate for me to deal with the application. I confirmed that I would do so and had no difficulty or embarrassment in doing so.

Mr Potts KC submissions

6. Mr Potts KC said that Mr Smith submits, in summary, that it would now be impossible for me (the Judge) to preside over a fair hearing, or a fair trial, involving the RBI's claims and applications against him or his applications against RBI.

[1] *dated 27 September 2023*
[2] *dated 8 December 2023*
[3] *See KSG's letter of 30 October 2023*

7. He stressed that the application was put on the basis of a real possibility of apparent bias and a real possibility of predetermination having regard to the following matters:

   a) the Plaintiff's reliance on inadmissible, and prejudicial, evidence in the context of various interim hearings that have taken place on an *ex parte* basis (to Mr Smith) to date;

   b) a failure to give any reasons when granting the *ex parte* Order dated 27 June 2023; and/or

   c) adverse findings, reasoning, and conclusions expressed to date with respect to the affidavit evidence that Mr Smith has given to date on behalf of the existing Defendants, and with respect to the other Defendants' applications to contest the jurisdiction of the Court and/or the applicable governing law.

8. Mr Potts KC submitted that these areas of concern should be viewed cumulatively and although they could be analysed individually, it was the cumulative effect that was important.

9. Actual bias was not alleged and Mr Potts KC submitted that he did not need to show as a matter of probability that matters had in fact been predetermined against his client. All that he needed to establish objectively was a real possibility of predetermination and a real possibility of apparent bias, which amounts to the same thing.

10. If that is established, the *ex parte* Order dated 27 June 2023 should be set aside, whereby the Plaintiff was given permission to join Mr Smith as the ninth defendant, on the grounds that I should have recused myself from hearing the Plaintiff's *ex parte* application (of my own motion), on the grounds of 'apparent bias' and 'predetermination'.

11. Mr Smith relies upon a number of rulings or judgments or orders in these proceedings, including the following matters of record which I have listed below, grouped for ease of reference below certain headings.

Adverse findings, reasoning, and conclusions expressed to date with respect to the affidavit evidence that Mr Smith has given to date on behalf of the existing Defendants, and with respect to the other Defendants' applications to contest the jurisdiction of the Court and/or the applicable governing law.

a) An *ex parte* freezing injunction Order dated 30 September 2019 against the First Defendant (without a reasoned, written judgment or ruling) with orders for service out of the jurisdiction on the original foreign Defendants (the Second to Fourth Defendants);

b) An order dated 4 November 2019 whereby the Court refused to stay the freezing injunction application against the First Defendant pending a discharge application;

c) A note of ruling dated 3 February 2020 (following a contested 3 day hearing on 23, 24 and 29 January 2020) continuing a freezing injunction against the First Defendant, and making a freezing injunction against the Fifth Defendant, both 'uncapped' as to amount, while also granting leave to the Plaintiff to proceed against the Sixth to Eighth Defendants as additional Defendants; A written set of reasons for the ruling dated 3 February 2020, in a judgment dated 7 July 2020 in which it was expressly held that "*[t]here [was] a clear juridical advantage to having all [the] alleged conspirators [including D4] at the same trial… That would be fair to all parties and in the interests of justice*" (at paragraph 94). Having so held, Mr Potts KC submitted that it was hard to see objectively how the Judge could approach that issue again with a completely open mind.

d) He also referred to the Judge's refusal (wrongly, as the Court of Appeal subsequently held) not to impose a "maximum sum" or a "cap" on the *Mareva* injunction orders that were granted in favour of the Plaintiff (see paragraph 187).

e) As part of the judgment dated 7 July 2020 it was noted that the Plaintiff alleged that "*only two individuals were behind the scheme: Mr. Smith and Mr. Morrow*" (see paragraph 21); as well as the following comments by the Court:

> *"A permanent feature of this case has been that notwithstanding the detailed and extensive narrative that has been provided by Mr Penny QC both extensively in writing and orally which support the submission*

that all of the material activity that has been detailed was intended to put D2's assets out of the reach of RBI, no overall counter narrative has been advanced by Mr McMaster QC. There is no positive case advanced explaining the purpose and legitimacy of the transactions and conduct complained of" (see paragraph 76);

"the represented defendants' evidence … is questionable at the very least" (paragraph 79);

"In all the circumstances it is to be inferred that the Dividend was part of the unlawful scheme to assist D2 to avoid its contractual obligations to RBI" (paragraph 100);

"The represented defendants' evidence in relation to these representations is contradictory and weak. It consists of denying that there were any representations and asserting that RBI had misunderstood or misconstrued what was being represented. It is also suggested by the represented defendants' evidence that it was obvious that D2 would not remain in the MFC group and therefore the MFC group did not think to explain these matters to RBI. The represented defendants' evidence is to the effect that these were well known and readily discoverable reorganisations. That in my view is not credible in view of the conduct of the represented defendants and the lengths undertaken to move companies and assets in this case" (paragraph 106(e));

"The evidence shows evasive conduct and a lack of candour on the part of the MFC group…" (paragraph 106(g));

"Mr Lawler's evidence assists the court to form the view that MFC group's accounts were opaque and there were breaches of accounting standards within them" (paragraph 106(i));

"This it seems to me in totality amounts to more than a plausible evidential basis for RBI's case" (paragraph 107);

> *"The evidence that has been provided by the represented defendants is in places inconsistent and in many respects simply not credible" (paragraph 186).*

f) An order dated 1 May 2020 granting permission to the Plaintiff to join four additional Defendants and to serve the Re-Amended Writ on the foreign Defendants out of the jurisdiction;

g) A ruling dated 29 September 2020, followed by a judgment dated 28 October 2020 in which an anti-suit injunction application was granted restraining the First Defendant from continuing with proceedings pending before the Malta courts. In doing so, findings were made that the First Defendant had brought the Malta proceedings "in bad faith to harass and vex RBI" (see, for example, paragraph 75):

> "*The inference the court draws is that the Malta proceedings have been brought by D1 in bad faith to harass and vex RBI. In this regard, I accept what is said by Mr Dellemann at [paragraphs] 97-110 of his seventh affidavit."*

And paragraphs 79-80:

> *"79. I echo Rix LJ's views in Glencore that litigation of this complexity and with multiple differently domiciled parties should be conducted with as much economy and efficiency as is possible and preferably in one forum so as to do justice between the parties. This is particularly so where fraud and conspiracy are alleged*
>
> *80. The court therefore is satisfied that the interests of and the ends of justice necessitate an ASI and grants the mandatory relief sought ..."*

h) A written set of reasons dated 12 March 2021 in which the Judge dismissed the Third Defendant's and Sixth Defendant's jurisdictional challenges, and repeated his previous findings, in these terms:

"42. The Court in the 7 July 2020 judgment made certain provisional findings which, although not binding, … nevertheless were made following a contested 3 day hearing…

48. Based on the evidence before the court in January 2020, findings were made that the relevant transfers were made with the express purpose of asset stripping D2 so that it could avoid its obligations to creditors and were carried out without notice to RBI and at an undervalue.

49. In support of that purpose, the court found that there was a plausible evidential basis for RBI's allegations that the transactions were structured in a deliberately convoluted way, that the MFC defendants' conduct was evasive and showed a lack of candour following the Plan of Arrangement, and the true state of affairs and true financial position were obscured. There was also an arguable case that incomplete and misleading evidence had been given in some respects." (referring to paragraphs 106(a), 106(g), 146, 161, 147-150, 151 and 184 of that earlier judgment).

"51. It is RBI's case that these entities were used to further the aim of stripping and distancing D2's assets, with Mr Morrow and Mr Smith, the only relevant Directors of all of the MFC entities, pulling the strings. Mr. Morrow and Mr. Smith signed all the relevant documents relating to the transactions involving D3 and D6.

52. The inferences drawn by the Court as to their knowledge and the plan to remove assets from D2 may well in due course be ultimately attributed to D3 and D6 assuming they owe the relevant duties to the respective companies to impart information, or that the conspiracy is proven against them for the relevant transactions. For the time being the question is whether there is a real prospect that attribution of knowledge will be established."

……

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"116. The court is not able to finally decide between the two competing narratives at this interim stage. It can only examine the evidence and argument and form provisional views.

117. The court does now have, albeit belatedly … :'another side to the story'…

118. It is not however an account which at this stage undermines the case RBI made out that there was a concerted intent and scheme implemented to asset strip D2. If the MFC group properly thought that the guarantee would never be called upon at the time of the transfers, it went to extraordinary lengths to divest D2 of its assets and move it out of the group, which is not explained away by the financial position of MFCC."

"122. At this stage whilst Mr Wardell QC's 'no motive' contention does provide 'another side to the story', it is one which has not been fully developed to disturb the court's conclusions.

123. The competing narrative provides another factor for the court to assess. It does not by itself lead the court to seriously doubt at this stage whether there was a sound inferential basis for a dishonest motive for the transfers of assets. The net effect of these transfers took assets away from D2, against the provisional factual matrix found by the court as set out above following the January 2020 hearing."

…..

"170. In a conspiracy claim there is an advantage in having all of the alleged conspirators in one forum both to serve the interests of justice and for reasons of efficiency. The Court will be examining a complex chain of transactions involving parties which it is alleged were orchestrated by two common conductors, Mr Morrow and Mr Smith, who there is a good arguable case for holding were the directing minds

of D6 (and D3) as well for these purposes."

i) An Order dated 23 March 2021 dismissing the Third Defendant's and Sixth Defendant's jurisdictional challenges. Mr Potts KC submitted that the argument that D6 had made that it was not a necessary or proper party to claims against D1 and D5 was the kind of argument that Mr. Smith would also wish to advance and an observer would conclude that there was a real possibility that this had been predetermined against him in his absence without him even being a party.

12. Mr Potts KC submitted that the language used goes way beyond what a court would be expected to find in identifying if there is a serious issue to be tried, or a good arguable case, or in relation to whether one side provisionally had the better argument, recognising that RBI bore the burden of proof.

13. Mr Potts KC submitted that the observer would conclude that there was a real possibility of predetermination because on Mr Smith's application, the Judge would find that even if those previous judgments are not binding, they did follow substantial hearings involving affidavit evidence and involved Leading Counsel on behalf of other parties, and the issues would not be properly revisited. The observer would say that the Judge having made findings in January 2020 relied on those earlier findings with regard to D3 and D6 and would be likely to rely on them further in Mr Smith's application.

14. Mr Potts KC also relied on:

a) A judgment dated 25 March 2021, in which the Judge ordered the First Defendant to pay the Plaintiff's costs of the anti-suit injunction application on an indemnity basis, holding that "the facts in any event show that D1 has conducted these proceedings improperly and unreasonably to a high degree"; there should be a "mark of disapproval" against the First Defendant; and that the First Defendant acted with the "ulterior motive" or "collateral purpose" of "harassing and vexing RBI", including by "causing damage to RBI and/or creating obstacles to enforcement by RBI in Malta*";*

b) An amended Ruling dated 28 May 2021 refusing the Third Defendant's and the Sixth Defendant's applications for leave to appeal his Order dated 23 March 2021 on jurisdictional issues;

c) An Order dated 12 December 2021 granting the Plaintiff's *ex parte* application for an adjournment of the Amendment and Joinder Application;

d) A Ruling dated 20 September 2022 dealing with the First Defendant's application for a review of the taxing officer's decision to allow effectively all of the costs of an interim application as between the Plaintiff and the First Defendant (and see also the Order dated 1 March 2023).

15. Mr Potts KC submitted that what one got from these decisions and passages as expressed is that the jurisdiction question had been pre-determined and the Judge's conclusion was that not only is Cayman the proper forum, but that any attempt to have another forum for the resolution of disputes was brought in bad faith to harass and vex RBI. He stressed that those findings were made without cross examination of fact witnesses. He also relied on the finding that in cases of fraud and conspiracy it follows that all of it must be dealt with in the Cayman Islands. That all pointed to, he submitted, that the observer would conclude that the Judge was unable to keep an open mind in relation to Mr Smith's jurisdiction application.

A failure to give any reasons when granting the ex parte Order dated 27 June 2023

16. An *ex parte* Order and *ex parte* Ruling granting the Plaintiff permission to join Mr Smith, and to serve him outside of the jurisdiction, on 27 June 2023 provided as follows:

> *"1. Having considered the extensive material that was provided to me over the weekend, and including a very lengthy and helpful skeleton argument for the Plaintiff and position statement for the first, and third to seventh defendants, and all the evidence, and having reviewed the various applications.*
> *2. I am prepared to order and direct that Raiffeisen Bank International AG, the Plaintiff, has permission to join Mr Smith and to re-re-amend the re-amended writ and re-amend the amended statement of claim in the form approved by the Court, and to serve out and for the directions that Mr Penny took me through at the outset in relation to the suggested order with the relevant amendments".*

17. Mr Potts KC submitted in relation to this ruling that there were no reasons given for a decision in a very heavy application and for the order which was granted. There was no judicial analysis of the

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rights and wrongs of the application set out. Whilst acknowledging that a challenge could be made at the *inter partes* stage and the matter could be appealed, what the absence of reasons and analysis shows, he submitted, is a real possibility of predetermination. When you put that in the mix with all the other factors, in his submission, it was more than enough to tip the balance in favour of recusal.

18. Mr Potts KC also referred to a passage in RBI's lengthy (91 page) written argument in support of the *ex parte* application (paragraph 18):

> "*Additionally, RBI refers to 2 previous interlocutory judgments of Parker J and the 2 appeal judgments thereof in which RBI has established on the merits of its claim in conspiracy against D1 to D8 (as applicable), and the involvement of Mr Smith therein, to at least the serious issue to be tried threshold, and to the higher threshold of a good arguable case as against D1 and D5. RBI is entitled to rely on these prior judgments to establish a serious issue to be tried, notwithstanding the rule in Hewthorne [sic] that previous judgments are not binding on third parties, because decisions of another court can be relied on in an interlocutory context to establish that there is a serious issue to be tried as doing so does not endanger a fair trial to the parties.*"[4]

19. He argued that RBI were wrong to argue that these matters could be relied on for the purpose of showing to the Court that there was a serious issue to be tried (which had been decided) because that involved predetermination against Mr Smith.

CICA decisions

20. The Court of Appeal expressly noted at paragraphs 56, 116, and 134 of its judgment dated 30 December 2021 that the Judge had failed to mention any of the expert evidence adduced by the First Defendant and the Fifth Defendant in his judgment on the freezing injunction applications:

> *"56. A key piece of evidence much relied upon by the Appellants before the judge was the evidence of their forensic accounting expert from LMD. This was particularly relevant to whether there was a good arguable case. Despite numerous references in his judgment to the evidence of Mr. Lawler, RBI's forensic accounting expert, there is not a single*

[4] *relying on Sabbagh v Khoury [2014] EWHC 3233(comm) per Carr J (as she then was)*

> *reference in the judgment to the evidence from LMD … it seems to me that the failure to refer even once to what was said by LMD in opposition to the evidence of Mr. Lawler does raise a real possibility that the judge failed to consider LMD's evidence".*

21. The Court of Appeal noted at paragraph 194 of the Court of Appeal's judgment dated 30 December 2021 (on the First Defendant's and the Fifth Defendant's successful appeals against the, 'uncapped', freezing injunction orders), "*the liability of the Appellants has yet to be established and … any view of the judge as to the honesty of Mr Smith and Mr Morrow can only be provisional as it has been reached on the basis of affidavit evidence, and without the benefit of oral evidence or cross-examination".*

22. Mr Potts KC submitted that an observer would conclude there was a real possibility of predetermination against Mr. Smith because although this was not evidence being adduced by Mr. Smith it showed a one - sided approach to evidence against the defendants, even though he acknowledged that the Court of Appeal itself, having examined the accounting evidence, upheld the Judge's finding that there was a good arguable case.

23. Mr Potts KC submitted that even more importantly, in relation to the uncapped freezing injunction, what the Court of Appeal appears to have been concerned about were the Judge's findings, as summarized at paragraph 187, that had been said to justify the Judge's exceptional decision not to impose a maximum sum on his freezing injunction order (which the Court of Appeal held to be such an unreasonable decision that it was outside the band of decisions that were reasonably open to the Judge, at an interlocutory stage when the defendant's liability has not yet been established).

24. The Judge had accepted the Plaintiff's submissions that this case was on all fours with the 'most unusual' case cited at paragraph 191 of the Court of Appeal's judgment (as discussed in an appellate judgment of Kitchin LJ), which related to a post-judgment injunction order in which the defendants in that case had been found to have given "brazen and dishonest evidence". The Judge found that this was an analogous case, because he had positively found that the Defendants had given "incomplete and misleading evidence" (see paragraph 187(ii) of the Court of Appeal's judgment, summarizing the effect of paragraphs 186 of the Judge's judgment).

25. Mr Potts KC submitted that as the Court of Appeal made clear, that was quite wrong of the Judge, since that case was "*very different from the present case, where the liability of the Appellants has yet to be established, and where any view of the judge as to the honesty of Mr. Smith and Mr.*

Morrow in their evidence can only be provisional as it has been reached on the basis of affidavit evidence, and without the benefit of oral evidence or cross examination".

26. Mr Potts KC submitted the use of the word "can", in this context, is effectively the same as the word "should": i.e. the Court of Appeal was implicitly saying that the Judge had gone too far in his predetermination of the Defendants', and he submitted Mr. Smith's credibility, in the absence of cross-examination at trial.

27. Mr Potts KC submitted that the nature of the findings the Judge made and the way he expressed himself as a consequence would lead to an observer concluding that there was a real possibility of predetermination as regards Mr. Smith.

Mr Smith's affidavit evidence

28. Mr Potts KC submitted in relation to Mr Smith's affidavit evidence[5], that this was all provided against a backdrop of great urgency in relation to the freezing order. No affidavits were sworn by him on his own behalf or for his own personal benefit; nor did he swear them voluntarily; nor did he swear them with the benefit of independent legal advice having regard to his own personal interests. This is confirmed by Mr Smith's affidavit evidence.

29. Mr Potts KC submitted that it also follows that each and all of the five Affidavits were sworn by Mr Smith under compulsion of law, and therefore subject to express or implied undertakings on the part of the Plaintiff prohibiting collateral use of the affidavits, their contents, or their exhibits, or their contents; and solely in his capacity as a witness (not in his capacity as a prospective party), and therefore subject to the privilege that witnesses have of 'immunity against suit".

30. Mr Potts KC submitted that it is clearly important to note (as did the Court of Appeal) that Mr Smith was not cross examined on his five Affidavits and that no application or order was ever made for his cross-examination (as would ordinarily be required if such affidavit evidence were to be criticized, challenged, or rejected). Mr Potts KC submitted that in those circumstances, it is quite wrong for RBI to come along years later to apply for permission to join Mr. Smith by reference to that evidence and by relying on it. He submitted that an observer would conclude that there was a real possibility of that reliance causing the Judge to predetermine the position as regards Mr. Smith

[5] 5 affidavits sworn between October and November 2019

who was not a party in his own right and was simply assisting another party in a situation of great time pressure and under compulsion.

31. Mr Potts KC submitted that against this background, and having regard to all of the evidence, it is clear that in the course of the proceedings to date (and prior to Mr Smith being joined as a party in his own right, or being served with the proceedings outside of the jurisdiction, or being legally represented at any hearing):

   a) the Judge had expressed strong views, and made strong findings, against the various Defendants in these proceedings to date, and in favour of the Plaintiff, including by reference to criticisms of Mr Smith's untested Affidavit evidence; and the clear impression given to an objective reader of the Judge's judgments is that the Judge has already found Mr Smith to be guilty of an 'unlawful means' conspiracy to commit fraudulent dispositions under Cayman Islands law, but in circumstances where Mr Smith had not yet been named as a party to the proceedings, or had the benefit of any legal representation whatsoever.

   b) although it is the objective analysis that is important for present purposes, it is important to note that Mr Smith has no confidence that the Judge remains in a position to approach the merits of Mr Smith's individual and separate position with an 'open mind', including on issues such as jurisdiction, *forum non conveniens*, or joinder, or that the Judge will do anything other than to repeat the findings that he has already made to date.

Mr Penny KC submissions

32. Mr Tim Penny KC appeared for RBI.

RBI submissions in summary

33. Mr Penny KC submitted that the recusal application should be refused. If, contrary to RBI's primary submission, the Court determines that the recusal application should be allowed, RBI will submit that the Court should not simply proceed to set aside the June 2023 Order. Rather, the Court should defer consideration of the appropriate consequence of any such recusal to a necessarily different Court on the hearing of the balance of Mr Smith's Jurisdiction Application. To set aside the June

2023 Order upon and by reason of any recusal alone would be unfair, disproportionate and wrong in principle. Among other things, it might give Mr Smith the windfall of a limitation defence that would not otherwise have been available to him.

34. Mr Penny KC first identified what is not said by Mr Smith. It is not said that the Judge has any relevant personal connection or animus. Nor that the Judge failed to disclose something that he should have disclosed. Nor that the Judge had 'descended into the arena', and had himself in the hearing advanced, or made findings on the basis of, points that had not been advanced by RBI. Nor is it said that the Judge decided the case by reference to matters that are extraneous to the legal or factual merits of the case, or the evidence before him (although it is said that some evidence was inadmissible).

35. Mr Penny KC pointed out that Mr Smith does not by the Summons seek that the Judge recuse himself from the trial of these claims, or any further applications in these claims, against any of the other Defendants.

36. Mr Penny KC made the following general points.

No findings against Mr Smith

37. As to the contention that adverse findings, reasoning, and conclusions have been expressed with respect to the affidavit evidence that Mr Smith has given on behalf of the existing Defendants, and with respect to the other Defendants' applications to contest the jurisdiction of the Court and/or the applicable governing law, none of the preliminary findings on which Mr Smith relies were preliminary findings against him.

38. Mr Smith was not a party at the time to the proceedings, let alone the particular application(s) as were in issue. Mr Smith's role as a witness was at least primarily only in the early stages of these proceedings. None of Smith 1-5 post-date 2019. They concern the stay application made by D1 in October 2019 as regards its asset disclosure obligations (Smith 1-2), D1's asset disclosure (Smith 3), then D4's jurisdiction challenge and D1 and D5's opposition to the freezing Orders at the January 2020 hearing (Smith 4-5).

39. Thereafter, no further evidence was filed by Mr Smith, only by Mr Morrow. That includes evidence for the ASI hearing and the D3/D6 jurisdiction challenges. Mr Penny KC maintained that RBI does not wish to overstate this point: it is accepted that RBI has continued to refer back to Mr Smith's evidence in these and other subsequent hearings. However, it is fair to note and important context that much of these matters had little if anything obviously to do with Mr Smith or RBI's case against him.

RBI has not always succeeded

40. It is not correct to say that RBI has always succeeded before the Judge in these proceedings to date. As part of the D3/D6 jurisdiction judgment (at [9]-[41]) the Judge rejected RBI's application to strike out parts of D3 and D6's evidence. Upon the Judge's review of the decision of the taxing officer as to the ASI costs, the Judge reduced the amount payable to RBI.

Decisions in favour of a party do not without more show apparent bias

41. The mere fact that various of the KSG Defendants have lost most of the interlocutory hearings to date cannot in and of itself establish apparent bias (against them or Mr Smith)[6]. Nor do the number of interlocutory hearings make any difference[7].

Judicial comments concerning witness evidence without more do not show apparent bias

42. Nor can the mere fact that a judge earlier in the same case has commented adversely on a witness (or a party) or found the evidence of a witness (or a party) to be unreliable without more establish apparent bias.[8]

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[6] *see Arab Monetary Fund [1994] 6 Admin LR 348 (EWCA), at* p354-355 and Okritie [2015] CP Rep 6 (EWCA),
[7] *In Ablyazov (No.9) (EWCA, the Judge in question (Teare J) had by that point in the litigation given at least 26 judgments: see at [3]*

[8] *Mohanty at § 17 and Locabail v Bayfield [2000] QB 451 at § 25 per Lord Bingham LCJ, Lord Woolf MR and Sir Richard Scott VC*

Previous comments by the Judge

43. Mr Smith says in his evidence by way of complaint as regards previous comments by the Judge:

> *D9/Smith-1 [63]: "… it seems to me that the Judge's comments in his Judgments to date, whether assessed cumulatively or individually, have gone far beyond a mere expression of his provisional views…" See also D9/Smith-1 [56]-[58]*
>
> *D9/Smith-1 [56]: "… the Judge has expressed some very strong views, and made some very strong findings …"*

44. Mr Smith relies on the maximum sum cap *(D9/Smith-1 [55.3]* and the LMD2 report *(D9/Smith-1 [60]* to show these findings were wrong.

45. Mr Penny KC submitted that what Mr Smith must do is establish that one or more of the matters complained of in his evidence show apparent bias. He submitted that Mr Smith has cherry-picked the passages on which he relies out of context (and indeed, mis-quoted some of these passages). The 'observer' will read each of these in their proper context.

Predetermination

46. Mr Penny KC submitted it is evident that the Judge has not made any decision in final terms on the merits:

   a) Each of D1, D5, D3 and D6 have themselves submitted as much to the Judge and the Court of Appeal, as regards the July 2020 judgment [9]

   b) In any event, each of the judgments repeatedly makes this clear, and such statements by the Judge are to be taken at face value.

[9] *it was D1 and D5's own submission in written reply on appeal that the Judge "made no findings whatsoever" (as least as regards dishonesty) and "[a]t its highest, all that can be said is that the Judge considered that [RBI's] evidence met the threshold of a good arguable case.": see at [3]-[7], esp. at [6]-[7]*

c) Both the July 2020 judgment and D3/D6 jurisdiction judgment have been the subject of review by the Court of Appeal, with neither criticised on grounds of (apparent) bias. Indeed, both were upheld (save on a single point). He relied on the dictum of Lord Bingham "It must … be hard to show consistent unfairness in the absence of consistent error."[10]

d) The ASI judgment was an inherently procedural matter concerning D1, was notably not appealed, and the judgment does not even refer once to Mr Smith.

The Judge's decisions

47. Mr Penny KC submitted that standing back, the Judge has decided the matters before him on the evidence, authorities and submissions he was referred to, and has done so fairly and judicially, bringing his objective judgment to bear on the material in this case. That is exactly what any other judge would have to do going forwards were the Judge to recuse himself. Indeed, that would be in reliance on the same material, which would necessarily include the Judge's judgments to date. The Judge has not 'pre-judged' the matter, for example by reference to extraneous matters or predilections or preferences.

48. In fact, there was only one hearing to date in these proceedings that has taken place truly *ex parte* to Mr Smith, that being the hearing in June 2023 at which he was joined to these proceedings and leave was given to serve him outside of the jurisdiction.

The position of the other defendants

49. Mr Penny KC emphasised that a remarkable feature of this application is that the KSG Defendants have never sought to suggest that the Judge has displayed apparent bias. This includes at the June 2023 hearing, in which the KSG Defendants participated, and filed written submissions, raising none of the issues on which Mr Smith relies. Indeed, the KSG Defendants' position to date has directly contradicted much of what Mr Smith now relies[11] upon. This is all the more remarkable in

[10] *Arab Monetary Fund v. Hashim (No.8) [1994] 6 Admin LR 348 (EWCA), at p354-355 per the joint judgment of Sir Thomas Bingham MR (as he then was), Stuart-Smith and Beldam LJJ*

[11] *D1 and D5's own submission in written reply on appeal, that the Judge "made no findings whatsoever" (as least as regards dishonesty) and "at its highest, all that can be said is that the Judge considered that [RBI's] evidence*

circumstances in which Mr Smith is a director and the Chairman of D1 (which is the ultimate parent company of each of the KSG Defendants), having until around May 2021 been the President and CEO of D1.

The errors found by CICA

50. As to the two errors complained of, both concern the July 2020 judgment. Neither shows any apparent bias, in particular against Mr Smith, and neither has much if anything to do with him.

51. As regards the maximum sum for the D1 and D5 freezing orders (D9/Smith-1 [55.3]) it is correct that the Judge was overturned on this one issue on appeal. That, Mr Penny KC submitted, must be seen in the context of a heavy 3-day interlocutory hearing, at which the Judge was required to determine a large number of issues and applications. Indeed, the Court of Appeal held that the Judge had applied the correct legal test, but distinguished the present case on the facts precisely because the Judge's findings were only provisional, as opposed to being findings of fact following trial: CICA D1/D5 Judgment [186], [191], [193]-[196].

52. Further, the Court of Appeal otherwise rejected D1 and D5's submissions on this point, and granted the cap that RBI proposed of €153m: CICA D1/D5 Judgment at [185]-[214] see also the CICA D1/D5 Costs Judgment at [22]-[30] and [60(i)] awarding RBI 95% of its costs.

53. Mr Penny KC submitted that this outcome is very difficult to square with any finding of apparent bias, let alone against Mr Smith.

54. As regards the failure to refer to the accountancy reports of LMD upon which D1, D4 and D5 relied before the Judge in January 2020 (D9/Smith-1 [60]-[61]) it is again, submitted Mr Penny KC, difficult to square the outcome in the CICA D1/D5 Judgment with any finding of apparent bias, let alone against Mr Smith.

55. None was relied upon by D1/D5 or identified by the Court of Appeal. It is correct that in light of this the Court of Appeal held that it should reconsider the matter and exercise its own judgment on

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met the threshold of a good arguable case.": see at [3]-[7], esp. at [6]-[7]
Notably, the same submission was made by D3 and D6 to the Judge at the January 2021 hearing of their jurisdiction challenges: transcript day 1, page 16, L15-18: "It's trite to say that it's not open to the court to make findings of fact at the interlocutory stage, and we don't read your judgment as having done so."

appeal: CICA D1/D5 Judgment [56]-[57], [116], [134] and [139]. In fact the Court of Appeal reached the same conclusion as the Judge on all of the issues that turned on that expert evidence, see e.g.: CICA D1/D5 Judgment [131.(i)].

56. Mr Penny KC submitted it is fair to note (i) the main (second) LMD report was filed only shortly before the January 2020 hearing, and D1, D4 and D5 did not have (or seek) permission for it in the directions; (ii) indeed LMD2 was filed so late that no party referred to it in any detail in the skeleton arguments (see for example D1, D4 and D5's skeleton argument at [5]).

57. Mr Penny KC submitted it is plainly wrong of D9/Smith-1 [60] to state that the Judge failed to refer to any of D1, D4 and D5's expert evidence. The two reports as to Austrian law, "Knoetzl 1 and 2", are referred to in the July 2020 judgment at footnote 2 to paragraph 3, alongside the reference to one of RBI's reports on Austrian law: "Wolf Theiss 1". Indeed, the Judge failed to refer to RBI's Wolf Theiss 2, much like LMD1-2. The Austrian law reports are then addressed at paragraph 97 of the judgment.

Reliance on inadmissible material

58. As to Mr Smith's argument of apparent bias on the basis of a party's reliance upon allegedly inadmissible material, Mr Penny KC submitted that this is not a basis for a recusal application. If the Judge is said to have determined the applications against Mr Smith on the evidence adduced, that is an exercise of his judicial function. It does not show predetermination or apparent bias. Whilst a party, at least in theory, might contend that a judge relied upon certain evidence in error, because that evidence was inadmissible, such as to give rise to an error of law and potential basis for an appeal, it does not show bias.

59. Mr Penny KC pointed out that no reliance is placed by Mr Smith upon the Judge having relied upon such evidence (although D9/Smith-1 [20] implies this). The Summons and D9/Smith-1 complain that RBI relied upon this material. Even to the extent that this is correct (and, Mr Penny KC said it is not correct that RBI necessarily relied materially as against Mr Smith upon any of the VIAC Award, the Hydro Aluminium proceedings, or Smith 3), it is no basis for recusal. Rather, Mr Penny KC said, it goes at best to Mr Smith's alleged abuse point for another day. Mr Smith says this evidence is inadmissible and prejudicial. Mr Penny KC argued that even to the extent that this is correct (which Mr Penny KC says it is not, this evidence being findings by the VIAC arbitral

tribunal, the fact of other proceedings, and Mr Smith's own evidence), Mr Penny KC submitted it adds nothing and goes nowhere.

60. Mr Penny KC pointed out that Mr Smith relies upon this evidence being deployed in "various interim hearings that have taken place on an ex parte basis to date." In fact, only one hearing has taken place on an *ex parte* basis to date as regards Mr Smith (which, Mr Penny KC submitted was a choice on his part and could have been *inter partes*).

61. Indeed, Mr Penny KC pointed out that only one hearing has taken place prior to that on an *ex parte* basis against all of the Defendants, that being the very first hearing in 2019. At each hearing thereafter (including that in June 2023), at least one or more of the KSG Defendants was a party and appeared, having filed evidence and/or submissions.

62. Mr Penny KC concluded his submissions on this point by saying none of the material relied on by RBI is inadmissible for the purposes for which it was deployed, and none of it was necessarily material to RBI's case. Even if such material was inadmissible, he submitted that the Judge is a professional judge and can be expected to put it out of his mind upon the hearing of Mr Smith's jurisdiction application.

The June 2023 ex parte order

63. As to the argument that a failure to give any reasons when granting the ex parte Order dated 27 June 2023 showed apparent bias, the point taken in the Summons at [1.(a).(ii)] is that no reasons were given. D9/Smith-1 [59] seeks to broaden this to a point that no or no adequate reasons were given. In particular it is said (1) that the Judge "effectively accepted every assertion or allegation made by [RBI] without independent analysis or scrutiny"; and (2) the practical effect of the ex tempore judgment of the Judge is that "it is impossible for me, and for my lawyers, to know the basis upon which the Court actually made the [Order]".

64. Mr Penny KC submitted that this was not a basis for a recusal application. Even if Mr Smith were right in everything he says as regards this basis of his application, a failure to give (adequate) reasons does not show bias. It can in some circumstances be a basis in and of itself for an appeal, or an application to set aside, but neither application was made.

65. Mr Penny KC submitted that it is not right to say that the Judge gave no reasons. The Judge referred to the "extensive material that had been provided to [the Judge] over the weekend". That including "a very lengthy and helpful skeleton argument" from RBI, which ran to 91 pages, addressing all of the relevant evidence and authorities on a full and frank basis (and Mr Penny KC pointed out Mr Smith does not say that RBI failed to comply with that duty to the Court).

66. Mr Penny KC also said the Judge referred to the "position statement" from the KSG Defendants, who attended the hearing. Mr Penny KC submitted in light of the KSG Defendants' extensive involvement in the case to date, it would have been reasonable to infer that they would have taken any point to which the Judge needed to be referred from their point of view.

67. In addition, Mr Penny KC pointed out that the Judge said that he had considered "all the evidence". This was considerable, with the main evidence upon the application running to over 2000 pages, by way of exhibits to five affidavits. A further 3000 pages of additional material was also included in the bundles, to which RBI's skeleton referred.

68. Mr Penny KC submitted that the observer must be assumed to appreciate the entire context, and that it is common (and certainly not unusual) for a Judge to give only limited if any reasons for an *ex parte* decision in circumstances in which the respondent, once served, will be entitled to a return date after having filed any evidence (as opposed to the respondent being required to appeal). The Judge expressly referred during the hearing to the possibility that Mr Smith would seek to set aside the order for service out: P69, L14-15. Further, the Judge took the same approach at the *ex parte* hearing in September 2019 [transcript p52-53], of which no complaint was made by D1-D4.

69. Mr Penny KC submitted that Mr Smith is wrong to say that the Judge "effectively accepted every assertion or allegation made by [RBI] without independent analysis or scrutiny". The Judge intervened on a number of points during the hearing[12].

70. Furthermore, Mr Penny KC submitted, the hearing lasted for almost half a day, and the Judge stated in terms that he had, prior to the hearing, undertaken extensive reading of the relevant materials, RBI having asked him in its skeleton argument to set aside an entire day for this.

[12] *P64, L18; P66, L6-21.; P69, L14-15*

71. Mr Penny KC pointed out that the Judge ultimately only found that RBI's pleaded case, supporting evidence and submissions met the various applicable legal tests, that for the most part being merely that there was a serious issue to be tried (a case that was real as opposed to fanciful) on the merits. Again, this must be seen in the context of the entitlement of Mr Smith to a return date, and that he had filed no evidence in response to the application at that time (despite RBI's invitation).

72. Mr Penny KC submitted that it has plainly not been impossible for Mr Smith and his legal team to know the basis on which the Order was made. Mr Smith has filed an extensive jurisdiction challenge (taking almost every conceivable point, save any as to full and frank disclosure) in D9/Smith-1. Further, and contrary to what Mr Smith suggests at D9/Smith-1 [11]-[16], Mr Smith has had access to the materials on which RBI relied in support of its application for almost a year prior to ultimately making both this recusal application and his jurisdiction application on 27 September 2023.

73. Mr Penny KC submitted that an observer would note that (a) it is typical (and certainly not unusual) for applications for joinder and service out to be *ex parte*; (b) the duty of full and frank disclosure upon RBI at such a hearing, and that Mr Smith does not say that RBI failed to comply with that duty, including as regards the matters on which Mr Smith now relies as establishing that the Judge ought have recused himself; and (c) that the common practice following such hearings, if the applicants succeeds, is for the respondent to be served, at which point the respondent will have a right to a return date, at which the Court will consider any evidence filed by the respondent and the submissions that the respondent seeks to make.

74. Mr Penny KC finally pointed out that Mr Smith was invited to participate in that hearing and chose not to do so; it was only *ex parte* at his election. As long ago as August 2022, a law firm acting for Mr Smith (Nixon Peabody) wrote to RBI seeking all relevant court documents as regards the joinder of Mr Smith. RBI provided the core application documents (and offered to provide further material) on 4 October 2022.This invited Mr Smith to consent to joinder and service out, without prejudice to his right to thereafter (if so advised) challenge jurisdiction at a return date. RBI thereafter sent further documents and repeated that offer. Mr Smith declined, and Nixon Peabody said it was not instructed to accept service. The application was accordingly made *ex parte*, and Conyers came on the record for Mr Smith.

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The law

Apparent bias and predetermination

75. The guiding principle is that parties to proceedings have a right to a fair hearing before an independent and impartial court established by law.

76. In *Re Principal Investing Fund I Limited et al, FSD 268-270 of 2021 (DDJ), Judgment dated 21 November 2022 (unreported)* David Doyle J observed that:

> *"148… special regard must be had to the contents of the relevant local judicial codes of conduct. In this case the applicable Cayman Judicial Code reinforces and gives particular weight to the precautionary principle.*"

77. The 'Code of Conduct for the Cayman Islands Judiciary' provides in pertinent part as follows:

> *"[16] Appearance of partiality or bias can arise where bias does not exist in fact. The test is whether a reasonable, fair-minded and informed observer would reasonably conclude that there is a real possibility that the judge is not impartial. The appearance of partiality may be impossible to dispel: leaving the litigant – and the informed observer – with a sense of injustice which is destructive of confidence in judicial decisions…*
>
> *[18] Apparent conflicts of interests can arise in many different situations. A judge must be alert to any appearance of bias arising out of connections with litigants, witnesses or their legal advisers. The parties should always be informed by the judge of facts within his or her knowledge which might reasonably give rise to a perception of bias or conflict of interest…*
>
> *[19]… There is a need to avoid the practice of 'forum shopping' by litigants who raise objections on the ground of apparent bias without good reason to do so. Additionally, a judge will need to have in mind, amongst other matters ... the burden which will fall on other judges if he or she disqualifies himself or herself without good reason ... the burden that will be imposed on the litigants if an appellate court reverses ... and erosion of confidence in the judiciary… If the issue of apparent bias is raised before the judge has*

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embarked on the hearing, it may be sensible for the judge to decline to sit in order to avoid adding that issue to the other contentious issues in the case…"

78. Page 22 of the Guide to Judicial Conduct in England and Wales (March 2018) provides:

> *"[A judge] should be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately."*

79. It is also clear from a review of the relevant authorities that every case is fact specific. Lord Hope's seminal decision approved a two stage test:

> *"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."*[13]

80. This objective test has been held to represent the law of the Cayman Islands in numerous decisions. This includes a number of decisions of the (Cayman) Court of Appeal and of the Judicial Committee of the Privy Council. The test has also recently been unanimously affirmed as a matter of English law by the UK Supreme Court.[14]

81. Lord Lloyd -Jones in the Privy Council put the test as[15]

> *"15. The appearance of bias as a result of pre-determination or prejudgment*
> *is a recognised ground for recusal. The appearance of bias includes a clear indication of a prematurely closed mind …*
> *16. … 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 mind is closed in some respect relevant to the decision 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.*

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[13] *Porter v. Magill [2002] 2 AC 357 (UKHL), at [102-103], per Lord Hope approving the formulation of Lord Phllips MR in In re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700*
[14] *Halliburton v. Chubb [2021] AC 1083 at [52] per Lord Hodge DPSC*
[15] *R v Stubbs [2018] UKPC 30 at [15]-[16]*

… 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";

82. The relevant authorities also support the following matters relating to the "fair-minded and informed observer" who is to consider the facts:[16]

a) The observer will inform themselves on all matters that are relevant. They are the sort of person who reads the text of an article as well as the headlines.

b) The observer is neither complacent nor unduly sensitive or suspicious. The observer reserves judgment until both sides of any argument are apparent.

c) The observer is able to put whatever they have read or seen into its overall context, and appreciate that this forms an important (and in some cases crucial) part of the material that they must consider before passing judgment.

d) The observer is not to be confused with the person who has brought the complaint. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. It is open to the Court to have regard to the fact that what is alleged may be extreme and/or improbable.

e) The observer knows that justice must not only be done but seen to be done. They know that judges, like anybody else, have weaknesses, in particular in the form of unconscious predispositions. They will not shrink from the conclusion, if it can be justified objectively, that things that the judge has done or said may make it difficult for them to judge the case before them impartially.

f) The observer will take into account that the judge is a professional judge, with years of training and experience in deciding matters impartially[17].

[16] *Almazeedi v Penner [2018 (1) CILR 143] (JCPC) at [20] and [32] applying Helow v. Secretary of State for the Home Department [2008] 1 WLR 2416 (UKHL) at [2]-[3]*

[17] *Ebanks v. R [2012 (2) CILR 281] at [23]-[27] per Chadwick P; see also Helow [8], [23], [27], [30], and [56]*

g) The observer will also take into account that the Cayman Islands is a relatively small jurisdiction and that judicial resources are limited[18].

83. As a general rule, it is the duty of a judge to hear any case before them, and the decision to recuse is not one to be made lightly[19].

84. It must be presumed that all judges of the Grand Court will hear and determine any given case in the same impartial way[20].

85. The Court must be careful to guard against any potential abuse by way of "judge shopping", whereby a recusal application is presented in an attempt to remove a judge regarded as unfavourably disposed to a party's case. "Litigants, of course, cannot choose their judges."[21] This is all the more so in a smaller jurisdiction[22].

86. The 'precautionary principle' that 'it is better to be safe than sorry' must be approached by the Court in the light of these principles, and the facts of the particular case.[23]

87. It may be that such a principle is significant where a judge has a relevant personal association and/or where the recusal concerns an upcoming trial. The 'precautionary principle' is not a general rule, and it is the facts of the case that determine what is required.

88. The test is not a matter of discretion. The test is wholly fact-sensitive[24]. Either there is a real possibility of bias or there is not[25].

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[18] *Ebanks [29]*
[19] *Nor should an application for recusal, see Jian Ying Ourgame High Growth Investment Fund v Powerful Warrior,] (Unreported, FS 255 of 2021, Grand Court, 22 July 2022) at [38] per David Doyle J and Mohanty v. Health Service Authority [2003 CILR 40], at [15] per Sanderson J*
[20] *Mohanty at [24]*
[21] *Jian Ying [34]*
[22] *Principal Investing [148]*

[23] *Arnage Holdings v. Walkers (Unreported, FSD 105 of 2014, Grand Court, 16 June 2023) at [98], per Doyle J.*
[24] *JSC BTA Bank v. Ablyazov (No. 9)[2013] 1 WLR 1845 (EWCA), at [65] per a review of the authorities from [44]*
[25] *AWG v. Morrison [2006] 1 WLR 1163 (EWCA) at [6], [19]-[20]*

89. Although convenience cannot palliate the appearance of bias (if established), it is relevant to consider, through the eyes of the 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 a designated judge[26].

90. The Court must distinguish between 'pre-judging' (or 'apparent bias') and the proper discharge by the judge of their office[27]*:*

> *"... 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 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. ... 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."*

91. As to apparent bias on the basis of previous judicial findings or comment:

> *"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."*[28]

92. In *Arab Monetary Fund v. Hashim (No.8) [1994] 6 Admin LR 348 (EWCA),* at pp 355-356 per the joint judgment of Sir Thomas Bingham MR (as he then was), Stuart-Smith and Beldam LJJ, it was held as regards past interim applications:

> *"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, discrimination and knowledge of the rules than its opponent. [Counsel for the applicant/complainant] accepted, as we understood, that no*

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[26] *Ablyazov (No. 9) at [65]*
[27] *per Ablyazov (No.9) at [70]*

[28] *Mohanty at [17] citing Locabail (UK) Ltd. v. Bayfield Properties Ltd. (2) [2000] QB 451 (EWCA) at [25]*

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."

93. In *Otkritie v. Urumov [2015] CP Rep 6 (EWCA),* following a review of the authorities on this point at [1]-[2] [13]-[34] per Longmore LJ, with whom Moore-Bick and Laws LJJ agreed at [42]-[43], it was held following trial:

> *"[16] … 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.*
> *…*
> *[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". …*
> *[32] … 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."*

94. In *Perry v Lopag*[29] Sir Jack Beatson said:

> *"[163]... '[t]he mere fact that a judge has previously commented adversely on a party or witness would not 'without more' found a sustainable objection.'*
> *[164] The position would be different if a judge committed himself to a view of the facts or decided that a party or a witness was a crook or a rogue so that he might not be able to put himself back into a state where he has no preconceptions about the merits of the case. So might it, where he has expressed a preliminary view '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 on to revisit it' ….*"

[29] *(unreported, CICA (Civil) Appeal 16 of 2020, 19 November 2021)*

95. Commenting on that passage, David Doyle J added:[30]

> *"[22]…In between these two extremes there may be other circumstances in which a judge is duty bound to recuse.*
>
> *[23] Fairness and justice allow no room for the perception of pre-judgment especially on substantive issues. Judges must also carefully guard against the possibility of unconscious and cognitive bias…"*

Decision

96. I have given careful consideration to the evidence adduced by Mr Smith on this application and the submissions made and to the evidence and matters relied upon by Mr Potts KC on his behalf. I have also been assisted by Mr Penny KC's submissions.

97. I apply the legal principles above which were not materially disputed. I look at the evidence and arguments through the lens of the fair minded observer. I ask myself whether the evidence shows that a fair minded and informed observer would conclude that there was a real possibility of bias or predetermination.

98. Having done so, I do not accept that a fair minded and informed observer would conclude that there was (or would be) a real possibility of bias. I have closely reviewed the judicial findings relied on by Mr Smith which he points out were made in litigation between RBI and the other defendants. I have had regard in particular to the findings on issues relating to proper forum and jurisdiction. Having examined these, including the assessment of the relevant evidence by the Judge and all of the other matters relied on, I do not accept that a fair minded and informed observer would conclude that there was a real possibility that I would approach Mr Smith's jurisdictional challenge with a closed mind.

99. As to the decisions and passages relied on by Mr Smith in relation to the anti-suit injunction and the permission to serve out against D3 and D6 judgement, there is, as Mr Penny KC pointed out, a passage in the judgment in which the Judge dismissed RBI's application to strike out some of the

[30] *In Jian Ying at [22]-[23]*

evidence adduced by D3 and D6[31]. The observer assessing whether there was a real possibility of bias would also take into account the following comments:

> *"[30] ... D3 and D6 are entitled to put forward all appropriate matters which they consider assist their application to set aside ... No principle of issue estoppel or res judicata applies to them."*

> *"[34]... the court does not view the material objected to ... as a collateral attempt to attack the 7 July ... judgment ... [It] made certain findings of fact it is true, but they are necessarily provisional and interlocutory at this stage of the proceedings, which is well before trial. D3 and D6 are not bound by them. It would not in my view be manifestly unfair to RBI if the same points were to some degree challenged, nor do such arguments bring the administration of justice into disrepute."*

100. The observer would also take into account §37 of that judgment where the Judge refers to "a competing narrative at trial which the defendants will argue is consistent with legitimate commercial dealings and honesty and which will need to be explored at some length and depth with all relevant evidence and the necessary testing of that evidence."

101. The fair minded and informed observer would take into account that all of these findings necessarily involved preferring one party's case over another's when assessing whether there was a real possibility of the Judge closing his mind to what is now being faced by Mr Smith.

102. Applying the relevant legal tests set out above I am not persuaded that there is evidence from these decisions and passages which would lead the observer to conclude that there was a real possibility that the Judge would be unable to keep an open mind in relation to Mr Smith's jurisdiction application and the claims brought against him by RBI.

[31] §§9-41

103. I accept that the fair minded and informed observer would not shrink from concluding that there was a real possibility of bias if that was objectively justified on the evidence. I also accept that any doubts ought to be resolved in favour of recusal. I also have regard to the so called 'precautionary principle' and all of the relevant provisions of the Cayman Islands Judicial Code of Conduct. However, I am not satisfied that the fair minded and informed observer would so conclude.

104. There would be on analysis by the fair minded and informed observer, a conclusion that no final view was expressed by the Judge as alleged on the same or materially similar or overlapping issues in previous applications (but in the absence of Mr. Smith), as Mr Potts KC submitted.

105. The fair minded and informed observer would conclude that the views expressed were all necessarily provisional based upon the material and in the context of the applications before the Court at the relevant times. The Judge, as required by the parties, made numerous interlocutory decisions based on the material provided. On many occasions the question was whether a good arguable case or a serious issue to be tried had been made out, which involves balancing arguments and written and documentary evidence from both parties to decide whether there was a plausible evidential basis for the application. That exercise necessarily involves forming provisional views and expressing them.

106. The fair minded observer would not conclude that those views were expressed in final terms having considered all the evidence and argument. The fair minded observer would not conclude that the Judge had given the impression of having formed a final view, or had closed his mind, when all the relevant circumstances have been examined.

107. The fair minded observer would not conclude that the Judge had expressed views on the affidavit evidence which went further than they needed to in interim decisions so that predetermination could be detected. The fair minded and informed observer would conclude that no final view at all has been formed on the issues arising between RBI and Mr Smith by the Judge.

108. The fair minded and informed observer would note that Mr Smith has no confidence that the Judge remains in a position to approach the merits of Mr Smith's individual and separate position with an 'open mind'. [32] The fair minded and informed observer, whilst taking this into account would not conclude that Mr Smith's opinion is in itself sufficient to show a real possibility of bias.

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[32] see §§ 56- 59 of D9/Smith 1

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109. Mr Potts KC emphasised that Mr Smith may be named in the pleadings and he did give affidavit evidence in difficult circumstances, but he has not been a party. He is now facing an application to be joined for the first time, where many matters have been decided in his absence and so he is in a disadvantageous position different to that of the defendants that have been contesting this case. No doubt the observer would consider that carefully. The observer would also take into account, that as well as Mr Smith's own position as a director and the Executive Chairman of D1 (which is the ultimate parent company of each of the KSG Defendants), he was until May 2021 the President and CEO of D1.

110. The fair minded and informed observer would also take into account the Judge's decisions relating to jurisdiction and the way the Judge has dealt with the evidence and in particular Mr Smith's evidence, in their context. Balancing all of these factors I am not persuaded that the observer would conclude that there was in all the circumstances a real possibility of bias.

111. The fair minded and informed observer would note that part of the Judge's training and experience equips him to be able to put out of his mind (as he must) any inadmissible or prejudicial material that he should not have regard to. For example, the fair minded and informed observer would take into account that the Judge is able to put out of his mind evidence or submissions which Mr Smith argues was wrongly put forward, with regard to previous interim decisions, or which is otherwise unfairly prejudicial to Mr. Smith.

112. I have carefully analysed the findings and language used in previous decisions relied on by Mr Smith with a view to assessing whether there was a real possibility that the fair minded observer would detect subconscious or unconscious bias against Mr Smith. Having done so I find that this is not made out. The previous decisions and their terms, which would be viewed in their context, and without confusing findings of the Judge with the submissions made by RBI, do not found a basis for recusal.

113. The two errors upheld by CICA (the expert evidence and cap points) would not lead a fair minded and informed observer to conclude that there was a real possibility of bias concerning the case against Mr Smith. The fair minded and informed observer would also take into account the number of points taken on appeal[33] and the number of days of argument and material adduced, to put those

[33] *There were no consistent errors*

errors into context as well as the outcome of the appeals. The fair minded and informed observer would also take into account that there was no criticism of the substantive findings made, (apart from the cap which was set at 150m EUR), nor the language used.

114. As to the June 2023 *ex parte* order, Mr. Smith says[34] that no or no adequate reasons were given, the practical effect of which is that it is impossible for him and his lawyers to understand the basis on which the court made the order. The fair minded and informed observer would take into account that the Judge in fact referred to the extensive material that had been provided. That including a "written argument" from RBI, which ran to 91 pages, addressing the relevant evidence and authorities on a full and frank basis. The Judge also referred to the "position statement" from the KSG Defendants which he had considered.

115. The fair minded and informed observer would take into account that the material provided to the Judge included the main evidence upon the application (over 2000 pages, by way of exhibits to five affidavits and a further 3000 pages of additional material was also included in the bundles, to which RBI's skeleton referred). In assessing whether the Judge "*effectively accepted every assertion or allegation made by [RBI] without independent analysis or scrutiny*" as Mr Smith says, the observer would take into account that the Judge intervened on a number of points during the hearing[35], the hearing lasted for almost half a day, and the Judge stated that he had, prior to the hearing, undertaken extensive reading of the relevant materials, having set aside an entire day for this.

116. The informed observer would take into account that it is not unusual for a Judge to give only limited, if any, reasons for an *ex parte* decision in such circumstances and in particular that Mr Smith, once served, would be entitled to a return hearing. The observer would also take into account the communications between the lawyers acting for RBI and Mr Smith in which Mr Smith was invited to participate in that hearing and chose not to do so and that RBI provided all the relevant documents to him.

117. The fair minded and informed observer having taken all take of these matters into account would not conclude that there was a real possibility that the Judge had predetermined the case against Mr Smith or set his mind against him.

[34] *Smith §59*
[35] *P64, L18-P65, L4; P66, L6-21; P69, L14-15*

118. As Mr Potts KC acknowledged, the fact that the Judge has decided applications and issues against certain parties in the past is not generally a reason for recusal. If that were the case it would not be possible for the same Judge to hear multiple interim applications in complex cases. In addition, judicial decision making necessarily involves preferring the submissions of one party over another. In fact, there is a real advantage to the parties and to the administration of justice in securing judicial continuity unless the observer would conclude that there was a real possibility of bias.

119. Having subjected the application to considerable scrutiny through the lens of the fair minded and informed observer I have decided that he would conclude that the decisions that have been rendered so far in this case were taken on the basis of argument and evidence with nothing contained in each of them individually or taken cumulatively to show a real possibility of bias.

120. 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 involving the same parties, or a related party like Mr Smith. A fair minded observer who is informed would assess the evidence in the light of the oath of office taken by the Judge to administer justice without fear or favour, affection or ill will, and the professional ability and duty to carry out that oath by reason of his training and experience.

121. I myself do not feel embarrassed to continue and have no difficulty in proceeding to decide questions between Mr Smith and RBI impartially and fairly in accordance with that oath.

122. The recusal application fails and is dismissed. RBI is entitled to its costs to be taxed on the standard basis if not agreed.

THE HON. MR. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

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