[2017] JMCC COM 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2015CD00119

BETWEEN	**ERVIN MOO YOUNG**	**CLAIMANT**
AND	**DEBBIAN DEWAR**	**FIRST DEFENDANT**
AND	**MARSHANEE CHEDDESINGH**	**SECOND DEFENDANT**
AND	**ZIP (103) FM LIMITED**	**THIRD DEFENDANT**

IN CHAMBERS

Symone Mayhew and Kimberley Morris for the claimant

Tana'ania Small Davis, Sidia Smith and Kerri-Ann Allen Morgan instructed by Livingston Alexander and Levy for the first and second defendant

Elizabeth Salmon instructed by Rattray Patterson Rattray for the third defendant

May 4 and May 11, 2017

CIVIL PROCEDURE – APPLICATION FOR RECUSAL – WHETHER JUDGE DISQUALIFIED BY REASON OF ADJUDICATING ON PRIOR MATTER INVOLVING LITIGANT – APPARENT BIAS

SYKES J

The application

[1] Mr Ervin Moo Young has a serious concern. He is of the view that this court as constituted may be biased against him. The reason for this is view is based on two things. First, he refers to a judgment delivered by Sykes J in **Joni Ann Young Torres (As Administrator of the Estate of Karl Angus Young) v Ervin Moo Young and others** [2016] JMSC Civ 17 ('the Young Torres judgment'). Mr Moo Young says that in that case I expressly rejected his evidence despite the fact that there was no cross examination. Second, he says that during a case management conference he formed the view that I had 'already arrived a (sic) determination of the matter.' He did not set out in his affidavit what it was that I had said and the context in which it was said.

[2] The application was heard and refused on May 4, 2017. A brief oral judgment given with a promise to deliver a written judgment. This is now the fulfilment of that promise. Miss Elizabeth Salmon, on behalf of the third defendant, did not support the application. Miss Sidia Smith, on behalf of the second defendants, opposed the application. The court accepted for the most part the submissions of Miss Smith.

[3] In respect of the Young Torres judgment Mr Moo Young identified the following paragraphs as those that gave him concern. They are paragraphs 44 and 63 – 69. The court will set them out in full. This is paragraph 44:

> *The proper analytical approach was stated thus at page 835:*
>
> *In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged,* ***to examine the substantial purpose for which it was exercised****, and to reach a conclusion whether that purpose was proper or not. in doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to*

exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls. (emphasis added)

[4] And there are paragraphs 63 – 69:

> ***[63]*** *This court would say the same in respect of determining whether the person acted for an improper purpose. If it is desired to say that Ervin exercised his director's power for an improper purpose then he should have been subjected to cross examination especially since he is the only director alive who was at that meeting. Ervin seems to be saying in his affidavit that he never addressed him mind to the purpose and presumably (the argument is that if he did not address his mind to the issuing of shares) the foundation for the exercise of the power for a proper purpose is non-existent and therefore he did not exercise his power for a proper purpose unless there is contrary evidence or at least evidence that neutralises this possible inference.*
>
> ***[64]*** *That is not the end of the story. It is important to examine the minutes of the July 8, 2010 board meeting more closely. The minutes record that Ervin and Chad were present. Chad is recorded as the chairman. It also says that the minutes from the previous directors' meeting were read, signed and confirmed. On the crucial issue of allotment of shares, it reads that the directors had discussions and it was agreed that 490,000 shares would be issued to Chad. The return of allotment was signed by Ervin. The date on the return of allotment is September 9, 2010. An examination of the document shows that it is headed return of allotment. At the bottom of the first page the box ticked indicated that the shares in question were newly issued shares. On the second page the particulars of shares indicated that 490,000 were to be issued. The third page indicated that the allottee was Chad. The fifth page bears Ervin's signature and the box ticked that he was a director. What could possibly be complicated about this that Ervin did not or could not understand?*
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> ***[65]*** *This court finds it difficult to accept that Ervin did not pass his eyes over the document before he signed for that is the only way he could have signed without appreciating what he was signing. The document is not long. It does not have complicated legal*

language. In his affidavit Ervin is not saying that Chad misled him as to the nature of the document. He is not even saying he did not know what the document was. He says he signed it 'without thinking anything of it and without taking any legal advice.' What does this mean? One meaning is that he did not think the document sufficiently complicated so as to require legal advice. If this is so, the likely reason for this is that the document was plain and simple and consistent with what was agreed by him at the July 8 meeting.

[66] *Indeed in his December 8, 2015 affidavit he is not saying that he did not attend the July 8, 2010 meeting. Ervin's December 8, 2015 affidavit was filed in response to Joni's affidavit dated October 28, 2015. It is Joni's affidavit that exhibits the minutes of the July 8, 2010 meeting. If he did not attend that meeting one would have expected him to say in his December 8, 2015 affidavit that he was not at the July 8, 2010 or if present the minutes do not accurately record what happened. Ervin even filed another affidavit dated December 23, 2015. In that affidavit he does not address the minutes of July 8, 2010.*

[67] *He must have appreciated that 490,000 is more than one and that the effect of issue would make him a minority shareholder. The more reasonable conclusion, on the evidence, is that Ervin was at the July 8, 2010 meeting; he took part in discussions; agreed to the allotment and issuing of the shares; he recognised he would become a minority shareholder and had no difficulty with that. This is the best explanation for his statement that he signed 'without thinking anything of it and without taking any legal advice.'*

[68] *Thus based on the evidence it is this court's conclusion that Ervin did address his mind to the allotment and issuing of shares. Ervin has not said that he has never read the articles of association. He may not know all the details but he has not professed a complete ignorance of either their existence or contents.*

[69] *In the absence of clear evidence to that effect this court is not able to infer that Ervin and Chad exercised the power to issue the shares for an improper purpose. As Mr Wood pointed out why should a lack of evidence lead to an adverse inference of lack of proper purpose when the burden is on Joni to establish that the*

> *directors did not issue the shares for a proper purpose? If it were otherwise then it would mean that virtually every decision by directors to issue share would be prima facie for an improper purpose unless they prove otherwise. Nothing that this court has indicates that this is how the law approaches the matter. The court therefore declines to find that the shares were issued for an improper purpose.*

[5] The passages cited were in the context of adjudication on claim in which it was being suggested that the shares in ZIP (103) FM Ltd were allotted for an improper purpose. Mrs Young Torres, in her capacity as Administratrix of the Estate of Mr Karl Young, sought to have the allocation of share to Mr Chad Young set aside. Mr Ervin Moo Young, based on the documents in the Young Torres case, was identified as one of the persons who signed the document allotting the shares. He provided an affidavit which did not deny signing the document but that he signed it without giving it much thought. The court was therefore analysing what he meant by that expression given that there was no cross examination his affidavit. In the absence of any admission that Mr Moo Young was part of an allotment of shares for an improper purpose and given that the only other director who participated in the allotment has died the court had to say whether Mrs Young Torres had made good her claim.

[6] It is well established law that judicial officers of superior courts of record ought to give reasons for decisions and indicate his or her assessment of the evidence placed before the court. This was what the court was doing and has done in the Young Torres case. That is not the end of the matter because Mr Moo Young has now raised the issue of bias because this court is to hear a connected matter, this time with ZIP (103) FM Limited, in which Mr Moo Young is a litigant. It is now time to turn to the law on this area.

The legal position

[7] In this case Mr Moo Young is not alleging actual bias. No particulars of actual bias have been put forward. That leaves apparent bias the test of which is ‘whether a

fair-minded and informed observer, considering the facts would conclude that there was a real possibility that the tribunal was biased' (**Porter v Magil** [2002] 1 All ER 465).

[8] There are two cases from the Court of Appeal of England and Wales where the issue in this case has been considered, namely, whether a judge who has heard a matter involving a litigant in a pending case is disqualified, without more, from hearing that case if the judge in previous matter involving the same litigant made an adverse finding against him.

[9] The first is the case of **JSC BTA Bank v Ablyazov and others** [2013] 1 WLR 1845. In that case contempt proceedings were brought against Mr Ablyazov. The judge he heard the matter found against him and sent him off to prison for 22 months. The appeal against the contempt hearing was unsuccessful. Incidentally, Rix LJ was part the appellate bench that heard the contempt appeal as well as others. The appeals were unsuccessful. In effect, Mr Ablyazov as faced with two judges, one at first instance and another in the Court of Appeal, who had heard previous matters involving him and had ruled against him. The court will set out the first thirteen paragraphs in **Ablyazov** case to give a sense how serious the contempt was. These paragraphs are taken directly from the judgment of Rix LJ. These are the paragraphs:

> *1 This appeal (see para 94 below) is about the refusal of a judge to recuse himself as the nominated judge of trial in circumstances where he has had to hear, prior to trial, an application to commit one of the parties for contempt of court, and has found a number of contempts proven, leading to a sentence of 22 months' imprisonment. The question raised is whether in doing so the judge put himself out of the running, so to speak, as the judge of trial on the basis that, by reason of what is called pre-judgment, there would appear to the fair-minded and informed observer a real possibility of bias. This is the doctrine of apparent bias: see Porter v Magill [2002] 2 AC 357 . No one is suggesting that the judge is actually biased.*
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> *2 The applicant is Mr Mukhtar Ablyazov who until early in 2009 had been the chairman of the respondent bank, JSC BTA Bank (the "bank"), a major bank in Kazakhstan but now supported by its*

creditors. The bank has alleged that Mr Ablyazov has defrauded the bank of almost US$5 billion, and that he has done so by entering into specious but fraudulent transactions, such as loan transactions, with companies in which it is said that he was ultimately interested. Mr Ablyazov for his part asserts that the claims are an unjustified attempt by the President of Kazakhstan to destroy him as a political opponent and as a leading figure in Kazakhstan's democratic opposition.

3 The bank commenced its litigation by obtaining a worldwide freezing order against Mr Ablyazov and others. Since then the judge of the Commercial Court who has had the predominant role in the conduct of this litigation has been Teare J. The judge has had unrivalled experience of this litigation and has been called upon to produce many judgments in it (Mr Ablyazov's solicitor has counted 26 such judgments). Pursuant to the original freezing order Mr Ablyazov has been required to make disclosure of all his assets and to refrain from dealing with them. Mr Ablyazov has made partial disclosure of assets, but the value of that disclosure is not very great in comparison with the value of the allegedly purloined billions. To assist in the uncovering of Mr Ablyazov's assets the judge has appointed receivers on the basis that Mr Ablyazov could not be trusted to comply with the court's orders: JSC BTA Bank v Ablyazov (No 3) [2010] EWHC 1779 (Comm); [2010] EWCA Civ 1141; [2011] Bus LR D119 .

4 In March 2011 the judge dealt with a lengthy case management conference. As a result three of the eight cases proceeding in the Commercial Court were selected for trial and shortly thereafter a date for trial before the judge was fixed to commence in November 2012. It is the practice in complex cases in the Commercial Court for there to be continuity of a designated judge for both interlocutory matters and final trial: see para D4 ("Designated judge") in the Admiralty and Commercial Courts Guide in Civil Procedure 2012 , vol 2, p 319.

The contempt proceedings

5 On 16 May 2011 the bank applied to commit Mr Ablyazov for contempt of court. A series of 35 contempts were alleged but as a matter of case management the judge limited the application to

three allegations, one each under the separate headings of (a) non-disclosure of assets, (b) lying during cross-examination, and (c) dealing with assets: see JSC BTA Bank v Ablyazov (No 7) [2010] EWHC 1522 (Comm); [2012] 1 WLR 1988. The non-disclosure allegation concerned Bubris Investments Ltd ("Bubris", a BVI company); the lying allegation concerned companies which owned a number of English properties, and also the so-called "Schedule C" companies, viz FM Co Ltd (a Marshall Islands company) and Bergtrans Contracts Corpn and Carsonway Ltd (both BVI companies); the dealing allegation concerned assets held by Stantis Ltd (a Cypriot company) which were assigned to Nitnelav Holdings Ltd. The judge found these allegations proven, on the criminal standard of proof, so that he was sure of them. In effect he found that all these companies were owned by Mr Ablyazov. He found, however, that one of the English properties concerned, 79 Elizabeth Court, and the company which owned its shares, were not proven to be Mr Ablyazov's.

6 The judge gave three judgments in the committal application: one dealing with the alleged contempts of court, one dealing with sentence, and one dealing with the further consequences for the litigation as a whole, the so-called "unless" judgment. The contempt judgment was handed down on 16 February 2012 [2012] EWHC 237 (Comm) and sentence was dealt with by a further extempore judgment given that same day. The unless judgment was given on 29 February 2012 [2012] EWHC 455 (Comm).

7 In his contempt judgment the judge concluded that over the relatively narrow range of matters investigated, Mr Ablyazov had failed to disclose assets, had lied to the court, and had dealt with his assets in breach of the freezing order: and that in defending the committal application had relied on false witnesses and forged documents. The judge said [2012] EWHC 237 at [80]:

"notwithstanding the clarity and firmness with which Mr Ablyazov gave much, though not all, of his evidence I concluded that I could place little weight on his denials and could only accept what he said if it was supported by reliable contemporary evidence."

8 In his unless judgment the judge debarred Mr Ablyazov from defending the claims made against him in eight associated

Commercial Court actions and struck out his defences in them unless within a stated period he both surrendered to custody and made proper disclosure of all his assets and dealings with them. The order that Mr Ablyazov surrender to custody had been made necessary by his failure to turn up for judgment on 16 February 2012 (although he had said through his counsel that he would). He became a fugitive and had disappeared. The stated period for surrender was until 9 March 2012, and for disclosure until 14 March 2012, save that the sanctions for non-compliance would not take effect until seven days after any dismissal of any appeal.

9 Mr Ablyazov did appeal, from all three judgments, and his appeal came before us in July 2012. On 25 July 2012 we informed the parties that the appeals had failed, for reasons to be reserved, save that it had not yet been decided whether the order for surrender to custody should also have been made the subject of an unless order. Our formal order was also reserved.

10 On 6 November 2012 our judgments were handed down, having been previously sent out in draft to the parties about a week earlier: JSC BTA Bank v Ablyazov (No 8) [2013] 1 WLR 1331 . We dismissed all appeals (the appeal against the attachment of an "unless order" to the order that Mr Ablyazov surrender himself to custody was decided by a majority, otherwise we ruled unanimously). In dismissing the committal appeal, I had occasion to say this, at para 100:

"As this series of coincidences, misfortunes, errors, misunderstandings and inexplicable developments multiply, the court is entitled to stand back and ask whether there is in truth a defence or defences as alleged [to the committal allegations], even if no burden rests on Mr Ablyazov, and the burden remains on the bank, or whether there is at any rate the realistic possibility of such, or on the other hand whether the court is being deceived. The trial judge decided that it was being deceived by witnesses without credibility. It is not for this court to say that he was wrong without strong grounds for doing so, grounds which have simply not been formulated."

11 In dealing with the appeal against sentence, I went on to say, at para 106:

"Moreover, Mr Ablyazov's contempts have been multiple, persistent and protracted, have embraced the offences of non-disclosure, lying in cross-examination, and dealing with assets, and have been supported by the suborning of false testimony and the forging of documents."

12 Finally, in dealing with the appeal against the judge's "unless" order, I said this, at para 189:

"It cannot be just, fair, or proportionate, to permit a contemnor to avoid the consequences of his contempt by the expedient of disappearing ****1851*** *from sight (but not from the ability to communicate with his lawyers). As the judge said, it is a matter of choice for Mr Ablyazov. He may have his trial on the merits, if he complies with the court's orders. The court has denied him nothing except his ability to ignore the court's orders indefinitely. On the contrary, the order was made in an attempt to persuade Mr Ablyazov to comply with the freezing order 'and so ensure a fair trial in the full sense of that phrase' [2012] EWHC 455 at [76]."*

13 It was an essential part of Mr Ablyazov's appeal to this court that, even if, contrary to his primary contention, any findings of contempt survived, nevertheless the unless orders should be abrogated so that he could be permitted to continue to defend the proceedings against him at trial, if necessary from the unknown location to which he had taken refuge and assisted by means of a video link. A similar dispensation had been accorded to his brother-in-law, Mr Syrym Shalabayev, who had also become a fugitive from a committal sentence for contempt of court in proceedings against him, but who had been allowed by the judge to give evidence in support of Mr Ablyazov in the latter's contempt proceedings, and to be cross-examined, by video link, from an unknown hiding place. It was therefore inherent in Mr Ablyazov's contempt of court appeals that he wished the trial, then fixed to commence before the judge in November 2012, to take place with his participation as a defendant.

14 Whether, however, Mr Ablyazov intended to seek to maintain his participation if he lost his appeals totally, so that he could only continue to defend the claims against him if he surrendered to custody, made proper disclosure, and sought such relief against

sanctions as he might be able to obtain, remained unrevealed; but must be highly unlikely.

[10] As can be seen both the trial court and Court of Appeal had an unfavourable view of Mr Ablyazov. On the recusal application, the trial judge rejected it on the grounds of (a) waiver; (b) that there was no real possibility of actual bias and (c) that there was no possibility of apparent bias. Rix LJ held the following:

65 The authorities suggest the following conclusions. First, although the principles of apparent bias are now well established and have not been in dispute in this case, the application of them is wholly fact-sensitive. Secondly, a finding of pre-judgment has been rare. Livesey's case 151 CLR 288 and Timmins v Gormley (one of the Locabail cases [2000] QB 451) are examples, but their circumstances bear no relationship to the circumstances of this case. Thirdly, although discussion of pre-judgment issues are not uncommon in Strasbourg jurisprudence, they tend to fall within the criminal sphere where special problems arise in civil law countries through the use of examining magistrates at earlier stages of the criminal process, and the use of judges to decide guilt at both trial and appeal levels (the appeal is a complete rehearing of guilt and innocence). Mr Béar has told us that he has as yet found no Strasbourg authority in which a doctrine of pre-judgment has been used to disqualify a judge in civil proceedings. Fourthly, although no doubt matters of mere convenience cannot palliate the appearance of bias, and the application of the doctrine of apparent bias is not a matter of discretion (as distinct from assessment on all the facts of the case: see AWG Group Ltd v Morrison [2006] 1 WLR 1163 , paras 6, 20: that was not a case of pre-judgment, but arose out of the judge's long family acquaintanceship with a board director of one of the parties, who was going to be called as a witness), it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge. Fifthly, no example of a designated judge being required to recuse himself or herself has been found. In Arab Monetary Fund v Hashim (No 8) 6 Admin LR 348, 351 Sir Thomas Bingham MR said that the replacement of Hoffmann J by a different judge for trial was an "indulgence to Dr

Hashim", where he had shown "no grounds whatsoever for a change of judge". Sixthly, a case for recusal may always arise, however, where a judge has previously expressed himself in vituperative or intemperate terms. That, however, has not been alleged in this case.

66 That is not to say, however, that special problems may not arise in civil cases, where, for instance, a judge has had to be exposed during pre-trial applications to such things as significant privileged documentation. That, however, is not in question here. But there must also have been cases where a judge has given summary judgment, has been reversed on appeal, and has continued to try the case, without objection, as occurred in Equitable Life Assurance Society v Ernst & Young [2003] 2 BCLC 603 and [2005] EWHC 722 (Comm), Langley J. Moreover, in family matters, it is common practice for the same judge to try both fact-finding hearings and the determinative care assessment: see In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening) [2009] AC 11 , paras 74–76, per Baroness Hale of Richmond.

67 One significant development, however, which has been noticeable in recent times in very large and strongly fought civil litigation is the application for committal. As in this case, such an application can become a substantial "trial within a trial" all of its own. Moreover, even short of such an application, there may be need for pre-trial cross-examination of a deponent on his affidavit, as may occur in litigation which commences with a freezing order, and as has also occurred in this case. Therefore, for either or both of those reasons, a principal litigant, or an important potential witness, may be cross-examined even in advance of trial. No case brought to our attention has previously considered whether the situation of a judge who has heard such pre-trial evidence and may have had to come to conclusions about it has raised a problem of pre-judgment apparent bias.

68 Special considerations may arise in such cases. Where a judge has had to form and express a view as to the credibility of a party or an important witness as a result of such cross-examination, should that require the recusal of that judge from further involvement in the litigation, even where he does so, as in this case, in moderate terms? Committal applications have to be judged on the criminal

standard of proof, so that, where such an application has resulted in a finding of contempt of court, the judge has applied a standard of proof higher than that of a civil trial.

69 On the other hand, in any event the findings of the judge are part of the res gestae of the proceedings. They are, as it were, writings on the wall, and would need to be considered (subject to appeal of course), for any relevance, in any subsequent proceedings and at trial, by the same judge or by any other judge. They may not even be appealed, or, as in this case, they may be appealed and upheld, so that in either event it is not possible to say that the judge was in error. In this connection, certain findings might give rise to issue estoppels, which would not only have to be taken into consideration by any judge at trial but would be binding on him, as Mr Béar accepts. What then is the difference between the judge who bears in mind his own findings and observations, and another judge who reads what the first judge has written, as he must be entitled to do? Mr Béar submits that in the case of the first judge who has heard and written, the impact of what he has learned is the more direct, immediate and powerful, and that that is a critical distinction. However, it seems to me that, unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgment which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge—other than that he is more experienced in the litigation.

70 In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in Ex p Lewin; In re Ward [1964] NSWR 446 , approved in Livesey v New South Wales Bar Association 151 CLR 288). He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being

"influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case": see Secretary of State for the Home Department v AF (No 2) [2008] 1 WLR 2528 , para 53. I have also found assistance in this context in Lord Bingham's concept of the "objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments.

…

74 It is also relevant for the fair-minded and informed observer to know that, for all the prior involvement of Teare J as the designated judge, there is no suggestion of unfairness against him. Mr Béar's sole complaint has been of the judge's single remark in July of this year, in the course of argument, about wanting to be cautious about Mr Ablyazov's description of black as black. That is a colourful way of putting an obvious point which will arise for any judge. The fair-minded and informed observer will however know that over years of familiarisation with this case the judge has proceeded cautiously and judicially. With his two dozen and more interlocutory judgments there can be few judges whose scrupulousness and conscientiousness and fairness have been more put to the test and not found wanting than this judge. In my judgment, the fair-minded and informed observer would not consider that there was any real possibility of bias in this case on the part of the judge. He or she would rather conclude that this late objection to the judge hearing the trial, made some eight months after the judge's judgments in the committal proceedings, was made not so much from a fear of bias but in a desire to put off the trial at, so to speak, close to expiry of the twelfth hour. As Lord Bingham of Cornhill CJ said in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 , para 25: "The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." And as he also said, at para 26: "It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should."

> *75 Those considerations, as well as the more general matters referred to at para 65 above, have to be borne in mind as well as the precautionary principle that it is better to be safe than sorry. As it is, in the present case I am satisfied that it would be safe to proceed with Teare J as the trial judge, and there is in my mind about that question no doubt the benefit of which needs to be given to Mr Ablyazov.*
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> *76 In sum, I have formed my own view, independently of the judge's conclusion, that, irrespective of waiver, the fair-minded and informed observer would consider that there was in this case no real possibility of bias.*

[11] One could hardly find a more adverse finding against a litigant who has been found to have 'failed to disclose assets, had lied to the court, and had dealt with his assets in breach of the freezing order: and that in defending the committal application had relied on false witnesses and forged documents.' To put it bluntly, Mr Ablyazov was found to be (a) a liar and perjurer and (b) a manufacturer of false evidence. In effect a thoroughly dishonest man. The contempt finding had to have been at the criminal standard, that is to say, the judge was sure that he committed the contempt of which he was accused. Yet even in the face of those findings by trial judge the Court of Appeal held that it was not a case in which the judge should recuse himself. So far as the adverse findings were concerned the Court of Appeal took the view that as long as judge assessed the matter before him judicially, fairly and expressed himself in moderate language there is no basis for recusal on the basis of apparent bias. The judge had not referred to matters extraneous to the case and issues before him. Succinctly stated, the judge was acting properly in all respects. Rix LJ made the strong point that cases should not be put off unless there was reality or appearance of bias. It is now firmly established that apparent bias cannot be established by reason only of the fact that the judge had made a decision adverse to the litigant either in previous litigation or an earlier hearing in the same case. This position was reaffirmed in the second case to which the court is about to refer.

[12] The second case is **Otkritie International Investment Management Ltd and others v Mr George Urumov** [2014] EWCA Civ 1315. In that case the trial judge

acceded to the recusal application. He was reversed on appeal with a direction that the judge proceed with the trial. In a case prior to the recusal application, the judge had handed down judgment in which he made 'numerous damaging findings about Mr Urumov's fraudulent deception.' The judge not only found that he was deceptive but found him liable to the sum of over US$170,000,000.00. Longmore LJ had this to say:

> *There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself.* ***The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so.*** *Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive.* (emphasis added)

[13] His Lordship also added this:

> *By contrast many English cases have emphasised that the fact that a judge has made adverse findings against a party or a witness does not preclude him from sitting in judgment in subsequent proceedings and some cases have even emphasised the desirability of his doing so.*

[14] Longmore LJ reviewed a number of cases including **Ablyazov** and concluded:

> *There is thus a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences". There can be no suggestion that Eder J would proceed in the present case by reference to such matters.*

[15] Longmore LJ, if anything, was even more robust than Rix LJ was. His Lordship is saying that the fact of a previous adverse ruling against a defendant is no reason by itself for a judge to recuse himself unless it is shown that the judge is likely to reach his decision by reference to extraneous matters. It is clear that Mr Moo Young has quite a task on his hands.

[16] Regarding the judge's reasons Longmore LJ stated:

> *The judge appears to have thought that the charges of "actual bias" by Mr Urumov made all the difference because the allegations were "so serious" (para 17) that he ought to recuse himself. But can the mere elevation of the allegation from imputed bias to actual bias make a critical difference? I cannot think that it does. Of course such an allegation is an extremely serious one; it should not be lightly made. But the mere fact that a litigant decides to raise the stakes in that way cannot give rise to any difference of legal principle.*
>
> *Eder J gave 3 reasons for his decision. The first reason was that it was consistent with previous authority. I cannot agree; the above analysis shows that bias is not to be held to exist unless there is some reason to suppose that the judge would not bring an objective mind to bear on the case. If Mr Urumov wishes to rely on different arguments or different evidence from evidence previously adduced, no doubt the judge will take such arguments or evidence into account. There is no reason to suppose he will be influenced by extraneous matters or predilections or preferences. In one sense the present case is even less promising for Mr Urumov than it was for Mr Ablyazov because Mr Urumov can rely on the principle that a charge of contempt must be proved to a criminal standard. Mr Ablyazov had already been found to be in contempt to the criminal standard of proof and yet the judge was held to have rightly not recused himself from a trial where only the civil standard of proof applied.*
>
> *Secondly Eder J applied the observation in Locabail that, if there is any real ground for doubt, that doubt should be resolved in favour of recusal. But he does not explain what the real ground for doubt is in this case. The judge specifically said (in para 17 and also in para*

13 of the judgment giving permission to appeal) that the allegations of bias are "groundless" and "spurious".

The third reason given by the judge is that the matter could be dealt with by another judge of the Commercial Court. No doubt it could be but that cannot in itself be a good reason for recusal any more than it could be a good reason not to recuse himself (in a proper case) that another Commercial judge could not be made available.

The judge appears not to have been referred to the remarks of Chadwick LJ in this court in Triodos Bank N.V. v Dobbs [2001] EWCA Civ 468; [2006] C.P. Rep 1 in which Mr Dobbs invited the court to recuse itself and (more particularly) Chadwick LJ to recuse himself, as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ, giving the judgment of the court of which Neuberger LJ and I were members, said this:–

"7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to

all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard.

8. In the circumstances of this case, I have considered carefully whether I should recuse myself. Mr Dobbs has not advanced this morning any reason why I should approach his appeal with a disposition to decide against him; other than that he tells me that he is criticising me in relation to past conduct. That, I am afraid, is not a good reason for me to recuse myself. I do not do so. The other members of the court, who are within the rather wider ambit of Mr Dobbs' application take the same view."

If the judge had been referred to these remarks (reiterated by this court in Ansar v Lloyds TSB Bank Plc [2007] IRLR 211 , para 17) he might very well have decided he ought not to recuse himself. (emphasis added)

[17] It is to be noted that in the second reason given by the judge, namely, that if there is any real doubt then that doubt should be resolved in favour of the applicant for recusal was found to be inadequate by Longmore LJ because the trial judge did not articulate what that doubt was or what gave rise to it. In other words, a judge cannot simply say that he or she has some doubt. That doubt must be fully articulated. As to the third reason, that is to say, the matter could be heard by another Commercial Court judge, was not a good enough reason. To state the matter affirmatively, recusal applications must fail if (a) there is no evidence of actual bias and (b) if the ground for recusal is based solely on a prior adverse ruling. Of course where the bias challenge fails a judge may still recuse himself or herself is he or she is genuinely, on objective ground, of the view that he or she cannot or is unlikely to consider the applicant's case fairly and judicially.

[18] It seems from these two cases the following principles are clear:

(1) a prior adverse adjudication against a litigant, in and of itself, does not automatically mean that the judge is precluded from hearing a subsequent case even if the previous case involved findings that the litigant was dishonest, fraudulent or lying;

(2) provided that the judge, basing himself or herself on the evidence, expressed himself or herself in moderate and restrained terms then there is no room for a successful application for recusal on the ground of apparent bias;

(3) a judge should not too readily acceded to an application for recusal;

(4) the judge should consider the application very carefully and if the judge comes to the conclusion that he or she cannot be impartial or that a fair-minded observer who has all relevant information and who is not unduly suspicious would conclude that there was a real possibility of bias then the judge should acceded to the application;

(5) it is a fundamental requirement of a fair trial that the judicial officer be impartial.

Application

[19] As noted earlier, Mr Moo Young is not alleging actual bias. He has not stated what was said at the case management conference that would give him the impression that he says he has. In the absence of that kind of information his complaint is difficult to assess. The court has looked at the paragraphs he identified from the Young Torres judgment and I have not seen anything there that was intemperate. It appears to be measured and moderate. Paragraph 44 is an extract from a judgment on which the court's reasoning was based. Having regard to the lack of cross examination the court was seeking to give meaning to Mr Moo Young's evidence that he signed the document 'without thinking anything of it and without taking any legal advice.' What the court was endeavouring to say was that it was unlikely that Mr Moo Young would not have passed

his eyes over the document and get some appreciation of what he was signing. There was nothing said that was disparaging of Mr Moo Young and neither was he denigrated in any manner.

[20] It should be noted as well that in the two cases cited the findings of the trial court involved issues of personal (dis)honesty on the part of the litigant and those issues were resolved against the litigant. It seems to this court if a prior finding of dishonesty, fraud and perjury did not automatically bar a judge from hearing a subsequent case involving the party against whom the adverse finding was made then it would seem that there would need to be something more in a case where no such finding was made. Be that as it may the ultimate question is whether the fair-minded observer would conclude that the Porter v Magil test was met. This court concludes that that test was not met. The court has also considered whether the court has any reason to be biased against Mr Moo Young and the court cannot find any reason.

[21] I should note that counsel for the first and second defendants produced a note of what took place during the case management conference. The court did not take that note into account. By doing so the court is not saying that it was inaccurate but since it was not placed in an affidavit and in the absence of agreement by counsel for the claimant the court concluded that it would not be appropriate to take it into account.

Resolution

[22] The application is dismissed.