IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NOs: FSD 268, 269 AND 270 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED (FSD 268)
AND IN THE MATTER OF LONG VIEW II LIMITED (FSD 269)
AND IN THE MATTER OF GLOBAL FIXED INCOME FUND I LIMITED (FSD 270)

CREDIT SUISSE LONDON NOMINEES LIMITED

Petitioner

and

PRINCIPAL INVESTING FUND I LIMITED (FSD 268)
LONG VIEW II LIMITED (FSD 269)
GLOBAL FIXED INCOME FUND I LIMITED (FSD 270)

First Respondents

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED (FSD 268)
LV II INVESTMENT MANAGEMENT LIMITED (FSD 269)
FLOREAT INVESTMENT MANAGEMENT LIMITED (FSD 270)

Second Respondents

Appearances: James Collins KC and David Lewis-Hall of Appleby for the Petitioner
Tom Weisselberg KC, Ben Hobden and Alan Quigley of Forbes Hare for the Second Respondents

Before: The Hon. Justice David Doyle

Heard: 10 November 2022

Draft Judgment circulated: 15 November 2022

Judgment delivered: 21 November 2022

HEADNOTE

Law and procedure relating to recusal applications based on apparent bias grounds - the recusal test - the need to guard against judge - shopping-the need for timely applications on proper grounds - the duty to sit absent grounds for recusal - attributes and presumed knowledge of the fair-minded and informed observer - the precautionary principle - the importance of the Cayman Judicial Code

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JUDGMENT

Introduction and the grounds of the recusal applications

1. There are before the court applications from the Second Respondents in FSD 268, 269 and 270 of 2021 (DDJ) dated 28 September 2022 for me to recuse on the ground of apparent bias.

2. The parties agreed between them a protocol for the management of various issues relating to the deployment of potentially privileged material. The question of whether these materials are privileged is the subject of a dispute between the parties which presently awaits to be determined by the High Court of England and Wales. I have endeavoured in this judgment to respect the protocol arrived at between the parties with the approval of this court. Where appropriate I will simply refer to the existence of some of the relevant materials rather than setting out the detailed contents of the same in a public judgment, so as not to prejudice the determination of the proceedings presently awaiting determination in England.

3. Despite a specific order requiring them to state the concise grounds in the applications, the Second Respondents specified the "grounds" of their applications unhelpfully by simply referring to the legal test as follows:

> "The grounds of the application are that a fair-minded and informed observer, having considered the relevant facts, would conclude that there is a real possibility that the Hon. Justice Doyle was biased."

4. James Charles Wilcox ("Mr. Wilcox") at paragraph 8 of his third affidavit sworn on 29 September 2022 says that the grounds for the applications are set out in JCW4. That 5 page document contains some 16 paragraphs a) to p) and h) has two sub-paragraphs. Grounds of applications should be contained in the applications and not in exhibits to affidavits.

5. The Second Respondents in their skeleton argument dated 27 October 2022 placed reliance on four grounds:

Ground One

(1) the judge was employed by, and continues to be a consultant to, Cains, a Manx law firm, which acted for Chia Hsing Wang ("Mr. Wang") until at least August 2022, including in relation to matters which are relevant to issues in dispute in the proceedings ("Ground One"); I cover the context and facts relevant to this ground in more detail below under the heading "Background and facts."

Ground Two

(2) Cains were involved in discussions concerning the fund structure of Long View II Limited ("Long View") and transactions including Real Assets (RA) Global Opportunity Fund I Limited ("RAGOF"), a fund incorporated in the BVI. The structure and reasons for establishment of Long View and the propriety of RAGOF transactions are both at issue in the proceedings ("Ground Two").

Further particulars are given at paragraphs 30 to 35 of the skeleton argument of the Second Respondents. The Second Respondents say that the manner in which Long View was structured and the purpose for which it was incepted are issues in the proceedings. The Petitioner pleads at paragraph 4 of the Re-Amended Winding Up Petition in FSD 269 of 2021 (DDJ) that Long View "… has been used as a device from its inception to wrongly exploit Mr. Wang's assets. It was not formed with the

principal purpose of generating investment returns as claimed, but was instead formed with the principal purpose of enabling the Floreat Management … and the Floreat Principals … to wrongly [sic] obtain access to Mr. Wang's assets and then to charge fees and otherwise exploit those fees as their own."

The plea is set out in further detail at paragraphs 36 – 39 of the petition. The relevant allegations are denied by the Second Respondents at paragraphs 127 – 136A of the Re-Amended Defences in the other proceedings. At paragraph 33 of the skeleton argument in summary form it is stated that Cains was instructed by and continue to act for a fund called 'Long View' which was incorporated in the Isle of Man in December 2005 ("Long View 1"). The fund known as Long View (of which the Second Respondent in FSD 269 of 2021 (DDJ) is stated to be the sole management shareholder) was conceived of in 2014 and ultimately incorporated in the Cayman Islands on 7 April 2015. The Second Respondents say that in creating the Long View fund which is the subject of the proceedings, Floreat sought to reflect and borrow from the investment objectives and the fee structure of Long View 1. The Second Respondents say that documentation drafted by Cains for Long View 1 was also used as a guide for the creation and documentation of Long View, and is therefore relevant to the appropriateness of the structure, purpose and fees charged by Long View, which are in issue in the proceedings.

At paragraph 35 of the Second Respondent's skeleton argument it is stated:

> "The Second Respondents intend to rely on the involvement of external firms such as Cains to indicate that the structure of Long View was intended to safeguard Mr. Wang's assets in a commercial and effective way.";

Ground Three

(3) the judge's overall conduct of the proceedings including the judge's response to the Second Respondents raising the conflict of interest ("Ground Three").

The Second Respondents rely on eight points in respect of Ground Three. First, they complain that the Petitioner failed to alert the judge of the Cains' involvement. Second, they say that on the return date of the *ex parte* applications the judge dismissed their arguments relating to material non-disclosure in summary terms, characterising them as an attempt to seek pre judgment of the matters at issue in the Petitions, and in an unreasoned way. Third, they refer to the judge's first instinct to recuse when he was first alerted to their concerns. Fourth, they complain that the judge then acceded to the Petitioner's request that the decision be revisited without giving any reasons. Fifth, they complain that the judge's statement made on 19 August 2022 did not explain the extent of the judge's knowledge of Mr. Wang's engagement with Cains. Sixth, they complain that the judge listed applications made by the Petitioner and by non-party applicants to be heard immediately after the hearing of the recusal applications. Seventh, they complain that the judge has taken what they describe as a broadly hostile approach to the Second Respondents in the applications that he has heard and determined. Eighth, they say that Mr. Wang (through the Petitioner) has taken steps which indicate that he considers that the judge will be a favourable tribunal for him, including that he failed to draw to the judge's attention on the *ex parte* applications his potential conflict of interest, and he sought to reverse the judge's decision to recuse himself;

Ground Four

(4) the judge has considered, read, reviewed and relied on materials in relation to RAGOF, both when making *ex parte* orders in respect of the First Respondents and when

refusing to discharge those *ex parte* orders in April 2022, but following a recent decision of the BVI Commercial Court those materials must not inform any element of the judge's decision making in relation to the petitions ("Ground Four").

Background and facts

6. Having set out the four grounds of the recusal applications now relied upon by the Second Respondents I provide below some background and the factual context of the applications.

7. Some of the background to these proceedings generally can be found in the judgments included in Bundle A, namely my judgments delivered on 17 September 2021, 8 April 2022, 10 May 2022 and 31 May 2022 and the judgment on 30 June 2022 of Justice of Appeal Sir Alan Moses providing detailed reasons for refusing applications by the Second Respondents for leave to appeal. I do not set out all the background again in this judgment but have full regard to it and to the pleadings and the relevant evidence placed before the court in respect of these cases.

8. By letter dated 9 August 2022 Forbes Hare, the attorneys acting for the Second Respondents, wrote to Appleby (Cayman) Ltd, the attorneys acting for the Petitioner, referring to "connections between Mr. Chia Hsing Wang (otherwise known as Bruno Wang) and Cains Advocates Limited ("Cains"), the Manx law firm for whom Justice David Doyle is a consultant." Forbes Hare stated that "Mr. Wang received advice from Cains". Forbes Hare added that "at a meeting in August 2019 between, amongst others, Mr. Wang, Thomas Lowe KC and Cains it was suggested that Justice Doyle, as an employee of Cains, be asked to provide formal advice to Mr. Wang and that his involvement with Cains would provide value and assistance to Mr. Wang going forward. Our clients do not know whether such advice was obtained." Forbes Hare requested from Appleby "full and complete details of all of Mr. Wang's links to Cains" by 5pm on 12 August 2022 adding:

> "We, as officers of the Court, believe we have a duty to the Court to bring the matters raised in this letter to the attention of His Lordship without delay. Therefore, we have

copied Justice Doyle's personal assistant to this letter and request that the letter be brought to His Lordship's attention."

9. By email dated 10 August 2022 my PA communicated with Forbes Hare and Appleby as follows, specifically addressing two apparent facts raised by them in their letter dated 9 August 2022 namely, a meeting with Mr. Wang and the giving of advice:

> "Justice Doyle has never met Mr. Wang and has no recollection of ever advising him. However, based on the facts stated in your letter to the effect that Justice Doyle was employed by Cains at a time when Cains were advising Mr. Wang, Justice Doyle feels obliged to recuse."

10. Appleby responded on the same day referring to various legal authorities and inviting me to reconsider the position and that as a matter of procedural fairness the question of recusal be properly set down for a hearing at which both parties can present evidence (in affidavit format) and arguments so that a reasoned decision can be reached in accordance with the law.

11. By email dated 11 August 2022 Forbes Hare responded and by email on the same day my PA indicated that I was minded to reconsider the issue of recusal and suggested directions for the filing of evidence and skeleton arguments leading to a hearing of any recusal applications.

12. There was further correspondence and written submissions and by email dated 19 August 2022 my PA forwarded to the attorneys the orders I had made leading to a hearing in respect of any recusal application and a statement. The brief reasons for my orders were specified in that 2 page email. The final 4 paragraphs of that email reading as follows:

> "Justice Doyle notes the weighty principle of finality referred to in the Second Respondents' written submissions and has also considered other relevant factors including the overriding objective. It is noted that no perfected recusal Order was made.

Justice Doyle has noted the short period of time that had elapsed before it was indicated that he was minded to reconsider the issue of recusal, the lack of significant prejudice to the parties in revisiting the issue and the need to give the parties a proper opportunity to be heard on the recusal issue, if a recusal application is made, and the need to decide any recusal issue on a proper factual and legal basis after the parties have filed relevant evidence and skeleton arguments and authorities. Justice Doyle is of the view that the factors in this case (including those noted above) are sufficient to displace and overcome the "deadweight of the finality principle" and the other factors raised in the Second Respondents' written submissions.

In the circumstances of these particular cases, Justice Doyle reverses the indication of recusal provided by email and has made the Orders attached to this email so that the recusal issue can, in the interests of justice, be dealt with properly if and when a recusal application is duly made.

Please note that the issue of recusal should be dealt with in accordance with the attached Orders and not by way of any further correspondence with the court."

13. The statement dated 19 August 2022 reads as follows:

"1. I joined Cains Advocates Limited ("Cains"), a company incorporated under the laws of the Isle of Man, in November 2018 as an employed salaried senior legal adviser and left their employment at the end of May 2021. My consultancy agreement with Cains, which is subject to my full time commitments in the Cayman Islands, commenced on 1 June 2021. I am not and never have been a director or shareholder of Cains.

> 2. I was sworn in as a Judge of the Grand Court of the Cayman Islands on 23 March 2021. I then acted remotely on a part-time basis until I travelled to the Cayman Islands and commenced full time judicial work in July 2021.
>
> 3. I have never met Chia Hsing Wang and I have no recollection of ever providing him with legal advice."

14. I note the Cains' letter dated 5 September 2022 and in particular the reference to the "last substantive action" being carried out in October 2019 (with total fees in the amount of approximately £20,000) and that I was not involved in the Manx matter which in any event was not the subject of the dispute which gave rise to the proceedings in the Cayman Islands. Mr. Colquitt, a director of Cains, says he has no clear recollection but considers that it is likely he would have mentioned the Manx matter to me in outline terms following the call on 8 August 2019 when he had mentioned to others the possibility of my future involvement but that I had no eventual involvement in the file.

15. I note the Appleby letter dated 6 September 2022 to Forbes Hare.

16. I note that the Second Respondents in their skeleton argument dated 27 October 2022 at paragraph 27 refer to my statement dated 19 August 2022 and state:

> "The statement is silent on the question of whether Mr. Wang's case was ever discussed with the Judge, in outline or otherwise."

17. In my statement dated 19 August 2022 I endeavoured to deal with the three main issues raised in the Forbes Hare letter dated 9 August 2022 as I then saw them namely (1) my connections with Cains (2) whether I had met with Mr. Wang and (3) whether I had advised Mr. Wang. I note the evidence now filed including the letter from Cains dated 5 September 2022 which has refreshed

my memory. As I mentioned during the hearing, I confirm for the court record that I do not recall Mr. Wang's case being discussed with me in outline or in any detail. Having read the Cains letter dated 5 September 2022, I do now have a vague recollection that Mr. Colquitt, very briefly mentioned to me, when I was an employee of Cains, something to the effect that instructions may be forthcoming in relation to a matter involving Taiwan and that he would like to get me involved in it, if anything came of it. It was a passing comment and no outline or detail was discussed to the best of my recollection. I do however remember the word "Taiwan" being mentioned. It may be therefore that this was the matter the Second Respondents now refer to. I do not recall the name of Mr. Wang being mentioned. I simply noted the comment and I thought nothing more of it. This very brief contact lasted no more than a matter of seconds rather than minutes. I do not recall receiving any emails or documents in respect of the matter and, although I do note the reference to my name being mentioned by Mr. Colquitt, it does not appear to be suggested by anyone that I was engaged to provide advice or that I received any emails or documents in respect of the matter.

18. I should make it crystal clear that when these cases under references FSD 268, 269 and 270 of 2021 were first assigned to me Cains did not enter my mind in respect of these cases and I was aware of no reason why I should not have accepted the assignments. I now note the evidence in respect of the prior limited involvement of Cains on the instructions of English solicitors for Mr. Wang albeit some years ago now and not in respect of the subject matters of the cases presently before this court. I also note the Second Respondents' references to the involvement of Cains in respect of the fund structure of Long View and transactions including RAGOF. My position is as outlined above. I have never acted for Mr. Wang and it now appears rare common ground between the parties that I have never provided any advice to Mr. Wang in respect of these or any other matters.

Law and guidance

19. Having referred to some of the relevant background and the facts I should now refer to some of the relevant law and guidance.

The recusal test on apparent bias grounds

20. The text for recusal on the ground of apparent bias is well established. It is whether "the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the tribunal was biased" (*Perry v Lopag Trust* CICA 19 November 2021; Sir Jack Beatson JA at paragraph 152).

21. Robert J Sharpe in his excellent book on *Good Judgment Making Judicial Decisions* (2018) at page 256 suggests that:

> "the achievement of true impartiality depends more upon professional integrity and ethical standards of the bench than upon the formal test for bias."

At page 258 Robert Sharpe (a former judge of the Court of Appeal of Ontario) stated that:

> "….it would be a serious error for judges to take the formal legal test literally."

22. Tom Bingham, in a chapter on Judicial Ethics in *The Business of Judging* (2000) at page 81, described the judge's duty to be completely impartial during the conduct of a case as "fundamental." He suggested that in certain cases even if the legal test was not formally satisfied, the judge "may prefer to stand down" but noted that a charge of apparent bias should not "be lightly made."

The Bill of Rights

23. Section 7 of the Bill of Rights scheduled to the Cayman Islands Constitution provides that everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time. It is in similar terms to Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

Judicial Codes of Conduct

24. The Code of Conduct for the Cayman Islands Judiciary (9 March 2012) stated to be drawn up by the Cayman Islands Judicial and Legal Services Commission pursuant to Section 106 (10) (a) of the Cayman Islands Constitution Order (the "Cayman Judicial Code") stresses at paragraph [13] that "Impartiality is essential to the proper discharge of the judicial function." At paragraph [14]: "A judge must avoid both partiality, (or bias) in fact and the appearance of partiality. Justice must both be done and be seen to be done." At paragraph [15]: "A judge who has the least doubt as to his or her ability to decide the issues before him or her impartiality …. must disqualify himself or herself and decline to hear the case." At paragraph [16]:

> "Appearance of partiality or bias can arise when 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."

25. At paragraph [17] it is stated:

> "Circumstances which might lead to a reasonable, fair-minded and informed observer reasonably to conclude that there is a real possibility that the judge is not impartial include (but are not limited to) an apparent conflict of interest, judicial behaviour on the Bench, or association and activities off the Bench …. Where a judge concludes that (applying the relevant test) his or her associations or conduct may give an appearance of bias, he or she should disqualify himself or herself and decline to hear (or to continue hearing) the case."

26. At paragraph [18] it is stated:

> "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.

In particular:

[18.1] A judge should disqualify himself or herself where he or she or (while he or she was in practice) his or her firm acted as a legal advisor in connection with the subject matter of the dispute which has given rise to the proceedings.

[18.2] A judge should disqualify himself or herself if in a close relationship to litigants, witnesses or the legal advisors in the case.

[18.3] A judge should disqualify himself or herself if he or she or a close relative or member of his or her household has, directly or indirectly, a financial, beneficial or other similar interest in the outcome of the proceedings ….

[18.4] A judge should give most careful consideration whether to disqualify himself or herself if the case raises issues in relation to which he or she has made public statements or firm opinion after appointment." (my underlining)

27. Paragraph [19] of the Cayman Judicial Code reads:

"The question whether to disqualify himself or herself on the grounds of actual or apparent bias is, in the first instance, for the judge to consider and determine. A judge should be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately. 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: (i) the burden which will fall on other judges if he or she disqualifies himself or herself without good reason; (ii) the burden that will be imposed on the litigants if an appellate court reverses

his or her decision not to disqualify himself or herself; and (iii) the possibility that a decision not to disqualify himself or herself may (if reversed on appeal) lead to an erosion of confidence in the judiciary. In the latter context a judge should have in mind that, although the fact that the appellate court reverses the judge's decision not to disqualify himself or herself does not, of itself, imply that he or she lacked impartiality, that may not be the perception of the litigant or of the public. If the issue of apparent bias is raised before the judge has 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." (my underlining)

28. Paragraph [25.18] of the Cayman Judicial Code under the heading "Propriety" provides:

> "A judge should avoid association with those who are engaged, whether as participants, witnesses or otherwise, in cases currently before him or her."

29. The Guide to Judicial Conduct in England and Wales (March 2018) at page 8 states:

> "The question whether an appearance of bias or possible conflict of interest is sufficient to disqualify an officeholder from hearing a case is subject to Strasbourg, English and Welsh and Commonwealth jurisprudence ….
>
> Circumstances will vary infinitely and guidelines can do no more than seek to assist judges in reaching their own decisions."

30. At page 12:

> "As a matter of common sense, judges should avoid direct association with individual members of the profession who are engaged in current or pending cases before them."

31. At page 21:

> "Past professional association with a party as a client need not of itself be a reason for disqualification but the officeholder must assess whether the particular circumstances could create an appearance of bias."

32. At page 22:

> "Judges should be careful to avoid giving encouragement to attempts by a party to use procedures for disqualification illegitimately. If the mere making of an insubstantial objection were sufficient to lead an officeholder to decline to hear a case, parties would be encouraged to attempt to influence the composition of the bench or to cause delay and the burden on colleagues would increase. A previous finding or previous findings by the officeholder against a party, including findings on credibility, will rarely provide a ground for disqualification …"

33. The Guide to Judicial Conduct (2019) to the United Kingdom Supreme Court (which applies to Justices in the final court of appeal and not first instance judges who play a different role in the administration of justice) under the main heading "Impartiality: Bias and appearance of bias":

> "3.11 Reasons which are unlikely to be sufficient for a Justice not to sit on a case, but will depend on the circumstances, include:
>
> (i) friendship or past professional association with counsel or solicitors acting for a party;
>
> (ii) the fact that a relative of the Justice is a partner in, or employee of, a firm of solicitors or other professional advisers involved in a case; much will depend upon the extent to which the relative is involved in or affected by the result in the case;

(iii) past professional association with a party as a client; much will depend upon how prolonged, close, or recent that association was."

Some Cayman authorities

34. I now turn to some Cayman authorities.

Brandon

35. One of the first Cayman cases which gently touched upon the law of recusal was *Brandon v Shaw* 1952 – 79 CILR 211 where the plaintiff, an attorney at law, brought an action against a stipendiary magistrate seeking damages for injuries to his reputation as a result of the magistrate's behaviour towards him in court. Acting Justice Parnell held that the magistrate had not acted wrongly or irregularly and called for legislation to control and discipline attorneys in the Cayman Islands. On recusal generally Parnell J (Ag) at page 238 stated:

> "The judge in a particular case may wish to disqualify himself for good and sufficient cause."

At paragraph 239 adding:

> "In the seat of judgment courage should be demonstrated … The personality of the parties (including counsel) engaged in the proceedings should not inhibit him. In the exercise of his judicial functions a judge should only be restrained by his judicial oath, his conscience, his training and his own competence."

Euro Bank

36. Smellie CJ in *Euro Bank Corp* 2001 CILR 114 at paragraph 5 referred to the "fair minded and informed member of the public." Smellie CJ referred to "the test favoured in the Australian courts [which] may be more in keeping with the requirement that justice must objectively be seen to be done."

Mohanty

37. Sanderson J in *Mohanty v Health Services Authority* 2003 CILR 40 also referred to English and Australian authorities on recusal and at paragraph 20 concluded:

> "I am satisfied that the defendant has brought this application for an improper purpose, namely judge-shopping …. The defendant has been unsuccessful in some of those applications before me …"

Sanderson J continued:

> "23. I conclude that the defendant wrongly believes that because I had ruled against it on some preliminary matters or because of what was said during those applications, that it would fare better at trial with a different judge. It has had that unfounded view for some time and has been abusing the process of this court, in an attempt to have this matter head by another judge whom it thinks will view its case more favourably. This amounts to an attack on the integrity and independence of the court itself and cannot be accepted.
>
> 24. It must be presumed that all judges of this court will hear and determine this case in the same impartial way. That is, based on the evidence before them and the applicable law. Different judges may not come to the same conclusion but they will reach it based on the facts and law as they understand them and without fear or favour of any person.

25. In view of the conclusion I have reached, I do not think it is possible for me to hear these trials. I have concluded that the defendant had intentionally taken a course of action for the purpose of securing a judge who it thinks is more likely to favour its position and not because it was concerned about any legitimate reasonable apprehension of bias. Having reached that conclusion, it would be difficult to disabuse my mind of it when trying to determine the credibility of Dr. Heap or other defence witnesses who have been involved in this process...

27. When tactics such as these are employed by Government departments and Crown Counsel's office, I find it to so profoundly disturbing that I question my ability to act completely impartially. I regard this application as an unfounded attack on my impartiality as a judge and one which has succeeded in causing me embarrassment in having to arrive at the conclusions I have reached. For these reasons, I disqualify myself from hearing the trial of these matters. This gives the defendant its desired result but for entirely the wrong reasons. Its conduct may amount to contempt of court."

Bromley

38. Note 33 to 2003 CILR reads as follows:

"HEALTH SERVICES AUTHORITY v. BROMLEY
Court of Appeal (Zacca, P., Rowe and Taylor, JJ.A.): December 5th, 2003

Civil Procedure – fair trial – apparent bias – test
In determining whether there is apparent bias on the part of a judge, the court should no longer simply ask itself whether there is a real danger of bias, but rather whether the circumstances would lead a fair-minded and informed observer to conclude that there is a real possibility that the judge is biased (*Locabail (UK) Ltd. v. Bayfield Properties Ltd.*,

[2000] Q.B. 451; [2000] 1 All E.R. 65; (1999), New L.J. 1793 applied; *Porter v. Magill*, [2002] 2 A.C. 357; [2002] 1 All E.R. 465, applied)."

CVC

39. In *CVC/Opportunity Equity Partners Limited v Demarco Almeida* 2004 – 05 CILR Note 13 the Court of Appeal (Zacca P, Collett and Taylor JJA) followed *Porter v Magill* and held that the "modern test for bias" was whether the fair-minded and properly informed observer would conclude that there was "a real possibility that the tribunal was biased."

Tibbetts

40. One of the leading authorities in this area of the law is *Tibbetts v Attorney General of the Cayman Islands* [2010] UKPC 8 2010 (1) CILR 92 which at paragraph 3 followed the "real possibility" formulation laid down in the leading English authority of *Porter v Magill*.

Ebanks

41. In *Ebanks v R* 2012 (2) CILR 281 the Court of Appeal (Chadwick P, Mottley and Conteh JJA) followed the well-known English and Australian authorities and referred to some local "small jurisdiction" considerations.

BTU Power

42. In *BTU Power Company*, *Almazeedi v Penner and Sybergma* 2015 (2) CILR 156 the Court of Appeal (Mottley, Rix, Newman JJA) followed English authorities.

Almazeedi

43. In *Almazeedi v Penner and another* 2018 (1) CILR 143 Lord Mance (with whom Lord Wilson, Lord Hughes and Lord Lloyd-Jones agreed) applied the well-established recusal test to the facts and circumstances of that case which resulted in the recusal of a judge sitting in the Financial Services Division of the Grand Court of the Cayman Islands.

Perry

44. More recently the Court of Appeal (Goldring P, Field and Beatson JJA) in *Perry v Lopag Reg* (unreported judgment with errata delivered 19 November 2021) referred at paragraph 139 to counsel's reliance on *Locabail* and apparent bias, and at paragraph 152 referred to *Porter v Magill*, *Tibbetts* and *Almazeedi v Penner* and confirmed that the relevant test for apparent bias in the Cayman Islands is whether "the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility that the tribunal was biased."

The need to guard against judge-shopping

45. In *Mohanty*, Sanderson J made his disapproval of judge-shopping clear going so far to suggest that it may amount to contempt of court in the circumstances of that case. Other authorities also make it clear that judges should guard against the abuse of judge-shopping. At paragraph 34 of my judgment in *Jian Ying Ourgame High Growth Investment Fund (in official liquidation)* (FSD unreported 19 July 2022) I referred to the "potential abuse by way of "judge shopping" whereby some litigants wrongly present recusal applications in an attempt to remove a judge who they regard as unfavourably disposed to their case … Litigants, of course, cannot choose their judges."

46. Judge of Appeal Hytner in *Anglo International Holdings Limited v Cashandale Limited* 1996-98 MLR 8 presiding over the Appeal Division of the High Court in the Isle of Man at page 15 warned against "forum shopping" and at page 16 added:

"Judges must suppress their natural inclination and bear in mind the possible unfairness to the other party and the damage done to the fabric of justice if they give way to baseless applications of this sort. Advocates also must remember that they have a duty to the court as well as to their clients, and should bear in mind that the making of baseless allegations of bias is a clear breach of that duty, as is any attempt at "forum shopping." (my underlining)

47. At paragraph [61] of *Clarkson v Department of Infrastructure* 2011 MLR 279 I referred to the judgment of Kirby J sitting in the Australian High Court in *Antoun v R* [2006] HCA 2 at [34] where it was stressed that a judge should not too readily accept recusal because a party has demanded it. I added:

"In the administration of justice the parties do not have an entitlement to choose amongst the judicial officers of the relevant jurisdiction who should and who should not preside over hearings."

48. At paragraph [62] I stated:

"Deemsters considering recusal applications should not consider them in a defensive way or as a personal attack upon them. Although attempts at forum shopping should be discouraged and Deemsters should not hesitate to robustly dismiss improper applications Deemsters should also be sensitive to the fact that recusal applications are never easy applications for an advocate or a litigant in person to make …".

49. Lord Lloyd-Jones, sitting in the Privy Council, in *Stubbs v R* [2018] UKPC 30, [2019] AC 868 at paragraph 34 stated:

"… The Board wholeheartedly agrees with the Court of Appeal that a judge should not recuse himself unless there is a sound reason for recusal, lest unmeritorious applications

for recusal become the norm and result in damage to the administration of justice. In particular, it is necessary to stand firm against illegitimate attempts to influence which judge shall sit in a particular case ..."

50. Lord Sumption (dissenting as to outcome) in *Almazeedi v Penner and another* 2018 (1) CILR 143 at paragraph 36 stated:

> "… applications based on apparent bias are open to abuse …"

The need for timely applications on proper grounds

51. In *Jian Ying Ourgame* I stressed at paragraph 31 the need for the parties and their attorneys, as officers of the court, to promptly bring to the judge's attention any matters of relevance to any recusal issue: "I say this to encourage attorneys to act promptly in the future if they have good grounds for a recusal application." I also stated at paragraph 37 that attorneys needed to take great care when considering whether to file a recusal application and that they must satisfy themselves that there are reasonable grounds for making such an application. At paragraph 38 I added:

> "It is important that such applications are only made on solid grounds and on a timely basis … the recusal card should not be kept up the sleeve to be played at a time which the applicant considers best suits its own interests, rather than the interests of justice."

52. At paragraph 39 I stated:

> "It is important to maintain the community's trust and confidence in the administration of justice that justice must not only be done it must also be seen to be done. Moreover, considerations of inconvenience and costs do not count in a case where the principle of perception of judicial impartiality is properly invoked. This is because the right to a fair

trial by an impartial and independent tribunal is a fundamental principle of justice both at common law and under the Constitution. The recusal test is a mandatory test. It is not a discretionary case management decision reached by weighing various factors in the balance …"

53. If applications are left too late they may receive short shrift. Turner J in *Miley v Friends Life Limited* [2017] EWHC 1583 (QB) at paragraph 23 passed "adverse comment on the timing of this application" and at paragraph 25 stressed the importance of formal applications being filed in recusal issues. At paragraph 27 Turner J stated that:

> "It would also have been open to the Court to exclude the issue from consideration by reason of the inordinate and inexcusable delay in raising the point. Parties should not simply assume that in all cases an application for recusal will automatically be immune from procedural objection as a result of delay."

54. Jacobs LJ in *Baker v Quantum Clothing Group* [2009] EWCA Civ 566 stated:

> "35. … 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 the objection simply comes too late. It is not open to a party who thinks it has grounds for asking for recusal to take a leisurely approach to raising an objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable."

55. Despite what I said in *Jian Ying Ourgame* (at paragraph 38) there is some evidence (see Smellie CJ's recent decision in *Ebanks v Philander* G167 of 2021 7 October 2022; where a recusal

application was made without a proper factual basis) that ill-founded and misconceived recusal applications may be on the increase in this jurisdiction and judges must take care to guard against such abuse.

56. Lord Neuberger (the former President of the Supreme Court of the United Kingdom and lead judge of the Judicial Committee of the Privy Council) in '*Judge not, that ye be not judged': judging judicial decision-making* FA Mann Lecture 2015 (29 January 2015) stated:

> "36. … It is all too easy for a litigant who does not want his case heard by the assigned Judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge who will hear the case. In small jurisdictions or in specialized areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court."

57. Stanley Burnton J in *R (Toovey and Gwenlan) v The Law Society* [2002] EWHC 391 (Admin) at paragraph 80:

> "Applications for the court to recuse itself have become increasingly fashionable of late, regrettably often with no factual or legal justification. It may be tempting for a client to want to recuse the Court when he perceives his case is failing, but that is no justification for counsel to make the application … it is for counsel to satisfy himself that there are reasonable grounds for making such an application."

Duty to sit absent grounds for recusal

58. Lord Bingham, Lord Woolf and Sir Richard Scott V-C in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 sitting in the Court of Appeal of England and Wales at paragraph 21 indicated

that "if, for solid reasons, the judge feels personally embarrassed in hearing the case" he should recuse. They added:

> "He would be wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

59. The judges at paragraph 21 stated that they found force in the following observations, even though they were directed at the reasonable suspicion test, made 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 at 177:

> "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 nor 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." (my underlining)

This quote is repeated in many recusal judgments worldwide.

It was applied by the Supreme Court of Ireland in *Bula Ltd v Tara Mines Ltd (No6)* [2000] 4 I.R. 412 where at pages 449 Denham J stated:

> "A judge has a duty to sit and hear a case. However, in certain circumstances it is appropriate that he or she disqualify himself or herself from a particular case. The test is not whether that judge believes he or she would be impartial … Nor is it whether the parties consider the judge impartial. The test is objective …"

60. The English judges in *Locabail* also found great persuasive force in the comments of Mason J, sitting in the High Court of Australia in *In re J.R.L., Ex parte C.J.L* (1986) 161 C.L.R. 342 at 352:

> "Although it is important that justice must 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."

61. At paragraph [63] in *Clarkson v Department of Infrastructure* 2011 MLR 279 I stated that "Deemsters have a duty to sit in any case in which they are not obliged to recuse." I referred to comments of Lawrence Collins J in *BCCI v Ali* (3 December 2001, unreported):

> "It is important that judges 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."

62. Judges considering recusal applications should bear in mind the observations made by Chadwick LJ in *Triodos Bank v Dobbs* [2005] EWCA Civ 468 at paragraph [8]:

"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." (my underlining)

63. As Norris J stated in *Ghadami v Bloomfield* [2016] EWHC 1448 (Ch) at paragraph 17:

"To insist upon sitting when there is a real good ground for doubt does a disservice to the critic: to recuse oneself because one is too ready to admit real ground for doubt does a disservice to the critic's opponents."

64. McGuinness J in *Bula Ltd v Tara Mines Ltd (No6)* [2000] 4 I.R. 412 at 509 stated:

"It should, however, be remembered that this is a case *inter partes* and that the right to fair procedures does not belong solely to the applicants. The respondents, too, have a right to fair procedures."

The facts in Locabail and further judicial observations

65. The judges in *Locabail* carefully considered the background and facts. There was reference to Mr. Laurence Collins who had since 1995 been head of Herbert Smith's litigation and arbitration department. In 1997 Mr. Collins was appointed to sit as a deputy High Court Judge in the Chancery Division. In October and November 1998 Mr. Collins sitting in such judicial capacity heard two cases in each of which the plaintiff was Locabail (UK) Ltd and in each of which Locabail was attempting to enforce charges securing repayment of advances made to Mr. Emmanuel or to companies controlled by him. In one case the security consisted of a property owned by Waldorf Investment Corp, a company controlled by Mr. Emmanuel. In another case the security consisted

of Hawks Hill and a charge was in favour of Allied Trust Bank. The Bank obtained a possession order. Locabail took an assignment of the Bank's charge. Mrs. Emmanuel claimed to be the beneficial owner of Hawks Hill the matrimonial home of Mr. and Mrs. Emmanuel. Locabail took proceedings for possession of Hawks House. The defendants were Waldorf and Mr. and Mrs. Emmanuel. Summary judgment was consented to by Waldorf and Mr. Emmanuel but not by Mrs. Emmanuel. 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 and lasted 16 days. The deputy judge also heard Mrs. Emmanuel's appeal against judgment in the Hawks Hill action. He delivered judgments on 9 March 1999 which were adverse to Mrs. Emmanuel. He did not accept she was entitled to the equitable interests she claimed. Before the orders were drawn up Mrs. Emmanuel made an application to the deputy judge asking him to disqualify himself from further dealings with the two cases. The application was based on the fact that Herbert Smith had been, and probably still was, acting for a Russian company, Sudoexport, which had a claim against Mr. Emmanuel and one of his companies Howard Holdings Inc. 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 seemed that the company had substantial claims against Mr. Emmanuel. 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. The deputy judge gave judgment on the same day dismissing the application. Mrs. Emmanuel applied for permission to appeal.

66. Certain matters had come to light in the course of the hearing of the Hawks Hill case. Certain documents had been disclosed including a press cutting. The judge, part way through the hearing, said: "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 whatsoever to do with it." Neither counsel for Locabail or Mrs. Emmanuel made any response and both sides were content for the hearing to continue.

67. The judges at paragraph 58 stated:

> "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. 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? … How will it appear to the reasonable onlooker if the judge does not withdraw?" (my underlining)

68. At page 60 the judges felt that the point concerning the fact that the deputy judge had an interest (he being a partner) in fees earned by Herbert Smith was "tenuous and insubstantial."

69. At paragraph 61 the judges referred to "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."

70. At paragraph 64 the judges stated:

> "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."

71. At paragraph 67 the judges concluded:

> "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."

Attributes and presumed knowledge of the fair-minded and informed observer

72. Lord Clarke in *Tibbetts v Attorney General of the Cayman Islands* [2010] UKPC 8, 2010 (1) CILR 92 sitting in the Privy Council considering an appeal from the Cayman Islands at paragraph 3 referred to the question being whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the relevant tribunal was biased and added:

> "The fair-minded and informed observer must adopt a balanced approach and is to be taken as a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious."

See also *Lawal v Northern Spirit Limited* [2003] UKHL 35 per Lord Steyn at paragraph 14 approving Kirby J's comment in *Johnson v Johnson* (2000) 201 CLR 488 at 509.

73. Lord Kerr in *Belize Bank Limited v Attorney General* [2011] UKPC 36 at paragraph 37 referred to Lord Hope's comments in *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2, [2006] 1 WLR 781 at paragraph 17 on the question of the state of knowledge that the fair-minded observer should be presumed to have:

> "The fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally."

At paragraph 38 Lord Kerr added that "one needs to be alert to the danger of transforming the observer from his essential condition of disinterested yet informed neutrality to that of someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider's status." Lord Kerr referred to this theme being taken up by Baroness Hale in *Gillies* when she said at paragraph 39:

> "The 'fair-minded and informed observer' is probably not an insider (i.e. another member of the same tribunal system). Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in *Johnson v Johnson* (2000) 201 CLR 488 at paragraph 53, 'neither complacent nor unduly sensitive or suspicious'."

Lord Kerr provided further guidance as follows:

> "39. It might be supposed that if the observer is provided with a surfeit of information, his or her detached status would be affected and the essential component of public confidence in the lack of bias in the decision-making progress would be imperilled. One can understand that it is necessary that the objectivity of the notional observer should not be compromised by being drawn too deeply into a familiarity with the procedures, if that would make him or her too ready to overlook an appearance of bias, but I do not consider that either Lord Hope or Lady Hale was suggesting that the amount of information available to the observer should necessarily be restricted to that which was instantly available to a member of the public. The phrase "capable of being known" from Lord Hope's formulation holds the key, in my opinion. This does not signify a need to restrict the material to that which is immediately in the public domain. It acknowledges that the observer must have such information as may be necessary for an informed member of the public without any particular, specialised knowledge or experience to make a dispassionate judgment. As Lord Bingham put it in the *Prince Jefri* case at para 16:

> "The requirement that the observer be informed means that he does not come to the matter as a stranger or complete outsider; he must be taken to have a reasonable working grasp of how things are usually done."

74. In *Bula Ltd v Tara Mines Ltd (No6)* [2000] 4 I.R. 412 Denham J at paragraph 444 stated:

> "The reasonable person will have a reasonable knowledge of the way counsel work – but not a knowledge in depth such as could be attributed to a lawyer or legal academic …"

And at page 445:

> "… The test is the view of the reasonable person who would have a reasonable knowledge of a barrister's work and so the link or links alleged need to be more than simply that the judge as barrister had acted for one of the parties in an action."

75. Lord Mance in *Almazeedi v Penner and another* 2018 (1) CILR 143, a case resulting in the recusal of a judge of the Financial Services Division of the Grand Court, at paragraph 32 stated:

> "The fair-minded and informed observer is in this context a figure on the Cayman Islands legal scene. But she or he is a person who will see the whole position in "its overall social, political and geographical context"."

76. Lord Sumption (dissenting as to outcome) at paragraph 36 stated:

> "The notional fair-minded and informed observer, whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious nor apt to envisage the worst

possible outcome. The many decisions in this field are generally characterised by robust common sense."

77. Sir Jack Beatson JA in *Perry v Lopag Trust Reg* (judgment with errata delivered 19 November 2021) at paragraph 153 helpfully highlighted some of the attributes of the fair-minded and informed observer as outlined in the authorities and the importance of context and detachment:

(1) "the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument";

(2) "is not unduly sensitive or suspicious";

(3) whose approach "must not be confused with that of the person who has brought the complaint"; and

(4) "the assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively."

78. The observer will also have regard to the judicial oath and the training and experience judges have in dealing with legal issues independently and impartially. In Cayman the judicial oath is to well and truly serve His Majesty King Charles III "and the people of the Cayman Islands … and that I will do right to all manner of people according to the law without fear or favour, affection or ill-will."

Guidance from other authorities

79. Lord Dyson in *Belize Bank Limited v AG* [2011] UKPC 36 at paragraph 75 referred to a lecture by Lord Rodger who in relation to apparent bias stated that the court should "adopt a course that can be expected to command the assent and respect of the general public … Similarly, while decisions from other (foreign) jurisdictions may provide useful guidance, especially as to the test which is to

be applied, a court has to apply that test against the background of the traditions, history and culture of its own society, which may affect the way the public view such matters." (my underlining)

McCarthy

80. In the well-known and oft cited English case of *R v Sussex Justices ex parte McCarthy* [1924] 1 KB 256 arising out of a collision between a motor vehicle belonging to the applicant and one belonging to W a summons was taken out by the police against the applicant alleging he had driven his motor vehicle in a manner dangerous to the public. At the hearing of the summons the acting clerk to the justices, who was a member of the firm of solicitors who were acting for W in a claim for damages against the applicant for injuries received in the collision, retired with the justices in the usual way to advise on any issues of law. It was held that it was improper for the acting clerk to be present with the justices when they were considering the matter and that there had been no waiver of the irregularity. Lord Hewart CJ at page 259 uttered his now famous words:

> "…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."

Locabail

81. The judges at paragraph 25 of their oft-quoted judgment in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 stated:

> "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 [now real possibility] of bias. Everything will depend on the facts, which may include the nature of the issues to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based … on previous judicial decisions … or previous receipt of instructions to act for or against any party,

solicitor or advocate engaged in a case 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 [now possibility] of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." (my underlining)

Smith

82. In *Smith v Kvaerner Cementation Foundations Ltd* [2007] 1 WLR 370 the claimant sustained serious injuries when he was in a vehicle, owned by the defendant, which was involved in a road accident in Thailand. He brought a personal injury claim and on the morning the trial was due to start, the claimant was informed that the judge due to hear the trial was the head of chambers to which both his counsel and the counsel for the defendant belonged and that he had acted for the defendant in the past and might do so in the future. The claimant made no objection. The claim was dismissed. Four years later the claimant sought permission to appeal out of time. The headnote to the law report summarises that the Court of Appeal of England and Wales held that the mere fact that counsel and the judge were in the same chambers did not, of itself, give rise to an appearance of bias nor was a fair trial put at risk, but as the judge considered the defendant to be a longstanding and current lay client, he should not have tried the claimant's case unless the claimant waived his right to object to him doing so; that in order to be a valid waiver, the party waiving his right had to be aware of all the material facts, and of the consequences of the choice open to him, and given a fair opportunity to reach an unpressured decision. The English Court of Appeal granted the application and allowed the appeal. LCJ Phillips delivered the judgment. At paragraph 20 LCJ Phillips referred to a proposition of Lord Denning MR in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 600 which he said "has never been challenged":

> "No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge of that party in another proceeding. Everyone would agree that a judge, or a barrister or solicitor (which he sits ad hoc as a member of a tribunal) should not sit on a case to which a near relative or a close friend is a party. Nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased."

LCJ Phillips at paragraph 21 concluded:

> "in the absence of waiver by Mr. Smith, the recorder should not have tried the case."

Re Polites

83. The High Court of Australia (Brennan, Gaudron and McHugh JJ) in *Re Polites*; *ex parte Hoyts Corporation Pty Ltd* [1991] HCA 25 at paragraph 10 stated:

> "10. A prior relationship of legal adviser and client does not generally disqualify the former adviser, on becoming a member of a tribunal (or of a court, for that matter), from sitting in proceedings before that tribunal (or court) to which the former client is a party. Of course, if the correctness or appropriateness of advice given to the client is a live issue for determination by the tribunal (or court), the erstwhile legal adviser should not sit. A fortiori, if the advice has gone beyond an exposition of the law and advises the adoption of a course of conduct to advance the client's interests, the erstwhile legal adviser should not sit in a proceeding in which it is necessary to decide whether the course of conduct taken by the client was legally effective or was wise, reasonable or appropriate. If the erstwhile legal adviser were to sit in a proceeding in which the quality of his or her advice is in issue, there would be reasonable grounds for apprehending that he or she might not bring an impartial and unprejudiced mind to the resolution of the issue. Much depends on

the nature of his or her relationship with the client, the ambit of the advice given and the issues falling for determination." (my underlining).

Bula

84. Denham J sitting in the Supreme Court of Ireland in *Bula Limited (in receivership) and others v Tara Mines Limited and others* [2000] 4 IR 412 at 445 considered the above quote to be "a correct analysis of the situation and the approach to be taken in analysing the issue. The link must be cogent and rational." In *Bula*, after the Irish Supreme Court had delivered judgment, four parties applied to have the judgment set aside on grounds of "objective bias" as two of the judges (Barrington J and Keane J) had links with the respondents over twenty years previously. Barrington J had acted for the fifteenth respondent in two sets of proceedings relating to the Tara respondents in one case and the applicants in another. He had also advised on legislative reform in the area of mineral mining and had acted against the Tara respondents in a case and had prepared two sets of advices for the first respondent. Keane CJ had advised the first respondent and undertaken to appear at an anticipated hearing but in the end did not do so since he was appointed to the High Court. The applicants contended that "objective bias" arose from these connections between the two judges and the respondents.

Denham J at page 445 stated:

> "… the mere fact that a judge when a practising barrister acted for a party is not a bar to him or her acting as a judge in a subsequent case where that party is a party to the litigation. The test for the court is more than a prior relationship of legal adviser and client."

Denham J at page 446 added:

> "If a judge has acted for or against a person previously as a legal advisor or advocate that alone is insufficient to disqualify him or her from acting as a judge in a case in which that person is a party, there must be an additional factor or factors. The circumstances must be considered to see if they establish a cogent and rational link so as to give rise to the reasonable apprehension test. The link must be relevant." (my underlining).

Denham J at page 446, in the context of Ireland, added:

> "A judge is not disqualified from adjudicating in a case merely because one of the parties was in receipt of his or her professional legal services at an earlier time. In the context of the independent bar, which operates in Ireland, such a link is not a connection sufficient to disqualify. It requires special additional circumstances to disqualify a judge from adjudicating in a case. Thus, a long, recent and varied connection may disqualify a judge. The circumstances must be cogent and rational so as to give rise to a reasonable apprehension that the judge might not bring an impartial mind to the resolution of the issues in the case. Special circumstances precluding a judge from presiding include a situation where the judge as counsel had previously given legal services to a party on issues alive in the case to be heard by the court." (my underlining)

Denham J at page 458 stated:

> "… the fact that a judge previously acted for a party does not bar him or her from acting as a judge in a case in which that person is a party. However, if the litigation is between the same parties on an issue or issues upon which as counsel he or she has previously advised or advocated in a cause between the parties then it would not be appropriate for a judge to hear the case …"

Denham J was right to stress at page 461 that:

> "The constitutional right to fair procedures, the right to an impartial judge, the reasonable apprehension of a reasonable person that the procedures would be fair, go to the heart of the justice system. The intrinsic nature of these matters are at the core of the system of the administration of justice."

Denham J also stressed the following at 461:

> "In order for a judge to be disqualified from hearing a case, in addition to the relationship of client/counsel, there must exist a factor which would give rise to a reasonable apprehension of bias in the mind of a reasonable person. Such a link must be cogent and rational. Such a link could be if the counsel had advised on the issues to be determined. However, in this case the advice and advocacy given was not in relation to the issues on the appeal."

The Precautionary Principle

85. In *Morrison v AWG Group Limited* [2006] EWCA Civ 6 the Court of Appeal of England and Wales referred to what Mummery LJ (with whom Latham LJ and Carnwath LJ agreed) described as the "precautionary principle" as follows:

> "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 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." (my underlining)

86. It may be that the judges in *Locabail* had the precautionary principle in mind when at paragraph 58 they stated:

> "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 in the case."

87. Rix LJ in *JSC BTA Bank v Ablyazov (No9)* [2012] EWCA Civ 1551, [2013] 1 WLR 1845 at paragraph 75 stated that various matters "have to be borne in mind as well as the precautionary principle that it is better to be safe than sorry".

88. I do not wish to elevate the precautionary principle to a local statutory provision but I think I would be unwise to ignore it especially as the recusal issues in this case have arisen well before trial. I also read it in light of the wise guidance offered in the Cayman Judicial Code in particular at paragraphs [16], [18] and [19]. The closing words of paragraph [19] reflect the wisdom of the precautionary principle:

> "If the issue of apparent bias is raised before the judge has embarked on the hearing, it may be sensible for the judge to decline to sit in order to avoid adding to the other contentious issues in the case."

As per Lord Sumption in *Almazeedi v Penner and another* 2018 (1) CILR 143 at paragraph 36 the approach of judges in this area should be characterised by robust common sense.

89. Judges faced with recusal issues must, where relevant, have regard to the precautionary principle but they must also have regard to the duty to sit (absent good grounds for recusal) and they must guard against the abuse of judge shopping.

Submissions

90. I record that I have considered all the relevant written and oral submissions put before the court. They form part of the court record and I do not set them all out in this judgment.

Determination

91. I now turn to the determination of the recusal applications.

92. In this case the Second Respondents object to me presiding over the six week hearing scheduled to start in April 2023 on the basis that there was a real possibility of apparent bias. There is no suggestion of actual bias or personal financial interest. The legal test for apparent bias is well-established. It involves a two stage approach. First the court must ascertain the relevant facts and circumstances. The authorities stress that the context, and the particular circumstances are of supreme importance and the process requires an intense focus on the essential facts of the case and the issues to be determined. I have set out the relevant background, context, circumstances and facts above in some detail. Secondly, having ascertained the facts and circumstances bearing on the suggestion that the judge was (or would be) biased, the court must then ask whether those facts and circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was (or would be) biased.

93. I deal with the four grounds now relied on as follows:

Ground One

94. The facts appear to be that Cains was in September 2017 contacted by a firm of English solicitors on behalf of Mr. Wang and the Wang Estate in respect of a matter which was not the subject matter of the dispute which gave rise to these proceedings in the Cayman Islands. Cains entered an engagement letter on 22 February 2018. The last substantive action carried on in respect of this engagement was stated to be in October 2019 (and the engagement was formally terminated "at the time" the Cains letter dated 5 September 2022 "was prepared", with about £20,000 being billed). I was an employee of Cains from November 2018 to May 2021 and my consultancy agreement, which I retain, with Cains commenced in June 2021. There is reference to a meeting on 8 August 2019 (at which I was not present) and the mention of the possibility of my views being sought at an appropriate point in the future. My views were never sought and I never provided any views or advice in respect of the Manx matter.

95. The fair minded and informed observer would note that I was not engaged in respect of the Manx matter and such did not form the subject matter of the dispute which has given rise to the proceedings in the Cayman Islands. The observer would note the comments of the judges in *Locabail* that they could not conceive of circumstances in which an objection could be soundly based on "previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him." The observer would note the words of the High Court of Australia in *Re Polites* at paragraph 10 that:

> "A prior relationship of legal adviser and client does not generally disqualify the former adviser on becoming a member of … a court … from sitting in the proceedings before that … court to which the former client is a party …".

96. The observer would note the words of Denham J in the Supreme Court of Ireland in *Bula* at page 446: "If a judge has acted for or against a person previously as a legal advisor or advocate that alone is insufficient to disqualify him or her from acting in a case in which that person is a party, there must be an additional factor or factors."

97. It is informative to note that not even the Second Respondents felt that mention of my possible involvement was sufficient to justify a recusal application. They simply raised it in a letter from Forbes Hare dated 9 August 2022. After investigation it transpired that I was not involved and did not give advice. As Mr Collins put it, "it turned out to be a false trail." The observer may reasonably and fairly, on an informed basis, regard Ground One as a damp squib.

98. I was not instructed or engaged in respect of the Manx matter, although the observer would note that Cains received instructions via English solicitors on behalf of Mr. Wang and the Wang Estate and that Cains did act in respect of the Manx matter. As Mr. Collins submitted, the facts reveal that, Cains have absolutely no role whatsoever in these Cayman proceedings, or in any other dispute between what might be generally described as "the Wang parties" on the one side and "the Floreat parties" on the other. The observer would also note that the last active involvement by Cains was in October 2019 (over 3 years ago now) and that Cains are no longer instructed. The observer would also note the relatively small amount of the bill and realise that such involvement in itself was limited. The observer would consider the mere mention of my name in one conversation on 8 August 2019 and my lack of involvement in this historic Manx matter, which did not concern the subject matter of the dispute which has given rise to the proceedings in the Cayman Islands, as being a very remote connection.

99. In all the circumstances the observer would conclude that there was no real possibility of bias based on Ground One alone.

Ground Two

100. I think on Ground Two the observer would take a more cautious approach as the additional factors of Long View and RAGOF come into play. I accept that it is not suggested that I had any knowledge of or was involved in respect of these matters or even mentioned in dispatches, but it appears that Cains did have some involvement.

101. The Second Respondents at paragraph 2.2 of their skeleton argument say that Cains were involved in discussions concerning the fund structure of Long View, and transactions involving RAGOF. They add that "The structure and reasons for the establishment of Long View and the propriety of RAGOF transactions are both at issue in these Proceedings." Although they do not say as much, I think it would be unwise to try and separate out Long View in FSD 269 of 2021 with FSD 268 of 2021 and FSD 270 of 2021.

102. Mutaz Otaibi ("Mr. Otaibi") in his fifth affidavit at paragraphs 10 to 22 deals with Cains' involvement in initial discussions concerning the structuring of Long View and at paragraphs 23 to 25 comments on the relevance of this involvement to these proceedings. I note all that Mr. Otaibi says in respect of the involvement of Cains which seems to date back to at least 2005 when Long View I was incorporated in the Isle of Man. Mr. Otaibi at paragraph 21 says that when Long View was incorporated in the Cayman Islands in 2015 the "documentation drafted by Cains for Long View 1 was used as a guide." Mr. Otaibi at paragraph 25 says:

> "The inception of Long View, the manner in which it was structured and the purpose for which it was incepted are issues which arise for determination in the Proceedings. The Second Respondents intend to rely on the involvement of well reputed third party professionals, including Cains, as evidence that Long View was not incepted for the purpose which Mr. Wang alleges."

103. Mr. Otaibi at paragraph 30 says that "Cains were involved (on the sell side, via their fiduciary business)" in the sale of an Isle of Man company to RAGOF in 2015. Mr. Otaibi at paragraph 33

refers to the involvement of Cains in a RAGOF subsidiary in 2017 and in paragraph 34 says that "Cains' role continued into 2021 (relating to the discharge of Manx registered security)." Mr. Otaibi refers to Cains being asked by RAGOF to quote for the incorporation of RAGOF Colmore Row Limited ("RCRL"). Mr. Otaibi refers to various references by the JPLs of RAGOF in their reports to various investments and at paragraph 38 says that the RAGOF JPLs approved (on behalf of RCRL) the instruction of Cains to deal with certain amendments to the financing arrangements.

104. Mr. Wang in his eighth affidavit at paragraph 12 says there is "no connection between me and the Judge" and at paragraph 14 adds that he has "no open matters with Cains". At paragraph 15 Mr. Wang says that "there is no relevant connection between the historical work carried out by Cains and the matters in issue in the proceedings." At paragraph 17 Mr. Wang says: "The fact that I faced the risk of enforcement action from Taiwan was obvious from the details of the asset freezes provided and I certainly do not dispute that I faced enforcement risks – I still do. What I do dispute is whether the enforcement risk was a reason for my investing in the Funds. It was not."

105. In addition to the evidence I have also considered the pleadings. At paragraph 4(b) of the Re-amended Winding Up Petition in 269 of 2021 it is alleged that Long View II Limited (the Fund) has been used as a device from its inception to wrongly exploit Mr. Wang's assets. It is alleged that it was not formed for the principal purpose of generating investment returns but for enabling the Floreat Management and the Floreat Principals to wrongly obtain access to Mr. Wang's assets and then to charge fees and otherwise exploit those assets as their own. In the Second Respondents' Re-amended Defence at paragraph 128.1(a) it is stated that the Fund is a genuine investment fund and at paragraph 128.1(iii) it is stated that it was "Mr. Wang who wanted to construct his financial affairs (and those of his family) in a manner that would make it more difficult for the Taiwanese authorities to be able to confiscate those assets." In the Amended Reply the Petitioner at paragraph 104 states:

> "As to paragraph 128.1(iii) and paragraph 136.1(b), in so far as it is alleged that Mr. Wang made his investments in the Floreat Funds with the aim of making it more difficult for the Taiwanese authorities to confiscate those assets, this is denied …"

These issues are plainly in dispute between the parties and no doubt evidence will be advanced at trial in respect of disputed issues.

106. Mr. Weisselberg highlights the fact that at paragraph 38 of the Re-Amended Winding Up Petition the existing allegations are expressed to be "Pending discovery and without limitation" and further allegations may be forthcoming after discovery which may also necessitate the Second Respondents relying on the prior Cains' involvement.

107. The Second Respondents say (at paragraph 35 of their skeleton argument) that they "intend to rely on the involvement of external firms such as Cains to indicate that the structure of Long View was intended to safeguard Mr. Wang's assets in a commercial and effective way."

108. If such statements are to be relied upon it appears that the involvement of Cains in respect of the structure of Long View 1 in the Isle of Man (which the Second Respondents say they used as a guide for the creation of Long View in Cayman) will form an important part of the defence of the Second Respondents in the proceedings in the Cayman Islands which are due to commence in April 2023. Mr. Weisselberg KC, the attorney for the Second Respondents, is an officer of this court and I must, to a large extent, rely on him when he says in effect that the Cains involvement in Long View will figure significantly at trial.

109. Mr. Collins criticises the Second Respondents for failing to identify specific issues which may arise at the hearing next year which may necessitate my recusal. In my judgment such criticisms underplay and fail to take full account of the proper application of the precautionary principle. The Second Respondents have referred to the past involvement of Cains and they say that they will be relying on this at trial. This places me in a somewhat invidious position.

110. I note my duty to try a case unless there are good grounds for recusal and that it is important for a judge to resist the temptation to recuse simply because it would be more comfortable to recuse. I am very conscious of my duty to sit, absent good grounds for recusal. Judges must also always guard against abuse by way of judge-shopping where a party seeks to remove a judge from presiding over a hearing in the hope that a judge more favourably disposed to that party will take the outgoing judge's place.

111. The recusal applications in this case have been presented well before the six week trial due to commence in April 2023. In such circumstances the wise guidance of Mummery LJ at paragraph 9 of his judgment in *Morrison* is at the forefront of my mind:

> "When 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 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."

112. Rix LJ in *JSC* at paragraph 75 also referred to "the precautionary principle that it is better to be safe than sorry."

113. I also note the helpful guidance contained at paragraph 19 of the Cayman Judicial Code which cautions as follows:

> "If the issue of apparent bias is raised before the judge has 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."

114. The judges in *Locabail* at paragraph 58 (perhaps reflecting the good sense of the precautionary principle) state that: "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." I think the precautionary principle may go further than this. If the potential recusal issue and potential conflict (serious or otherwise) is raised well before a lengthy trial is due to take place and the judge, even though satisfied that good grounds for recusal do not presently exist, cannot be sure how the issues surrounding the potential recusal and conflict issues may play out at trial, the precautionary principle teaches the judge to be safe rather than sorry. This is common sense.

115. In this case I note all that is said about the historic Cains involvement (which appears to have commenced many years ago now) and the Long View and RAGOF issues. I cannot be sure how those issues will play out at trial. The application of precautionary principle and the Cayman Judicial Code lead me to the conclusion that I must, in the interests of justice, lean on the side of caution and of being safe rather than sorry and that I should decline to sit in respect of 268, 269 and 270 of 2021. I have concluded that it would be unwise for me to preside over the hearing or any other applications in respect of these cases.

116. My conclusion on Ground Two is sufficient to dispose of the recusal applications but, for the sake of completeness I go on to deal with Grounds Three and Four.

Ground Three

117. Having considered Ground Three as objectively as humanly possible I do not think there is anything in this ground which would lead the fair minded and informed observer to conclude that there was a real possibility that I was biased. In fairness, Mr. Weisselberg in his oral submissions stated that he did "not push too hard" on Ground Three.

118. There is nothing in the complaint that on the return date of the *ex parte* applications I dismissed the Second Respondents arguments relating to material non-disclosure in summary terms and in an unreasoned way.

119. The return date hearing took place over 3.5 days ending on 28 March 2022. On 8 April 2022 I delivered a 43 page, 64 paragraph judgment. At paragraphs 16 to 33 on pages 8 to 22 I dealt with the relevant law in respect of the duty to make full and fair disclosure of material facts. The section headed "Reasons for the determination of the issues" begins at page 22. Under the heading "The alleged material non disclosures and lack of fair presentation in respect of the Receivership Order" from pages 24 to 29 I set out my determinations and brief reasons in respect of the non-disclosure complaints having criticised at paragraph 3(2) a "scattergun" approach by those making discharge applications relying on alleged non-disclosure and lack of fair presentation.

120. The fair minded and informed observer does not however have to simply rely on my judgment when considering the Second Respondents' complaints that my alleged lack of reasoning and other alleged failures should lead the observer to conclude that there was a real possibility that I was biased against the Second Respondents. The Second Respondents applied for leave to appeal. On 30 June 2022 Justice of Appeal Sir Alan Moses sitting in the Court of Appeal refused to grant leave. The following are extracts from his reasons which were included at Tab 31 of Bundle A:

> "4. This is, in reality, a dispute, likely to be hard-fought, between Mr. Wang who complains that the Floreat Principals [Messrs Mutaz and Hussam Otaibi and Mr. Wilcox] have used his funds [about US$500 million] for their own purposes and charged unjustifiable fees in the process, drastically diminishing the value of those funds and attempts by those Principals to prevent what appeared to the judge to be appropriate measures to safeguard those funds pending an investigation as to what has been going on …"
>
> 5. Time and again … the applicants complain that there was "no substantial basis" for the Judge's reasons. But the judge was properly focused on the allegations, well aware that in the light of their nature they were likely to be disputed and that any resolution of those issues would have to await a trial as to the disputed facts …

Receivership

13. As to the arguments that there was a failure to give full and frank disclosure … The arguments … refer to the absence of a sustainable basis for the judge's 'brief reasons'. This is just another way of saying that the judge should have found that there were no facts to sustain the allegations of misconduct and the risks which flowed from such misconduct if it is proved. But the judge was right to make no findings; he could not possibly do so. The reasons he gave were brief because the allegations merited no more lengthy a riposte.

14. Nor do they merit any appeal. None of the arguments raise any issue which has any real prospect of success. I dismiss the application for leave to appeal against the Receivership Order.

Appointment of Provisional Liquidators

15. In Grounds 1 and 2, the Applicants complain that there were inadequate reasons given by the judge either for making an order for the appointment of provisional liquidators *ex parte* or for dismissing the application to discharge. The reasons given by the judge properly explain why the allegations of a failure to make full and frank disclosure were rejected. The assertions of misconduct, if established, plainly justified an *ex parte* hearing and gave rise to a risk of further dissipation of assets and destruction of records by virtue of their very nature. Of course their veracity could not be determined but the reason why it was necessary for the court to do what it could to preserve the *status quo* pending investigation and resolution of the factual accusations is clear and it is not arguable to the contrary.

16. Under Ground 3, the applicants complain that in relation to the PIF fund there was no possibility of compulsory redemption. The fears expressed by Mr. Wang were not confined

to PIF and were related to risk. The judge dealt with the point properly and adequately at [54] and it is not reasonably arguable to the contrary.

17. The applicants also complain, under that Ground, as to the judge's treatment of the risk of document destruction on the basis of an absence of sustainable evidence to establish which a risk. Again, this is advanced under the heading of a failure to comply with the obligation of full and frank disclosure. I repeat, the very nature of the allegations of misconduct raise the risk feared by Mr. Wang. The real complaint advanced is that the judge failed properly to consider the contrary case in which it is said that the risks are fanciful in the light of "the identity, experience and, in some cases, regulated, status of the Funds' directors" (skeleton [17] re appointment of provisional liquidators). But the judge was in no position to resolve these issues. The risk had to be assessed in the light of the allegations; whether those allegations were well-founded could not have been resolved at this stage.

18. The same must be said in relation to the other proposed grounds under Ground 3; they are not reasonably arguable but merely seek a preliminary resolution, without a trial or evidence of issues of fact.

19. By ground 4, the applicants suggest that the judge failed adequately to deal with the point they had made as to alternative remedies. This seems to me an impossible submission in the light of his judgment at 54(3). It is beyond argument that, in light of the allegations made, there was no alternative means of protection and investigation pending the hearing of the proposed petition.

20. By ground 5 the applicants contend that the judge should have considered each fund on an individual basis. From time to time the judge did so (e.g. [54(10)-(17)). But it was right and necessary to deal with the applicants' grounds for discharge globally in light of the accusations made against those who were said to be responsible for the misconduct.

The alleged control exercised by the Floreat Principals required, at this interlocutory stage, a global view. The reasons dictating the need for continuation affected all the funds and the factors relating to one properly coloured the views of the judge in relation to others. It is not arguable to the contrary.

Conclusion

21. In light of the specific grounds of appeal raised, I can well understand the judge's view as to the approach of the applicants in their attempts to resist the receivership and to discharge the appointment of the Provisional Liquidators at the outset of his judgment of 8 April 2022. The arguments now advanced for leave to appeal do not disguise their lack of merit. None of them, in my view, are reasonably arguable and I therefore refuse permission to appeal in respect of all the applications."

121. In considering the Second Respondents' complaints that I dismissed the arguments relating to material non-disclosure in summary terms, characterising them as an attempt to seek pre-judgment of the matters at issue in the Petitions, and in an unreasoned way and there was therefore a real possibility that I was biased, the fair minded and informed observer would consider the facts and circumstances including the judgment of Moses JA and would conclude, as Moses JA did, that there was nothing in the Second Respondents' complaints.

122. As I commented during the hearing, the observer would note the context in which the remarks were made by Moses JA by way of a filtering process on behalf of a busy Court of Appeal and without a full hearing, but as Mr. Collins submitted the observer would also note the low threshold in respect of granting permission to appeal. The observer would note that a Justice of Appeal had concluded that there was insufficient in the Second Respondents' complaints to justify granting leave to appeal.

123. In respect of the initial indication of recusal, the fair minded and informed observer would not regard that as raising a real possibility of bias against the Second Respondents. Indeed such initial reaction was in their favour and what they wished for. It cannot reasonably be interpreted as indicative of bias against them. If the critical observer had any complaint in respect of the initial indication it may be that such would be on the ground that it was something of a knee-jerk reaction.

124. I doubt that the fair-minded and informed observer would attach much, if any weight, on the Second Respondents' complaint that the judge revisited the initial indication of recusal without giving any reasons. The observer would read my PA's email dated 19 August 2022 in a fair and balanced way and note that brief reasons were specified in that two page email. The observer would also note the Forbes Hare statement in an email dated 11 August 2022 that: "… if Justice Doyle is minded to reconsider his decision to recuse himself at a hearing, then the Second Respondent does not oppose taking that course."

125. In respect of the Second Respondents' complaints regarding my statement, the fair-minded and informed observer would note that the judge's statement made on 19 August 2022 sought to deal with the main points that had been raised at that stage namely the judge's connections with Cains, reference to a meeting with Mr. Wang and the reference to the possible giving of advice.

126. The fair-minded and informed observer would not regard the listing of other applications in the afternoon of the day when the recusal applications were due to be dealt with in the morning as indicative of bias but merely as prudent case management. The fair-minded observer does not suffer from paranoia and is not unduly suspicious. The observer would not regard the listing of other applications as indicative of bias. It may have been possible to come to a decision on the recusal applications immediately after hearing oral submissions. Obviously if the recusal applications were granted in the morning I would not have continued to preside over the other matters listed in the afternoon. If, however they were dismissed then, for the convenience of the parties and the attorneys with limited admission whilst they were on the island I could have heard and determined the other pending applications. In the event I decided on the day that it was necessary to reserve

judgment and did not go on to hear the other applications. The fair-minded observer would also note that on 7 November 2022 the parties presented for my approval Consent Orders signed by Forbes Hare on behalf of the Second Respondents seeking variations to my Order dated 25 October 2021 as varied by Orders dated 8 April and 31 May 2022 in respect of the progression of the proceedings.

127. The fair-minded and informed observer would not attach much, if any, weight, on the Second Respondents' allegation that the judge had taken a "broadly hostile approach to the Second Respondents in the applications that he has heard and determined." The judges in *Locabail* at paragraph 25 could not conceive of circumstances in which an objection could be soundly based on previous judicial decisions. In *Clarkson v Department of Infrastructure* 2011 MLR 279 at paragraph [102] I stated:

> "It is trite law that the fact that a Deemster may have made adverse determinations or comments against a party in prior proceedings does not automatically mean that such Deemster cannot sit in judgment in any future proceedings involving that party."

128. Moreover, if the Second Respondents were dissatisfied with my decisions they could seek to appeal them and if there was any merit they would be granted leave to appeal. As the authorities make clear, simply because a judge makes adverse decisions against or adverse comments in respect of a party does not mean that there is a real possibility that the judge is biased against such a party.

129. Moreover, the fair-minded and informed observer would not attach much, if any, weight on the complaints of the Second Respondents that the timetable I set to trial beginning in April 2023 was too tight. The fair-minded observer would regard such a timetable as active case management in accordance with the overriding objective rather than indicative of a real possibility that the judge was biased against the Second Respondents. The fair-minded and informed observer would read my judgment delivered on 31 May 2022 and the court's wish "to progress these matters expeditiously and the need to give all parties a fair hearing" (paragraph 25 of the judgment). The

fair-minded and informed observer would also note that there was no appeal against the Orders consequent upon that judgment.

130. In short summary, there was nothing in Ground Three that would lead a fair-minded and informed observer to conclude that there was a real risk that the judge was or would be biased against the Second Respondents.

Ground Four

131. Even though care needs to be taken not to equate the approach and knowledge of the fair-minded and informed observer to that of a judge or an "insider" I think it safe to conclude that Ground Four would not seriously trouble such an observer. Again, in fairness to Mr. Weisselberg in his oral submissions he did "not push too hard "on Ground Four either.

132. It is well known that judges are, by compliance with their judicial oath and by their training and experience well able to put out of their minds evidence that needs to be disregarded.

133. Mr. Collins referred to *Barings plc (in liquidation) v Coopers and Lybrand* [2001] EWCA Civ 1163 and the comments of Potter LJ sitting in the Court of Appeal of England and Wales at paragraph 17:

> "… our system has long recognised that judges are, by accident and necessity, frequently exposed to material that is both inadmissible and the subject of objection; yet it is also accepted that they are capable of compartmentalising it within their minds and ignoring it when coming to their decision."

134. The judges in *Locabail* at paragraph 61 stated:

> "… 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."

If this were not the case, judges would never be able to consider applications in respect of proposed admission of disputed evidence *de bene esse* which they frequently and properly do. I agree with Mr. Collins that it is fanciful to suggest that, after a 6 week hearing due to commence in April 2023, I would recall the substance and detail of the RAGOF material. Mr. Weisselberg sensibly and realistically accepted that if my position was that I did not recall the RAGOF material by the trial this would be an answer to Ground Four.

135. The comments of Chadwick P in *Ebanks v R* 2012 (2) CILR 281 at paragraph 23 are worthy of consideration but must be read in their context and in light of *Locabail*. Having noted submissions of counsel to the effect that it should be assumed that the judge is capable of putting out of his mind, and will not be prejudiced by, material which did not form evidence in the case before him Chadwick P stated:

> "There is, we think an obvious danger that those who are or have been judges (including, in particular, members of an appellate court drawing on their own experience) will treat the ability of a trial judge to put out of his mind material which is not in evidence before him in the trial with which he is concerned as self-evident. It is, as the Crown points out, what trial judges do as a matter of routine. But the knowledge of appellate judges as to what trial judges do as a matter of routine is not to be attributed to the fair-minded and informed observer. It is necessary to look at the position through the eyes of the putative observer; and, although that task must, of course, be undertaken by a judge (or judges), it cannot be undertaken on the basis that the putative observer is, himself or herself, another judge."

136. At paragraph 56 the Justices of the Court of Appeal asked themselves whether the fair-minded and informed observer, having regard to all the circumstances, would conclude that there was a real possibility that the judge would not be able to put out of his mind the irrelevant and prejudicial material and that there was a real possibility that the judge had a predisposition against the defendant and they were satisfied that the observer in that case would not reach that conclusion. The Justices of Appeal therefore rejected the apparent bias allegation on this ground. I likewise reject Ground Four in this case.

137. Mr. Weisselberg referred to *Berg v IML London Ltd* [2002] 1 WLR 3271 at paragraphs [22] to [24] and submitted that where a judge has been exposed to information which he ought not to have received, there are two elements: a subjective element about whether the judge believes that he can put the information out of their mind, and an objective element based on whether a fair-minded observer would consider that a judge with that particular knowledge could hold a fair trial.

138. In *Berg* Stanley Burnton J sitting at first instance in the Queen's Bench Division of the High Court of England and Wales considered an appeal in a case where a master had read some "without prejudice" correspondence. Stanley Burnton J did not think this was a case of bias (paragraph 13). He referred to two aspects:

> "The first question is whether subjectively the judge considers that he is disabled from fairly continuing with the case …" (paragraph 21).

139. He then referred to a second aspect which involved an objective element and described it at paragraph 22 as follows:

> "There are circumstances, in my judgment rare circumstances, in which whatever the subjective feelings of the judge in question, he cannot continue with the case without there

being a real possibility or a real danger of there being seen to be, by a fair-minded and informed observer, an unfair trial."

140. Stanley Burnton J at paragraph 24 usefully added:

> "The informed observer will know not merely of the traditions of judicial independence and impartiality, but will know of the procedures of the court, of the practices of the court and the facts of the case in question."

141. Applying these two elements I conclude as follows. Firstly, I subjectively consider that on Ground Four I would not be disabled from fairly continuing with the case. Secondly, on the objective aspect, I do not consider that Ground Four presents rare circumstances which would lead to a conclusion that I could not, based on the arguments presented on this ground, continue with the case without a real possibility of an unfair trial arising. Ground Four does not present a legitimate ground for recusal.

Waiver?

142. On behalf of the Petitioner, it was submitted that the Second Respondents had waived any objection as they had known for a considerable time about the involvement of Cains. They refer to the statement in the third affidavit of Mr. Wilcox at paragraph 38 to the effect that he was first involved in the potential instruction of Cains to provide advice to Mr. Wang in September 2017 and at paragraph 39 that on 14 September 2017 he approved the instruction of Cains on behalf of Mr. Wang. The Petitioner says, correctly, that my connection with Cains is a matter of public record. The Second Respondents say they only became aware that I might have been asked to provide advice following the recent discovery of a note in respect of a telephone discussion in August 2019. The Second Respondents say that they only became aware of my connection with Cains in early August 2022. The Petitioner says that the Second Respondents have waived any objection founded

on the fact that Cains was giving advice to English solicitors for Mr. Wang at a time when the judge was employed by Cains. The Petitioner says that the same is true of Long View and RAGOF in that the Second Respondents have known for a considerable time about both (1) the judge's connection with Cains; and (2) Cains' connections with Floreat and various RAGOF holding structures and they cannot now raise these matters in support of their recusal applications.

143. Waiver in the context of apparent bias cases is problematic. Indeed, some have argued against waiver on the ground that the behaviour of a private litigant should not be allowed to sacrifice the public interest in impartial justice (James Goudkamp *The Rule Against Bias and the Doctrine of Waiver* (2007) 26 CJQ 310).

144. Counsel have referred to some of the relevant law on waiver including *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551, [2013] 1 WLR 1845 at paragraphs 77 to 84.

145. I can deal with this waiver point fairly briefly. Having considered the relevant law, the submissions and the evidence before the court I am not satisfied that it would be appropriate to conclude that the Second Respondents have waived their rights. Once armed with the necessary knowledge the Second Respondents have not been dilatory in raising their objections, well before the date the trial is due to commence. They cannot fairly be taken to have waived their rights. This is not a case where with knowledge of the full facts the Second Respondents can be taken to have either tacitly or expressly waived their rights.

146. Mr. Collins, towards the end of his oral submissions, made a sensible and realistic concession to the effect that if the court accepted the evidence filed on behalf of the Second Respondents (despite the inconsistencies) as to their date of knowledge in respect of my connection with Cains as being early August 2022 or if the court felt it inappropriate to resolve what he described as the conflict in the Second Respondents' evidence on this point, then he accepts that his arguments on waiver fail and he responsibly and fairly did not press the waiver point in these circumstances.

Conclusion

147. In conclusion I am not satisfied that taken separately or together Grounds One, Three and Four relied upon by the Second Respondents are good grounds for recusal. However, applying the precautionary principle and the wise guidance of Mummery LJ in *Morrison* and Rix LJ in *JSC* and there being no certainty as to how the Long View and RAGOF issues surrounding Ground Two may pan out at trial, I have decided it is better to be safe than sorry and decline to sit further in respect of 268, 269 and 270 of 2021. This decision is also consistent with paragraph 19 of the Cayman Judicial Code. To refuse to stand down now and to continue with the trial only to discover say in week 4 or 5 of a 6 week trial that the way in which issues in respect of Long View and RAGOF had developed meant that I must recuse would be a terrible waste of time, money and limited judicial resources.

148. In small compact jurisdictions that attract high quality financial services litigation (such as the Financial Services Division of the Grand Court of the Cayman Islands) there are, I would suggest, in addition to the duty to sit, the need to guard against the abuse of judge-shopping and the precautionary principle, at least three other factors to have regard to when considering recusal applications. First, in small compact jurisdictions there is a limited pool of specialist judges dealing with financial services litigation. Second, the litigation in such courts, perhaps because of the amounts and issues at stake, is frequently (as Moses JA touched upon in this case) hard fought. The temperature and hostilities run high on occasions and the parties take all conceivable (and indeed some inconceivable) points which they think may assist their respective cases. Judges dealing with recusal applications in such a context must carefully bear this in mind. To put it mildly, the words mediation and settlement do not unfortunately appear to be at the forefront of the minds of the combatants or their well-resourced legal teams in such cases. Third, 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.

149. In small compact jurisdictions there is perhaps a need to take an even more cautious approach in respect of recusal applications. See in particular paragraphs [16] and [19] of the Cayman Judicial Code. Paragraph [16] includes the following wording "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". Paragraph [19] includes the following wording "If the issue of apparent bias is raised before the judge has embarked upon 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."

150. It is of fundamental importance, as I endeavoured to stress in *Jian Ying Ourgame,* that the local and international community's trust and confidence is maintained in the administration of justice and that justice is not only done but is seen to be done. Perception in this context is just as important as reality.

151. The parties and their attorneys should liaise with court administration and the Chief Justice for these cases to be assigned to another judge. As the recusal applications have been made and determined well in advance of next April's hearing hopefully the hearing dates can be kept.

152. Costs and any other ancillary applications should be reserved to the judge assigned to deal with these matters.

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The Hon. Justice David Doyle
Judge of the Grand Court