Neutral citation number: [2020] EWHC 3941 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Case No. HC-2017-002628

The Rolls Building
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Fetter Lane
London
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Tuesday, 14th July 2020

Before:
MR ADAM JOHNSON QC
(Sitting as a Deputy Judge of the High Court)

BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

and

(1) AVACADE LIMITED (IN LIQUIDATION) (TRADING AS AVACADE INVESTMENT OPTIONS)
(2) ALEXANDRA ASSOCIATES (UK LIMITED) (TRADING AS AVACADE FUTURE SOLUTIONS)
(3) CRAIG STANLEY LUMMIS
(4) LEE EDWARD LUMMIS
(5) RAYMOND GEORGE FOX

MR N VINEALL QC appeared on behalf of the Claimant
MR D BERKLEY QC appeared on behalf of the Second to Fourth Defendants

JUDGMENT
(Approved)

MR ADAM JOHNSON QC (Sitting as a Deputy Judge of the High Court):

1. I have to determine whether to exercise what has been described as "*the delicate jurisdiction of recusal*". The issue arises in the following way. I was the trial judge in this action, sitting as a Deputy Judge in the High Court, Chancery Division. I am also a partner in the law firm, Herbert Smith Freehills LLP. A conflict check carried out before I agreed to sit in the case indicated no issue with my doing so. The trial was in January and February 2020.
2. The proceedings are a civil claim by the Financial Conduct Authority against five defendants for various infringements of the Financial Services and Markets Act ("*FSMA*"). The focus of the trial was on determining whether the corporate defendants, Avacade and Alexandra Associates, were in breach of various provisions of FSMA. As regards the individual defendants, Craig and Lee Lummis, and Mr Raymond Fox, the key issue was whether, within the meaning of that phrase in section 382 of FSMA, they were "*knowingly concerned*" in any contraventions by Avacade and Alexandra Associates respectively.
3. The FCA made it clear at trial that if, ultimately, contraventions were found to have occurred, and if the individual defendants were held to have been knowingly concerned in those contraventions, then their intention was to seek restitution orders against the individual defendants. They also said at trial that depending on the findings in my judgment, they would likely seek an interim restitution order before any later full trial to deal with final financial remedies.
4. I should mention that the first defendant, Avacade, is in liquidation. It has played no part in the proceedings but indicated at an early stage that it would abide by any order the Court made. As to Mr Fox, the fifth defendant, he also played no part in the recent trial, and, although notified of my judgment, has confirmed by email to the FCA that he did not propose to attend the current hearing, and had no comment to make on the forms of order proposed by the FCA.
5. After I had circulated a draft judgment to the parties for corrections but prior to it being handed down, it came to my attention from a routine update of civil claims issued in the High Court that Herbert Smith Freehills, the firm in which I am a partner, had been instructed by the FCA in a test case now being brought against a number of insurers concerning claims for business interruption insurance arising as a result of the Covid-19 pandemic. That was on 15 June 2020. On the same day, I asked for a message to be sent to the parties, indicating that the matter had come to my attention but saying that I was not involved in the case and knew nothing about it but that, nonetheless, it seemed to me appropriate to draw the matter to the parties' attention. I understand that the message was communicated to them the following day, 16 June 2020.
6. I am now asked to deal with a number of matters following on from my judgment. Expressed at a high level, these are as follows:
    (1) The formulation of declarations consequential upon my judgment.
    (2) An application by the FCA for its costs of the proceedings.
    (3) An application by the FCA for interim restitution orders against all five defendants.
    (4) An application by the FCA for final injunctions against the second to fifth defendants, i.e., all defendants, save Avacade.
    (5) Directions in relation to any further trial.
    (6) An application by the second to fourth defendants, i.e. Alexandra Associates together with Craig and Lee Lummis, for permission to appeal.
7. The issue which arises is whether, given my firm's involvement on behalf of the FCA in the business interruption litigation mentioned above, I should now withdraw from any further involvement in the present case, and, if so, on what basis. After some exchanges by email,

and following a direction from me with the idea of crystallising the parties' position more formally, the second to fourth defendants issue an application seeking my recusal, on 9 July 2020. That was supported by a witness statement of Mr Lee Lummis. In addition to the fact of my firm's involvement in the business interruption litigation, this also referenced a conference held earlier this year, at which a number of Herbert Smith Freehills' representatives were present, and which also featured Mr Mark Stewart, executive director of enforcement and market oversight at the FCA. In response, the FCA have served a witness statement from Mr Harry Caldecott, who is the private secretary to Mr Stewart. He makes the point that the conference Mr Lummis refers to was put together by a conference organiser called City & Financial Global. Mr Stewart was one of a number of speakers, and Herbert Smith Freehills were one of a number of commercial sponsors.

8. Against that background, the second to fourth defendants say that I should recuse myself from further involvement in the present case beyond, as they put it in their skeleton, "*matters which derive organically from the judgment which are declaratory in effect*". They say that those matters which would, potentially, have serious financial consequences for the defendants, and would fall within the fresh exercise of discretion, should be dealt with by someone else. As to what this means in practice, the second to fourth defendants say that I can, and should determine the incidence of costs, i.e., whether the FCA should be entitled to its costs of the proceedings to date. They also say that I should be free to determine the scope of any declarations flowing from my judgment. However, they say that I should not assess the amount of any costs payable or determine whether any final injunction should be made, or determine whether any interim restitution orders should be made.

9. The FCA's position is that no proper basis for recusal has been made out and that I should continue to determine all extant applications. They point to the fact that neither I nor the FCA's legal team in the present action has any involvement with the insurance litigation, and they point to the fact that both Herbert Smith Freehills and the FCA are very large organisations. They say there is no real danger or real possibility of bias.

10. Before expressing my conclusions, I should make one or two preliminary points:

    (1) The second to fourth defendants have made it clear that, in the circumstances, no issue arises in connection with the trial of the action or in connection with my judgment handed down on 30 June. That is plainly the correct analysis. I am, therefore, only concerned with the question of any continued involvement.

    (2) No assertion of actual bias is put forward. The point is advanced, simply, as one of "*apparent*" bias.

    (3) The basic test for recusal on such grounds is clear; it derives from the decision of the House of Lords in *Porter v Magill* [2001] UKHL 67. Having first ascertained all the circumstances which have a bearing on the suggestion that the judge was biased, "*the question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*".

    (4) I have been referred by the parties to a number of authorities. These include, in particular, *Locabail (UK) Limited v Bayfield Properties Limited* [2000] QB 451, and *Jones v DAS Legal Expenses Insurance Company Limited* [2003] EWCA Civ 1071, in both of which useful practical guidance was given as to how to deal with situations which may give rise to questions of apparent bias. In *Locabail* at [25], the Court set out a number of examples of matters which were likely to be relevant, or possibly problematic, and then said, "*In most cases, we think the answer, one way or another, will be obvious but if, in any case, there is real ground for doubt, that doubt should be resolved in favour of recusal*". I have also been referred to *Helow v The Secretary of State for the Home Department* [2008] 1 WLR 2416 and

Watts v Watts [2015] EWCA Civ 1297, concerning the characteristics of a fair-minded observer, whose approach "*must not be confused with that of a person who has brought the complaint*", and who, in taking a "*balanced approach*" will "*take the trouble to inform herself on all matters that are relevant*".

11. I come then, to state my conclusion and the reasons for it. I have not found the issue an easy one, but, ultimately, have determined that the proper approach is that I should stand down from further involvement in the case on the basis proposed by the second and fourth defendants. I will briefly explain my reasons why.
12. To begin with, there is the question of the way the application has been put. There has, perhaps, been some confusion about this, stemming from the reference in the second to fourth defendants' skeleton to a possible financial interest being a part of the present application. It is a well-known principle that a judge who has a financial interest in the outcome of a particular cause or matter should automatically recuse himself, but the principle is a relatively narrow one: see *Jones v DAS*, already referred to, in particular, at paragraph [18]. Here, the relevant causal matter must be the present action by the FCA against these defendants. In my judgment, there is no sufficiently tangible financial interest in the outcome of that case which would have the effect of requiring automatic disqualification.
13. However, there is a different point which is not so much about any direct financial interest in the outcome of the present case but a more general concern arising from the fact that I am now aware that the claimant is a present client of my firm. As I read the second to fourth defendant's skeleton, this is their real point, which is developed by reference to *Sierra Fishing Company & Others v Hasan Said Faran & Others* [2015] EWHC 140 (Comm). The argument goes like this:

> "*The claimant is now an important client of your firm in a significant case. You are aware of that fact. You would, therefore, not wish to make findings which might possibly embarrass or cause difficulty for your existing client. On the contrary, a fair-minded and informed observer might think that you would be inclined to make favourable findings, because, if you do, and you keep your client happy, that may lead to your firm obtaining more work from them*".

14. I have thought very carefully about this point. It is very tempting to dismiss it. I say that because the test is whether a fair-minded and informed observer would conclude there was a "*real*" possibility of bias. What is required is an objective and considered assessment. The FCA say that on careful reflection, it is entirely unrealistic to think that they would expect or that I, as a judicial officer, would be inclined to proffer any favouritism. They point to the fact that my firm acts in proceedings against the FCA for other clients. It also seems to me relevant to have regard to the special character of the pending business interruption litigation, which, as I understand it from public sources, is brought by the FCA as a vehicle for promoting market certainty, and has been used, in substance, to advance the arguments of policyholders. Thus, it is certainly possible to say that there is no real possibility of bias because although a client of my firm, the FCA is a particular type of client, and the circumstances are quite different from those which led to the decision to remove the arbitrator in the *Sierra Fishing Company* case.
15. All that said, I do not feel it right to dismiss the point. It is also settled that the subconscious impulse to favour a particular side can be relevant to the question of apparent bias. I also bear in mind the particular significance to these defendants of the orders now sought against them, and the regulatory context in which they are sought. In particular, the financial relief sought by means of the interim restitution order is substantial. Craig and Lee Lummis say that such orders, if made, will lead to their financial ruin. Indeed, the FCA's position that a second trial

may not be necessary is premised on the idea that these defendants may not be able to meet any interim order made against them, and so a further trial would have no utility.

16. These matters seem important to me. On reflection, I think a fair-minded person might well feel a sense of discomfort about the judge called upon to make such an order being a partner in a firm of solicitors which represents, as a client, the regulatory body which is seeking them. As has been said in many cases, where bias is concerned, the appearance of the matter is just as important as the reality.
17. For completeness, and before moving on, I should perhaps make it clear that I have dismissed, without any hesitation, any point made by reference to the conference referenced by Mr Lummis in his evidence. That is both because I was not aware of it, but, even if I had been, it does not seem to me that participation in an event of the type described can possibly give rise to any reasonable doubt about the impartiality of a judge in my position.
18. Against that background, I come back to the authorities, including, in particular, *Locabail* and *Jones v DAS*. In my view both of them accept that in some circumstances, and given that apparent bias raises particular sensitivities and difficulties, it is appropriate to try and strike a balance between principle and pragmatism. By this I mean that, since in cases of apparent bias the thought that the Court may have been affected can become a festering sore for disappointed litigants, it is appropriate to examine whether sensible practical steps can be taken to avoid a problem arising before it actually crystallises.
19. The practical problems can be particularly acute where the bias issue arises partway through a case, and, as *Locabail* makes clear, the possibility of that happening is magnified if the relevant deputy is a partner in a firm of solicitors. That is a function of the size of many modern law firms, and, in particular, large commercial firms with many partners engaged in many matters which no individual partner can sensibly be expected to be aware of at any given point in time.
20. In *Locabail*, the very powerfully constituted Court of Appeal gave some useful guidance. That was in a case where, during the course of the trial, it came to light that the law firm in which the Deputy Judge was a partner (coincidentally the firm then known as Herbert Smith) was acting in some related litigation. One of the parties to the litigation before the Judge, Mrs Emmanuel, made an application for the judgment already given to be set aside, and for the Judge to be recused from any further involvement in the matter. The Court of Appeal accepted that the circumstances probably indicated there was a conflict of interest between Herbert Smith's clients in the separate action and Mrs Emmanuel, such that Herbert Smith would not have been entitled to take on Mrs Emmanuel as a client, but went on to say that that did not mean that the test of bias was automatically made out. That was too inflexible an approach, and everything depends on the circumstances. The Court went on, at paragraph [58], to say the following:

> "*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 the 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? Are the parties willing for the judge to hear the case? Do*

> *they positively want him to hear the case rather than have to suffer an adjournment? Is another judge available to take on the case? If the case has already started, how long has it been going on, and how much is left? What will be the expense consequences for the parties if the judge withdraws? How will it appear to the reasonable onlooker if the judge does not withdraw?*"

21. The Court then said, at [59]:

> "*In a case in which before or during trial the facts relating to the alleged bias have been disclosed to the parties, it seems to us right that attention should be paid to the wishes of the parties. They are the principals. If they are content that the trial should proceed, the judge should, in our view, except where he doubts his ability to be impartial, be very slow to abort the trial. If one party wants the trial to continue and the other wants it aborted, the judge must decide what to do, weighing all the factors and asking the questions to which we have referred*".

22. I do not see that, in the present case, a conflict of interest arises which is analogous to that in *Locabail*. Nonetheless, the encouragement to take account of "*variable factors*", and, as I see it, to assess what may be practical in case management terms, is still applicable. I assess the position as follows:

    (1) I think the case in favour of apparent bias is somewhat doubtful; see above. However, all other things being equal, the authorities tell me that I should give the benefit of the doubt to the defendants: see *Locabail* at paragraph [25].

    (2) If there is a realistic concern, it is better, if practicable, to avoid creating a problem which may turn into a "*festering sore*" for some of the parties affected. As to the present matter, the case before me has substantively been concluded. No challenge is made or could be made in respect of the trial or my judgment of 30 June. The parties are agreed that I can deal with the making of declarations which memorialise the findings in that judgment. We are at the end of, not in the middle of, the trial process. Consequently, I think it is appropriate to consider what is practically possible and desirable in order to exercise due caution.

    (3) The parties are agreed that I can deal with the incidence of costs. It may be appropriate to characterise that as amounting to a waiver by the second to fourth defendants, but however it is characterised, it is an example of the parties expressing their wishes: see *Locabail*. I should have due regard to it in determining what to do. It is an important and relevant factor. What it means, in practice, is that any issues which may be left over to another judge will be limited and self-contained: should the claimant be entitled to summary assessment or is detailed assessment-mandated under the Civil Procedure Rules, and if there is to be detailed assessment, then should there be a payment on account? As to the latter point, I have recently been provided with a breakdown of the FCA's costs, the majority of which are for phases of the action which were budgeted, and as to which, the claimed sums are capped at the budgeted level. It seems to me that in such circumstances, the issues which might arise could just as easily be dealt with by another judge. There is no obvious practical reason why only I should have to deal with them.

    (4) I likewise consider that the question of whether there should be final injunctions against the defendants, and whether there should be interim restitution orders and/or a further trial, are matters which can equally well be dealt with by another

judge. To use Mr Berkley's terminology, they do not, to my mind "*flow organically*" out of my judgment because they each require a further and fresh exercise of the judgment and discretion. The question of whether there should be an injunction is a short and relatively self-contained point. As regards the other issues, in my opinion, we are at a natural breakpoint in this case, where a view needs to be taken as to its ongoing management into the future. That will involve considering the question of any interim restitution orders, and considering the interrelationship of any such orders with the question of whether there should be a further trial. However, these are new matters I was not directly addressed on at the trial in January and February 2022. I see no practical difficulty with such matters being dealt with by someone else, based in part on my findings but also on such further submissions as the parties wish to make. In the circumstances, I consider that is not only practically possible but also desirable. There would, admittedly, be some convenience and likely cost-saving in my dealing with the issues mentioned above but, in my judgment, given the seriousness to the defendants of the orders sought, such considerations do not justify the conclusion that I should resolve any doubt about the question of apparent bias in favour of the claimant.

23. For all those reasons, I propose to accede to the applicant made by the second to fourth defendants, and to withdraw from further conduct of this case, save to the extent identified; that is to say, I will deal with the question of declarations, with the incidence of costs, and with the second to fourth defendants' application for permission to appeal. I hope and expect that any remaining matters can be fixed for hearing before another Judge at an early date.

End of Judgment.

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This transcript has been approved by the judge.