Neutral Citation Number: [2019] EWHC 2988 (QB)

Case No: QA-2019-000222 AND QA-2019-000269

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT EXETER (HHJ GORE QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/11/2019

Before :

MR JUSTICE PUSHPINDER SAINI

- -

Between :

James Dorman **And** **Caroline Dorman** **And** **Kirsty Clode** **And** **Andrew Turton**	**Claimants and Respondents**
- and –	
Clinton Devon Farms Partnership	**Defendant and Appellant**

- -
- -

Peter Cowan (instructed by **DWF Liverpool**) for the Appellant
Julian Horne (instructed by **Gilbert Stephens LLP**) for the Respondents

Hearing date: 30 October 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE PUSHPINDER SAINI

MR JUSTICE PUSHPINDER SAINI :

This judgment is divided into 9 sections as follows:

I. Overview

1. The Appellant (the Defendant below) appeals against two orders ("the Orders") made by His Honour Judge Allan Gore QC ("the Judge") sitting in the County Court at Exeter on 23 May 2019 ("the First Order") and 25 July 2019 ("the Second Order").

2. Permission to appeal against the Orders was granted by Garnham J on 16 July 2019 and 30 September 2019, respectively, with a direction that the appeals be heard together. I will call these appeals "the First Appeal" and "the Second Appeal".

3. Garnham J made some further important directions and observations on granting permission to appeal on each occasion. I return to these below when I address the nature of the allegations made by the Appellant against the Judge, particularly in the Second Appeal which raises the issue of recusal.

4. In very broad outline, the Orders were made by the Judge in two related claims which arose out of a fatal accident at a farm in Devon on 19 May 2014. The two appeals are directly related. The First Appeal is against certain procedural unless orders, indemnity costs orders, and directions for attendance before the Judge of the senior case handler (from the Appellant's firm) dealing with the matter. These were case management orders which the Judge, as he was entitled to do, made of his own motion.

5. The Second Appeal challenges the Judge's refusal to recuse himself from further involvement in the claims on grounds of apparent bias. The recusal application was based on the Appellant's concerns regarding the Judge's decisions and conduct in the proceedings leading to the orders challenged in the First Appeal.

6. I should record an important point at the outset. Proactive case management is expected of judges. One must guard against too readily characterising a judge's conduct of case management hearings as indicating apparent bias. Being robust is not to be equated with apparent bias, and merely deciding certain procedural matters against a party cannot properly (in and of itself) suggest an appearance of bias or actual bias. Proactive case management will often leave one party (and sometimes both parties) unhappy with the outcome. That may particularly be the case where a

judge considers parties have agreed a series of directions which the judge decides do not reflect responsible case management. These matters are of relevance to the two appeals.

7. In the appeal the Appellant was represented by Counsel before me but the Respondents (the Claimants below) did not attend the appeals. They did however submit helpful written arguments settled by single Counsel acting for each of them. In short, the Respondents accept that the First Order was wrongly made and do not seek to defend it. As to the Second Order, they essentially take a neutral position, as they did before the Judge below.

8. I should record that even though there was no oral or written opposition to the appeals, Counsel for the Appellant, in accordance with his professional obligations, was scrupulously fair in the argument before me in directing my attention to material (particularly references in the transcript of the hearing at which the First Order was made) which could support and justify the Orders, and which might undermine the Appellant's arguments on appeal. He made his submissions with moderation and respect.

II. The Facts and Procedural Chronology

9. Given the nature of the issues in the appeals, I will need to set out the facts and procedural chronology in some detail.

10. On 19 May 2014, there was an accident on the Appellant's farm estate (Clinton Devon Farm) near Sidmouth in Devon. An employee, Kevin Dorman, was driving a tractor pulling a 4-wheel trailer loaded with silage. As he descended the slope of a field, the tractor and trailer went off at a bank on the edge of the field and crashed into the lane below. This resulted in fatal injuries to Kevin Dorman. The aftermath of the accident was witnessed by a fellow employee, Andrew Turton, who went to the aid of Kevin Dorman.

11. The first claim (Case D83 YJ127, below) was brought by Mr. Dorman's parents as his estate's administrators, and by his surviving partner (I will refer to this as "the Dorman Action"). The second claim (Case D79YJ288, below) was brought against the Appellant by Mr. Turton, who pleads that he sought to rescue Mr. Dorman but found, in what must have been a distressing sight, that he had been crushed to death. Mr. Turton claims damages for post-traumatic stress disorder and personal injury losses (I will refer to this as "the Turton Action").

12. As appears from the more detailed chronology I set out below, the two claims did not come before the Judge for directions until 23 May 2019 (some 5 years after the accident) as a result of two main factors: the passage of time before the Claimants issued proceedings, and then the need to delay the proceedings by way of stay because of criminal proceedings arising out of the accident.

13. The criminal proceedings were for gross negligence manslaughter and health and safety offences. They were brought by the Health and Safety Executive and CPS against the Appellant and a further individual. The Crown Court trial concluded on 11

February 2019 with an acquittal on all charges, save one count where I understand the jury failed to reach a verdict. The prosecution was given 7 days to consider its position and indicated that it would not pursue the matter. There was in due course an acquittal in respect of that count.

14. In the Dorman Action, the procedural chronology can be summarised as follows:

19 May 2014	The fatal accident.
30 May 2017	Claim Form stamped as having been issued (there was no point taken on limitation by the Appellant).
1 August 2017	The Claimants applied for an extension of time for service of the Claim Form on the ground that they were unable to 'draft any meaningful Particulars of Claim' pending the conclusion of the criminal investigation.
26 September 2018	Further Order staying the proceedings until 20 May 2019.
15 May 2019	The Claimants served Particulars of Claim, Schedule of Loss and medical evidence.
15 May 2019	The Claimants and the Appellant agreed the order which should be made at the CMC on 23 May 2019. The agreement was that the Appellant would serve its Defence by 16 August 2019 and the parties would then file Directions Questionnaires by 13 September 2019. Costs were to be in the case.

15. I interpolate here to note that as at 23 May 2019, the Appellant was still well within time for service of its Defence in the Dorman Action. There had been no default.

16. In the Turton Action, I can summarise the procedural chronology as follows:

19 May 2014	The fatal accident.
22 May 2017	Claim Form stamped as being issued (again no point taken on limitation by the Appellant).
20 September 2017	Claim Form and Particulars of Claim served.
17 November 2017	Defence served. It was pleaded that there should be a stay pending the criminal proceedings.
20 December 2017	The Claimant filed his directions questionnaire asking for a stay of the action "pending the outcome of the criminal proceedings".

3 April 2018	Order staying the action.
19 September 2018	Further stay, by consent, to 20 May 2019.
14 May 2019	The parties filed a signed Consent Order providing for the Claimant to serve Amended Particulars of Claim, if so advised, by 2 August 2019, for the Appellant to serve an Amended Defence by 5 September 2019, and directions questionnaires to be filed by 17 October 2019. Costs were to be in the case.

17. Again, as in the Dorman Action, the Appellant in the Turton Action was not in default of any orders or rules concerning service of the Defence. Its Defence had been served long ago (and indeed, it was in fact the Claimant who wished to consider amending his Particulars of Claim). I should also record, because it becomes relevant later, that this was not simply a "holding" Defence (in the pejorative sense that a party has not properly complied with its pleading obligations). It set out properly arguable points of law on the basis of which the Appellant proposed to defend the Turton Action and made the point that it would not be proper for the Appellant to plead to the facts while serious criminal proceedings were in progress against it and its employees.

18. Aware that a hearing was coming up in both actions, the parties in both claims sent the consent orders referred above to the Court (seeking vacation of the hearing fixed for directions on 23 May 2019) but the Judge required a hearing. That was wholly appropriate given the substantial delay since the accident and the Judge was entitled to ensure that directions were now made to get the claims moving towards trial as soon as possible.

19. So, that is how matters stood when both claims came on before the Judge on 23 May 2019. On that day, the Judge made (against the Appellant) unless orders for service of Defences, an order for indemnity costs as well as an order for the attendance of the Appellant's senior case handler at the next hearing before the Judge. Each of these orders were made of the Judge's own motion.

20. I will address the hearing on 23 May 2019 in some detail below because it takes centre-stage in these appeals (it being the focus of the Appellant's complaints concerning the Judge's orders and conduct), but I need to first complete the post-hearing procedural chronology.

21. Following the making of the First Order on 23 May 2019, the Appellant appealed by Appellant's Notice dated 10 June 2019. Notably, at that time, the transcript of the hearing of 23 May 2019 had not been received and Counsel who settled the appeal documents (who had not appeared before the Judge) did not advance any complaints about bias in this First Appeal. He did however observe in his skeleton argument that: "[The Judge] made other observations about D's stance in the actions to which further consideration will have to be given when the approved transcript is available". This provides some context to the observations of Garnham J to which I refer below.

22. Although the Appellant had issued the First Appeal (but not yet obtained permission), it had to deal with the fact that it was facing a further directions hearing before the Judge on 25 July 2019. Having received the transcript of 23 May 2019, it made a

recusal application by Application Notice issued in the County Court at Exeter on 4 July 2019. Apart from seeking the recusal of the Judge from further involvement in the actions the Appellant sought an order that the actions be transferred to the County Court at Bristol for all further case management and trial.

23. On 16 July 2019, Garnham J granted the Appellant permission to appeal against the First Order. Garnham J would not have been aware of the recusal application but clearly appears to have noted what Counsel had said in his skeleton argument about the Judge's conduct (referred to in para. [21] above). In granting permission to appeal, Garnham J made certain observations and directions as follows (with my underlined emphasis):

> "This appeal is properly arguable for the reasons set out in the Grounds of Appeal and skeleton argument. It is important that this appeal is heard as soon as possible, the underlying action is already becoming elderly. Given the nature of the allegations made against the judge, I have directed that the future management of this case be transferred to Bristol to be heard by a Senior Circuit Judge."

24. The Judge decided that he would hear the recusal application dated 4 July 2019 himself. He rejected the Appellant's submission that this application should be released to the Senior Circuit Judge in Bristol. The Appellant also argued that (given the transfer directions of Garnham J which I have cited above) the recusal application had in any event become academic. The Judge rejected that submission in his substantive judgment on the recusal application ("the Recusal Judgment") where he said [19]:

> "I do not accept that the recusal application has become academic by virtue of the transfer order [that is, Garnham's J Order at [21] above]. There are several reasons for that conclusion. The first is that the appeal might not succeed. That will be a matter for the High Court Judge. The second is that it is only case management that has been transferred to Bristol. Trial venue has yet to be decided. If, in the fullness of time, the decision is taken for these cases to be tried by a Senior Circuit Judge, leaving aside the specialist judges of the Business and Property Court in Bristol, there are only three such judges on the entire Western Circuit, and, if I recuse myself, only two would be available, which is likely further to restrict the ability to list any necessary trials, thereby increasing delay."

25. The Judge then heard the recusal application and dismissed it for the reasons given in the Recusal Judgment dated 25 July 2019. I will address that judgment in more detail below.

26. The Judge refused permission to appeal against his decision to dismiss the recusal application. He explained that the matter was academic (in terms which appear to contradict what he said shortly before and which I have set out above at para. [24]). He said (my underlined emphasis):

> "I had a decision of fact to decide: whether a fair-minded and informed observer would conclude there was a real possibility of bias on my part. No error of law was alleged or apparent in my approach to this determination. The basis in evidence and argument for deciding the issue of fact is set out in my full judgment. There was no allegation nor was it the case that I took into account irrelevant matters or failed to take into account relevant matters. My decision was not perverse. There are no real prospects of success on appeal. In that by order of Garnham J dated 16th July 2019 the actions and all further case management of them have been transferred to the County Court at Bristol, and it is inconceivable that a party would apply or a court would order transfer of any trials to be reserved to me in Exeter, any appeal would be academic and there are no other compelling reasons why an appeal should be heard."

27. Be that as it may, the Appellants considered that there was a risk that the Judge would have some further involvement with the actions so they sought to appeal to the High Court against the dismissal of the recusal application; and Garnham J in due course granted permission to appeal on 30 September 2019 making the following observations (with my underlined emphasis):

> "This appeal is properly arguable for the reasons set out in the Grounds of Appeal and skeleton argument. Given the nature of the allegations made against the judge, I have directed that the future management of this, and all related proceedings, be transferred to Bristol to be heard by a Senior Circuit Judge. If I am available to hear these appeals, they can be listed before me. But I do not reserve the matter to myself. The most important consideration is that they are heard as soon as is practicable."

28. I should identify at this stage that in seeking permission to appeal to the High Court in relation to the Recusal Judgment, the Appellant's proposed Grounds of Appeal (and supporting skeleton dated 6 August 2019) did not, as I read them, include any clear allegation of *actual* bias against the Judge. Both the Grounds of Appeal of Appeal and skeleton were confined to the *apparent* bias limb. That is not surprising given that the recusal application which the Judge determined was made only on that basis.

29. The Appellants accordingly did not obtain permission to argue the *actual* bias limb (which would have been a new point on appeal) from Garnham J. I will return to this matter below where I record my decision that this point is not open to the Appellant. I now need to return to the events of 23 May 2019 in more detail.

III. The Hearing before HHJ Gore QC on 23 May 2019

30. Despite the fact that the parties had agreed consent orders on the terms I have set out in the chronology above, by the end of the hearing on 23 May 2019 the Judge had made, of his own motion, the First Order in the following terms:

"IT IS ORDERED that:

1. Claims Nos D83YJ127 and D79YJ288 shall be dealt with together for the purpose of all future costs and/or case management.

2. Unless the Defendant files and serves a fully pleaded and particularised Defence in each claim by 4pm on 14 June 2019, its Defences in both claims shall be struck out and judgment will be entered for the Claimants for damages to be assessed.

3. All parties in both claims shall file and serve costs budgets in Precedent H format by 4pm on 7 June 2019.

4. All parties in both claims shall file and serve responses in Precedent R format by 4pm on 14 June 2019.

5. All parties in both claims shall exchange their proposed directions for the future case management of the claims, including all proposals if any for a preliminary trial on issues of liability, by 4pm on 5 July 2019.

6. A Costs and Case Management Conference will be listed at 2pm on 25 July 2019 before HHJ Gore QC, in person (not by telephone), with a time estimate of 90 minutes. The senior file handler for the Defendant shall attend.

7. The Defendant shall file and serve a paginated hearing bundle by 4pm on 19 July 2019 on behalf of all other parties. This bundle should include a case summary summarising the position in relation to each claim and in particular identifying:

    a. The present position on liability in each claim.

    b. The extent of agreement and disagreement between the parties as to the proposed directions.

    c. Any proposals advanced by any party for the trial of preliminary issues as to liability.

8. In respect of both claims, the Defendant shall pay the respective Claimant's costs of today's hearing on the indemnity basis, to be subject to detailed assessment if not agreed."

31. I have underlined those parts of the First Order which are the subject of the First Appeal before me. By way of shorthand in the remainder of this judgment I will

describe these paragraphs as "the Unless Order" (paragraph 2), "the Attendance Order" (paragraph 6) and "the Indemnity Costs Order" (paragraph 8).

32. The Judge did not give any specific rulings or judgment in making these orders but, as is common and useful in case management hearings, made his rulings in a "rolling" fashion. It is therefore necessary to look at the transcript in some detail and I will set out the material parts of the transcript upon which the Appellant relies in support of its arguments. I have however considered the entirety of the transcript which is about 14 pages and demonstrates that the hearing itself was relatively short (between 10.37am and 11.27am on 23 May 2019).

33. In order for sense to be made of the transcript I need to identify who was appearing before the Judge. There were the following counsel: Mr Horne (for the First and Second Claimants in the Dorman Action), Miss Gibson (for the Third Claimant in the Dorman Action), Mr. Marwick (attending by telephone for the sole Claimant in the Turton Action), and Miss Clifton (for the Defendant (now Appellant) in both actions).

34. As soon as the hearing began, the Judge made clear that given the accident was in May 2014 he was concerned about the delay (p.1, line 30: "you can imagine my stance, can you not"). Mr. Horne fairly sought to describe the reason for the delay being the criminal prosecution which had recently been completed and the need for all parties to obtain documents from that process.

35. The transcript shows that the Judge was not satisfied with this explanation and that is the frame of mind with which he approached the entire hearing. The Judge made it clear that he held the Appellant responsible for the delay in obtaining the documentation (referring to the fact that their insurers - who currently instructed the Appellant's Solicitors- would also have funded the criminal proceedings and should have been readily able to obtain the documents).

36. Miss Clifton for the Appellant sought to explain the difficulties in obtaining the documents and said the papers were not in her client's control. The Judge's response is relied upon by the Appellant so I need to set out the exchanges in full (underlining specific parts which were relied upon before me).

37. After a discussion of some listing issues which occupies several pages of the transcript, there was a discussion of directions for there to be a further case management hearing before the Judge:

> "MISS CLIFTON: We are, we are slightly held back by the fact that the papers aren't within our control.
>
> THE JUDGE: <u>You are not. You are held back by not doing your job properly. The answer to my question is an application against a non-party for an order for disclosure that could have been listed in front of me today with the police represented, and they would have the papers within no more than fourteen days. Instead of which, you are bimbling around asking for a stay in respect of a claim that is already five years old, where presumably you are going to deny liability.</u>

MISS CLIFTON: Yes your Honour. I do take the point. I will pass back that to those instructing me.

THE JUDGE: It's outrageous. Outrageous. This civil claim should have been in a position to move seamlessly and quickly forward to a tried conclusion from today. And we have not even got a defence. Outrageous. Then the question arises: budgetary. Where are we on budgets?

MR HORNE: Your Honour, if I could speak from the claimants' perspective? We don't know what the defendants' position is going to be here. They obviously defended the criminal prosecution, but----

THE JUDGE: Well, you budget.

MR HORNE: -- burdens of proof are different and so on.

THE JUDGE: You budget for the -- you budget on the assumption it's going to be defended.

MR HORNE: Well the indication we've had so far is that it will be, but it will obviously be substantially cheaper if they admit liability, so----

THE JUDGE: Well of course it will, but you don't budget for that, you budget for the worst case scenario. Why aren't we in a position to budget this case now?

MR HORNE: Well your Honour, the short answer is because we haven't----

THE JUDGE: And, Miss Clifton, be warned.

MR HORNE: -- prepared a budget.

THE JUDGE: I apologise that you're the butt end of this. You should not have been sent here hung out to dry. You are the messenger.

MISS CLIFTON: Yes your Honour.

THE JUDGE: You've done nothing wrong. But who else am I supposed to talk to?

MISS CLIFTON: I appreciate, your Honour. My instructions are that we are awaiting the police report.

THE JUDGE: You need to communicate back to those instructing you, the tone and ire of the court.

MISS CLIFTON: I certainly will.

THE JUDGE: And I am warning you about another matter: given that you should have been in a position to contemplate your liability navel over the last five years, I am going to take a very dim view indeed of a budget that is not confined to the sort of costs necessary to explore quantum issues, except for the limited purpose of turning the volumes of evidence that you will have in this sad case from criminal proceedings compliant to civil proceedings compliant. But apart from that you are not getting a penny piece out of these people in terms of budgetary, and I'm going to reserve the costs management of this case to myself. Do I make myself clear?

MISS CLIFTON: Yes your Honour.

THE JUDGE: This is outrageous, and this is going to get sorted. Quickly.

MISS CLIFTON: Yes your Honour.

THE JUDGE: So, we're going to get nowhere today are we?

MR HORNE: Well your Honour, I would hope we would have some directions as to filing of defences and---- to get us to that CCMC. But beyond that, substantively, no.

THE JUDGE: When were the particulars of claim served?

MR HORNE: The fifteenth. So, last week.

THE JUDGE: And Mr Marwick, when were yours served?

MR MARWICK: Early 2018, your Honour.

THE JUDGE: So yours have been served ages ago.

MR MARWICK: Indeed. We have a holding defence.

THE JUDGE: Dorman particulars of the---- I've seen the holding defence, that's outrageous as well. Dorman particulars of claim were served on 15 May, and the Turton particulars of claim in 2018. The claim form having long-since been served, you cannot buy for yourself the extra fourteen days by filing an acknowledgement of service first, can you?

MISS CLIFTON: No your Honour.

THE JUDGE: Is there any good reason why I shouldn't order that unless your defence is filed as it is due, which is four o'clock, 29 May -- six days' time -- judgment for damages to be assessed will be entered in all of these cases? Is there any good reason why I shouldn't do that?

MISS CLIFTON: Your Honour, the defendant does need time to go through this evidence----

THE JUDGE: Only because you have not done what you're supposed to have done.

MISS CLIFTON: I appreciate the point, your Honour, and I'm also aware that the claimant in the Turton case is also seeking permission to amend their particulars of claim, which also would impact our defence.

THE JUDGE: Have I seen a draft? Mr Marwick?

MR MARWICK: Your Honour, I didn't---- I couldn't hear counsel for the defendant very clearly there.

THE JUDGE: Miss Clifton says that you have intimated a desire to amend the particulars of claim. Is there a draft?

MR MARWICK: It was a----

THE JUDGE: And is there an application?

MR MARWICK: Your Honour, it was in a conditional permission for (inaudible) of a (inaudible) prosecution papers. It can be---- I can forgo that and there's no formal application today.

THE JUDGE: You always have the right to apply to amend, but I'm not going to amend in a vacuum without seeing a draft, and there's no application and no draft. So as far as the defendant is concerned----

MR MARWICK: (Inaudible).

THE JUDGE: -- they have got to meet the currently pleaded case. Is that correct?

MR MARWICK: Indeed your Honour.

THE JUDGE: Why should I give you any latitude? [addressing Miss Clifton]

MISS CLIFTON: Your Honour, six days is a very insufficient amount of time to draft----

THE JUDGE: You've had five years.

MISS CLIFTON: I appreciate that, but considering that we have been waiting for the evidence -- I do take your point on the evidence -- we are awaiting that----

THE JUDGE: Where is the evidence of what, if any, things you have actually done to put yourself in a position to move this case forward? Or am I right in saying that, from my perspective in terms of what has been disclosed, there is in fact no evidence of you having done anything?

MISS CLIFTON: I appreciate there no evidence before the court at this stage. I am instructed that we have been chasing the relevant parties.

THE JUDGE: Do you agree that that is outrageous?

MISS CLIFTON: I take the point, your Honour. As far as I'm aware, the defendant does need time to draft this defence and six days would just be insufficient. I would ask for longer than six days in order that we can consider both of these claims fully and draft a fully pleaded defence so that we don't have to return.

THE JUDGE: Sorry. As regards liability, except for the point about the secondary victim, which you have already pleaded to but actually got the law wrong because he's not a secondary victim in the sense that you plead, subject to the Alcock criteria, because he's a rescuer, and different rules apply. And at the moment, you'll pardon me for saying this and I can say it diplomatically because of the absence of your clients -- particularly yours today -- but whether this sad event occurred because of, as you all say, the breach of duty of the defendant for which the defendant is directly responsible, or whether it happened because sadly Mr Dorman was negligent in the course of his employment -- my provisional view is that the proceedings in the Turton case are indefensible. The only way that they become defensible -- which is not the pleaded case -- is if you plead inevitable accident or act of God. And you haven't pleaded that. So, at the moment, I don't see that you've got a leg to stand on, on breach of duty in relation to Turton. But that is only a provisional view and I've seen no evidence and I've heard no argument. It's more difficult for you two, I accept, given the nature of what I understand to have been the defence in the criminal proceedings. There are issues that the court may have to resolve in the fullness of time. But you've had five years to investigate that.

MISS CLIFTON: I appreciate, your Honour, and we are waiting for the police report and the engineering evidence, which could be crucial to drafting our defence, and that is the reason we're awaiting----

THE JUDGE: But presumably you had engineering evidence for the criminal proceedings. So, as I say, the only thing that is necessary is the authorisation of its disclosure, its

supplementation to ensure compliance with the Civil Procedure Rules as opposed to the Criminal Procedure Rules. And I suspect that there may be the need for a modest supplementary report because the test for criminal liability---- The farm was charged with gross manslaughter amongst other things wasn't it? Or was it only health and safety?

MR HORNE: No your Honour, there were manslaughter charges.

THE JUDGE: Gross manslaughter. I thought there were. So gross manslaughter by negligence. The standard of the duty is slightly different between criminal proceedings and civil proceedings. That might require an addendum, and the burden of proof of course, the standard of proof is different as well, because the civil standard is a lower standard of proof. But this is topping and tailing. It's not a whole new report.

MISS CLIFTON: Yes your Honour. We're just awaiting a report. We have made the request.

THE JUDGE: Well, what have you done to get it?

MISS CLIFTON: I'm instructed that we have made the request and we are simply waiting at this stage.

THE JUDGE: Well that means nothing. But I have to be fair to them don't I?

MR HORNE: Well your Honour, certainly our position is that we were prepared to allow them a lot longer than 29 May, so I'm not going to back on that. I'm in your Honour's hands.

THE JUDGE: In one sense, professionally, you can't can you?

MR HORNE: No. No.

THE JUDGE: But I am entitled----

MR HORNE: Absolutely.

THE JUDGE: -- whatever accommodation you may have been willing to concede; I'm not bound by that am I?

MR HORNE: Not at all, your Honour.

THE JUDGE: That's right in law, isn't it?

MISS CLIFTON: Yes your Honour. The claimants have been in agreement with us though and they have consented to it, and it could potentially impact their cases in waiting for this evidence as well.

THE JUDGE: Well then you'd better make up your mind, and you'd better do it quickly. So the defence is nominally due on the twenty-ninth. I'm going to give you an extra fourteen days and round it up to Fridays because I like Fridays, and I am going to order that unless a fully pleaded and particularised defence is filed and served by 4.00 p.m. on 14 June, the defences in both cases will be struck out and judgment will be entered for all claimants for damages to be assessed. Now at the moment I can make little further progress with this litigation can I? Because it has to be budgeted.

MR HORNE: Your Honour, yes. The thing----

THE JUDGE: Is there any reason why, from your perspective on the worst case scenario, that budgets cannot be filed and served by 4.00 p.m. 7 June?

MR HORNE: Your Honour, on the worst case scenario and anticipating a defence denying liability and a very large amount of paperwork -- because at the moment we have no idea what we're going to see from them, so it will have to be disclosure budget on the worst case scenario as well -- we could do that, yes. We would probably be coming down from a high number at the CCMC rather than going up from a low number.

THE JUDGE: Yeah. And that's the risk to you because you've not done this properly.

MISS CLIFTON: Yes your Honour.

THE JUDGE: They are faced, potentially, with a monumental disclosure exercise, according to what you've warned them, and so I anticipate that the budget is going to be monumental on disclosure. But there's no good reason why budgetary can't be exchanged by then is there? So you will file and serve your Form Hs by then. How long do you need for Form Rs? Your exercise, in terms of Form R, is going to be modest----

MR HORNE: Your Honour, I'm sure that's right.

THE JUDGE: -- because I have already warned Miss Clifton that if her clients have the temerity to put in what looks like an eye-watering budget on liability issues when virtually all of their material will have been prepared and contemplated for the defence of the criminal proceedings, they're going to get butchered aren't they?

MR HORNE: Your Honour, yes. I would imagine we will be able to agree that.

THE JUDGE: So is your time for Form Rs going to need to be long?

MR HORNE: No, not at all.

THE JUDGE: And, Miss Clifton, is there any good reason why I should give your clients any latitude in relation to the Form Rs?

MISS CLIFTON: If the budgets are going to be as monumental as you say, your Honour, we would appreciate some time to go through this for the defendant.

THE JUDGE: Well that's all you keep asking for in this case. Or rather, in fairness to you, all your clients keep asking for; the appreciation of the need for time. I'm sorry, you're not getting it. I asked whether there was a good reason why.

MISS CLIFTON: Your Honour, I think it's also dependant on what is going to be disclosed from the claimants. I'm of the understanding that they are also seeking documents from relevant authorities.

THE JUDGE: Well I bet there are. They're going to seek the paperwork from the Health and Safety Executive and from any third party agencies who would have investigated the claim.

MR HORNE: Your Honour, yes, I think we've taken the view -- I can't speak for Miss Gibson -- but we've taken the view that probably everything is somehow within the control of the defendant, because they will have seen everything----

THE JUDGE: Yes.

MR HORNE: -- so ultimately it could come through them, but it might prove quicker----

THE JUDGE: They ought to have seen everything because everything that exists ought to have been considered by the prosecution and would have to have been disclosed in the prosecution, whether as material relied upon or as unused material.

MR HORNE: Your Honour, yes.

THE JUDGE: So the reasonable expectation is that the defence team have in fact got everything from every authority, and the chances are you will not need to be making third party disclosure applications against non-parties who might have investigated this tragic accident.

> MR HORNE: Your Honour, yes. We were trying to avoid those on the basis that we would have to pay their costs, whereas we wouldn't have to pay the defendants'.
>
> THE JUDGE: You're not going to have to.
>
> MR HORNE: No, but----
>
> THE JUDGE: They have an obligation of disclosure and I'm going to enforce it. This is----
>
> MR HORNE: Oh, your Honour, yes. From the defendants' point of view I agree.
>
> THE JUDGE: -- outrageous."

38. There was then a discussion concerning listing but the Appellants also rely on what the Judge said about costs.

> "THE JUDGE: Right. I'm so dismayed by the conduct of the defendants, that the obligation to do what I have just described I am going to direct the defendants to do. I know that is unusual, and you will have to liaise with each of the claimants to facilitate that, Miss Clifton, but you're going to do it.
>
> MISS CLIFTON: Yes your Honour.
>
> THE JUDGE: And you're going to pay for it. And you're going to pay for the costs of today, and you're going to do so on an indemnity basis."

39. Finally, in fairness to the Judge, I should set out his comments on the fact that he was concerned about the justification for three sets of representatives for the Claimants:

> "THE JUDGE: -- I think there needs to be some consideration as to whether, on liability at least, all parties in the Dorman case can be jointly represented.
>
> MR HORNE: Your Honour, yes, and it is something we've discussed.
>
> THE JUDGE: But if they can't be consolidated -- and they'll have to be separately represented by solicitors -- but----
>
> MR HORNE: In effect they are consolidated because they're all within one claim. It's unusual to have another firm of solicitors on record for a dependant.
>
> THE JUDGE: I need that thought about, and the thinking about that needs to be sooner rather than later because it will impact on the budget.

> MR HORNE: Yes.
>
> THE JUDGE: Because despite the ire that I have vented on the defendant, it is a bit unfair for the defendant to face three lots of costs on the same breach of duty issue, which is what it's threatened with at the moment unless some imaginative co-operation can take place between all three sets of representatives on the one hand, and possibly also the defendant. Because what you need to think about is, in order to reduce the potential costs in this case closer towards proportionality, we are going to have to think about what issues can and should be tried as preliminary issues.
>
> MR HORNE: Your Honour, it would certainly be possible if the defendant defended the case and they wanted to defend liability, but was careful about which bits, to have one firm in the Dorman case representing all the claimants on liability."

40. The Judge then addressed the nature of the claim made in the Turton Action (which he considered was a "rescuer" situation):

> "MR HORNE: Your Honour, it would certainly be possible if the defendant defended the case and they wanted to defend liability, but was careful about which bits, to have one firm in the Dorman case representing all the claimants on liability.
>
> THE JUDGE: And if the preliminary issues are carefully drafted that might be true of the Turton case as well, because the issue that is additional in the Turton case only arises if the court concludes at trial that this accident was not caused by the negligence of Mr Dorman, in which case an issue may arise as to whether in respect of non-delegable employer's duty the---- Actually even then it doesn't arise. He's a rescuer.
>
> MR HORNE: Yes your Honour, I haven't seen the pleadings in that case but it does sound like a difficult----
>
> THE JUDGE: I mean I've got that right haven't I Mr Marwick?
>
> MR HORNE: -- case to answer.
>
> THE JUDGE: He was a fellow employee, who rushed to the scene to try and look out for Mr Dorman. That's right isn't it?
>
> MR MARWICK: Yes, he was working out on the same field. He witnesses the accident. He was participating (inaudible) rescues.
>
> THE JUDGE: Right. So he's not properly characterised as a secondary victim at all. He's a rescuer, and that's a special category. So I do ask, not rhetorically, whether there is in fact

> a degree of conflict between the three sets of representatives for the various claimants in this case that requires separate representation at trial, or whether, by careful drafting of the preliminary issues to be tried, we can have all claimants represented on breach of duty issues by one representative, which will reduce costs and shorten the trial. And that needs to be explored by you all, and positions adopted, before the resumed CMC. Do I make myself clear?
>
> MR HORNE: Yes your Honour. I think----
>
> THE JUDGE: Mr Marwick?
>
> MR MARWICK: Yes (inaudible) your Honour.
>
> THE JUDGE: Because, you know, let's get a grip of this. Anyone want to argue against that?
>
> MR HORNE: No your Honour, it will make budgeting -- even on a worst case scenario -- more difficult because we won't have seen the defence's at that point. So, I'm---- it will be hard to know----
>
> THE JUDGE: Well you'll have to be pessimistic in the budget and they [the Appellants] will reap the consequences of that.
>
> MR HORNE: Yes. But we'll have---- I think we'll have to budget----
>
> THE JUDGE: And the only way you [the Appellant] wriggle out of this is get your act together quickly and properly, and if the bottom line of that is a concession of liability you rescue your position.
>
> MISS CLIFTON: Yes your Honour.
>
> THE JUDGE: If you don't you're going to get visited with the consequences of this, because this is too long."

41. Finally, the Judge acknowledged that he was aware that the need to complete the criminal proceedings was a cause of the delay:

> "THE JUDGE: I am entirely sensitive to the need to allow the criminal proceedings to conclude before the civil proceedings progress. It is a source of very considerable regret and disturbance to me that it took four-and-a-half-years for the criminal proceedings to conclude. And I might want some explanation of why that took so long, because at the moment I don't see why it should have.
>
> But I certainly don't see why the claimants should suffer prejudice because of that, and if you deny liability now, five

> years down the line, they will suffer prejudice because the burden of proof is on them to prove the relevant facts starting five years after the event, when, with the most robust case management that I can marshal, it's highly unlikely that I get this case on for trial on liability before the end of this year, if not before Easter next year, in which case I will have to -- because it will probably be me trying it -- have to determine liability based on witness recollection of events six years ago. That isn't fair. And the parties to whom it is not fair are the claimants, on who the burden of proof lies.
>
> And I'm going to do my utmost to minimise that prejudice: that's the only way I can comply with the equality of arms requirement of the overriding objective. And if anyone wants to say anything on the defendants' part about this, with the greatest of respect to you Miss Clifton, I suggest that the organ grinder is instructed to appear on the next occasion: that is the senior file handler of the defendants. Nothing less will do. Do I make myself clear?
>
> MISS CLIFTON: Yes your Honour."

42. I have underlined above those parts of the transcript to which Counsel drew particular attention. I have quoted the transcript at some length because of the seriousness of the allegations made and because fairness requires the full context in which the Judge made his comments to be properly understood. I will need to return to parts of the transcript below when I deal with the merits of each appeal.

IV. The First Appeal

43. I begin with the relevant legal principles governing appeals against case management decisions. There is clearly a substantial hurdle facing any appellant and this is established by a number of decisions of high authority.

44. In BPP Holdings v HMRC [2017] 1 WLR 2945 at [33] Lord Neuberger stated that there was what he described as a "high hurdle" to overcome before an appellate court could interfere with a case management decision. The Supreme Court endorsed the approach of Lawrence Collins LJ in Walbrook Trustees (Jersey) Limited v Fattal [2008] EWCA Civ 427 at [33]:

> "An appellate court should not interfere with a case management decision by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."

45. These principles were recently emphasised and applied by the Court of Appeal in R (on the application of Liberty) v Prime Minister [2019] EWCA Civ 1761 at [11]. I have also had regard to the guidance given in the White Book, Vol. 1 at para. 52.3.9, citing Abdulle v Commissioner of Police of the Metropolis [2015] EWCA Civ 1260; [2016] 1 WLR 898 (CA).

46. I am accordingly mindful of the substantial latitude which an appellate court must afford to a judge's case management decisions. However, I have no hesitation in concluding that the First Appeal is well-founded and the Judge's orders were wrong and unjust on the basis of the procedural history and facts before him.

47. I accept that a judge is not bound by consent orders and must always ensure there are effective case management orders, and that the overriding objective is respected. Part of that objective is however dealing with cases justly.

48. I will now set out my more detailed reasons for allowing the appeal in respect of the Unless Order, the Attendance Order and the Indemnity Costs Order.

49. One overarching point that needs to be emphasised is that the Judge was motivated in his concerns by his belief that the delay in the proceedings being progressed was to be laid at the door of the Appellant. The language used by him demonstrates that he was angered by this and that this anger seems to have moved him to make each of the orders to which the Appellant objects. My reading of the transcript is that the Judge concluded that robust case management (supported by sanctions and penal costs orders) was needed to "kick" the Appellant into action and that the Appellant was effectively dragging its heels in not throwing in the towel on liability.

50. However, as the procedural chronology I have summarised above shows, the Judge's belief about responsibility for delay was based on a number of errors of fact. The longest periods of delay were due to the Respondents' delay (some 3 years) in commencing each action and then the agreed (and plainly sensible) delays while the criminal proceedings were concluded (on 11 February 2019).

51. That error on the part of the Judge is enough to undermine each of the sub-orders within the First Order. That is because the Appellant had done nothing to justify imposition of an Unless Order or the Indemnity Costs Order. There had been no breach of earlier court orders or directions or defaults in respect of pleadings.

52. Further, the Attendance Order seems to have been motivated by a desire to get the "organ grinder" (the Senior Case Handler) before the Court to explain some perceived failures on the part of the Appellant. Putting aside this unfortunate use of language (which impliedly but clearly refers to Counsel - Miss Clifton - as the organ grinder's "monkey"), there were no relevant failures. Disclosure had not yet been ordered and all parties were awaiting prosecution material from the recently completed trial.

53. In my judgment, there was also a problem with the process leading to the First Order. The Judge gave Counsel no opportunity to address him on any of the orders before making them. They were simply announced. In my judgment that was plainly unfair at the most basic level. At the minimum, the Judge should have indicated a provisional view and asked counsel to address that view. However, Miss Clifton,

Counsel for the Appellant below, was unfortunately simply presented with a fait accompli.

54. One might argue that Miss Clifton should have asked the Judge for an opportunity to persuade him to change his mind. However, given the nature of the Judge's comments and overall approach, I think that is unrealistic. It is easier said than done when faced with a Judge who has expressed his views forcefully. It was the Judge's duty (even if he had a provisional view) to invite submissions rather than simply announce what were in effect a series of penal sanctions against Miss Clifton's clients.

55. I will allow the appeal against the First Order.

V. Real and Apparent Bias: the Law

56. On this issue, I have found substantial assistance in the judgment of Fraser J in Alan Bates v Post Office Limited [2019] EWHC 871 (QB) at [27]-[77] which contains a comprehensive review of the case law.

57. The following specific principles (which I respectfully adopt from Fraser J's survey) are of particular relevance to the present appeal:

(i) The basic test as regards apparent bias is whether:

> "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

Porter v Magill [2002] 2 AC 357 at [103]. I will refer to this "the Porter test" below.

(ii) Apparent bias includes giving the impression of having pre-judged any issue. Pre-judgment is also the mark of actual bias. In Otkritie International Investment Management Ltd and others v Urumov [2014] EWCA Civ 1315, Longmore LJ explained at [1] and [2]:

> "[1] It is a basic principle of English law that a judge should not sit to hear a case in which "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that [he] was biased", see Porter v Magill [2002] 2 AC 357 para 103 per Lord Hope of Craighead. It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias includes any personal interest in the case or friendship with the participants, but extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case. "

58. The case law also makes it clear that the fair-minded observer is not unduly sensitive or suspicious, but that where there are real grounds for doubt as to a lack of bias, the doubt must be resolved in favour of recusal.

59. Finally, disqualification for apparent bias is not a matter of discretion. There is either a real possibility of bias, or there is not. If a fair-minded and informed observer would conclude that there is a real possibility that the tribunal is biased, the judge must recuse himself.

VI. Apparent Bias: the arguments and decision on the Second Appeal

60. In oral argument before me, the foundations for the apparent bias argument were essentially built upon the oral observations of the Judge (and his orders) which are the subject of the First Appeal. I have set out the relevant parts of the transcript above and will not repeat them save insofar as I need to refer to specific matters emphasised by the Appellant.

61. In summary, the Appellant relies upon three aspects of the events on 23 May 2019: (a) the outcome of the hearing; (b) the Judge's comments about his approach to future costs and case management; and (c) the Judge's comments about liability.

62. In my judgment, the Appellant's complaints are well-founded. Taking each of the three aspects in *combination* the facts would to my mind lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger that the Judge was biased in accordance with the Porter test.

63. I will now set out my more detailed reasons by reference to each of the three aspects relied upon and will of necessity need to repeat some transcript quotations.

(a) The outcome of the hearing

64. It is well-established and indeed a matter of commonsense that the act of merely deciding a point against a party in an earlier stage of proceedings (particularly procedural hearings) cannot be enough to create an impression of bias. I refer here to the summary of the case law by Fraser J in Alan Bates v Post Office Limited [2019] EWHC 871 (QB) at [37]-[48]. The question in this aspect of the First Appeal is whether the fact of the orders the Judge made, and the comments of the Judge leading to them, satisfied the Porter test.

65. The First Order was made by the Judge in surprising circumstances. The Claimants (represented by three sets of lawyers) and the Appellant had agreed Consent Orders for further pleadings followed by a CCMC, with costs in the case. The outcome of the hearing, which was not sought by any party and which was imposed by the Judge

entirely of his own volition, was the Unless Order, Attendance Order and Indemnity Costs Order. That is an odd outcome on any view but it may have been justifiable. If, however, it was not justifiable, it raises at least an argument on the real possibility of bias. In my view, for the reasons already given on the First Appeal, there was no justification for the Judge's orders. I will however elaborate given the seriousness of this matter.

66. First, in the Dorman Action, the Claimants had only served their Particulars of Claim on 15 May 2019. The Appellant was, on 23 May 2019, still within the time allowed by CPR Rule 15.4(1)(a) for service of its Defence. Furthermore, the Claimants had agreed to an extension of time for the service of the Defence beyond that 14 day period. In those circumstances the Unless Order and the Indemnity Costs Order (or indeed any adverse costs order) were unjustified.

67. The same point applies in the Turton Action where the Appellant had served its Defence in November 2017. The Claimant did not take any further step until May 2019 when it indicated an intention to consider serving Amended Particulars of Claim. The Claimant had agreed an Order which permitted him to do so, following which the Appellant would serve an Amended Defence. In those circumstances, once again, the Unless Order and the Indemnity Costs Order were in my judgment unjustified.

68. Why did this happen? Insofar as I can see any reason, the Judge indicated that he was motivated to make those orders because of his '*ire*' and '*outrage*' (his language) at the overall delay in the progress of the cases and in particular by what he perceived as delay on the part of Appellant in obtaining and disclosing documentation from the criminal proceedings which concluded in February 2019. The Judge's outrage was directed exclusively at the Appellant.

69. I consider that the outrage was misplaced for the following principal reasons. The Claimants waited 3 years before issuing proceedings and they themselves sought and obtained stays of their actions which remained in place until 20 May 2019 (the hearing before the Judge was just 3 days later). Further, the stage for disclosure of documents had not been reached. In the Dorman Action the Particulars of Claim were not even served until 15 May 2019 so there had been no identification of the issues, which would inform the process of disclosure. Consistently with that, there was nothing before the Judge to suggest that any of Claimants had been pressing the Appellant to give disclosure or considered that the Appellant had been tardy in relation to its disclosure obligations.

70. The disparity between the Judge's outrage directed at the Appellant and apparent sympathy towards the Claimants is striking.

(b) The Judge's Comments About His Approach to Future Costs and Case Management

71. In my view, the Judge commented unjustifiably and used intemperate language in relation to the Appellant's conduct to date; and he made what seem to me to be

inappropriate comments which I can only describe as "threats" about his approach to future costs and case management, thereby giving rise to the appearance of bias.

72. I have underlined above the specific parts of the transcript which were drawn to my attention and I will quote from the parts of those extracts which gave me particular concern.

73. At page 3 line 20 the Judge stated (to Miss Clifton):

> "Instead of which, you are bimbling around asking for a stay in respect of a claim that is already 5 years old, where presumably you are going to deny liability."

74. It was in fact the Claimants who had previously obtained stays. The Appellant was not seeking any further stay. Nor was it fair to describe it as "bimbling around".

75. At page 3 line 25 the Judge continued:

> "It is outrageous. Outrageous…and we have not even got a defence. Outrageous."

76. Again, the Judge seems to have ignored the fact that the actions had been stayed at the *Claimants*' requests and that the stays had applied until 3 days prior to the hearing. In the Dorman Action the Particulars of Claim had been served only 8 days previously so it was unfair to suggest that it was 'outrageous' that Appellant had not served a Defence. In the Turton case a Defence had been served 18 months earlier. I do not consider it was simply a "holding" Defence with no positive case being advanced as a basis for defending the proceedings. Although the Defence made clear that a fuller response would need to await the outcome of criminal proceedings, it did advance a number of legal reasons for denying the claim. In short, there was nothing to be "outraged" about, particularly in circumstances where the Claimant in that action wanted the proceedings stayed pending the criminal process and sought no particularisation of the Defence; nor had the Claimant made any other complaint regarding the Defence.

77. At page 4 lines 17 to 26 the Judge stated in unequivocal terms that he was reserving costs management to himself, with what I can only read as an implication of adverse consequences for the Appellant. He said that, apart from the cost of turning 'criminal proceedings evidence' into evidence compliant for civil proceedings,

> "… [D] are not getting a penny piece out of these people [i.e. Cs] in terms of budgetary [sic] and I am going to reserve the costs management of this case to myself. Do I make myself clear?... This is outrageous, and this is going to get sorted. Quickly."

78. With respect to the Judge, in my view it is hard to avoid the conclusion that a reasonable person might consider that by this language the Judge indicated a closed mind as regards the future issue of budgeting of the Appellant's costs in relation to liability issues.

79. Immediately prior to that, at page 4 line 18, the Judge had sought to justify his expressed intended approach to the costs budgeting of the Appellant's liability costs in the observation:

> "And I am warning you about another matter: given that you should have been in a position to contemplate your liability navel over the last 5 years, I am going to take a very dim view indeed of a budget that is not confined to the sort of costs necessary to explore quantum issues, except for the limited purpose [of turning 'criminal proceedings evidence' into evidence compliant for civil proceedings]"

80. The Judge does not seem to have given any weight to the fact that for 3 years there were no proceedings and for the remaining period there was no Particulars of Claim in one action, and a stay on proceedings in both actions. There was, in my judgment, no basis for the comment about 5 years being spent contemplating D's 'liability navel' and no basis for the threat about future liability costs.

81. At page 8 lines 20 to 23 the Judge again referred to the issue of costs, stating that:

> "…if [D] have the temerity to put in what looks like an eye watering budget on liability issues when virtually all of their material will have been prepared and contemplated for the defence of the criminal proceedings, they are going to get butchered aren't they?"

82. At page 9 lines 22-24 the Judge stated:

> "They have an obligation of disclosure and I am going to enforce it. This is…outrageous."

83. But, as will by now be obvious, the stage for disclosure had not been reached. The actions had been stayed. Unsurprisingly, there was therefore no evidence that any of the Claimants had sought disclosure. None of the Claimants complained to the Judge about a lack of, or a delay in, disclosure. The proposed consent orders did not deal with disclosure – they contemplated further pleadings and then a CCMC. The Judge's language was again in my view unjustified and intemperate.

84. At page 11 lines 1-3 the Judge stated:

> "I am so dismayed by the conduct of the Defendants that the obligation to do what I have just described [prepare the bundle and case summary for the next CCMC] I am going to direct the Defendants to do. I know that is unusual…"

85. It is hard to avoid the conclusion that this is the Judge meting out 'punishment' (using the language of Counsel for the Appellant) to the Appellant for perceived misconduct.

86. Further 'punishment' is meted out at line 6 on page 11 when the Judge said to Miss Clifton:

> "And you're going to pay for it. And you're going to pay for the costs of today, and you're going to do so on an indemnity basis."

87. This is a remarkable approach when none of the Claimants had at any stage had sought a costs order. The Judge gave Miss Clifton no opportunity at all to make any submission about costs before (or after) announcing that decision. I have addressed that matter in the context of the First Appeal but such conduct is of particular importance in the context of the Second Appeal in relation to apparent bias.

88. The Judge returned to the theme of punishing the Appellant when, at line 13 on page 14 he stated to Miss Clifton:

> "Your people are going to pay for all of this because this is all, from my perspective, of your doing."

89. At page 13 lines 19 to 23 the Judge stated:

> "And the only way you wriggle out of this is get your act together quickly and properly, and if the bottom line of that is a concession of liability you rescue your position. [Miss Clifton: Yes, Your Honour]. If you don't you're going to get visited with the consequences of this, because this is too long."

90. Here the Judge is yet again unfairly blaming the Appellant for the delay in the action and is implying that unless the Appellant admits liability, future costs and case management decisions will go against it because of this delay.

91. At page 14 lines 25 to 29 the Judge stated to Miss Clifton:

> "I am dismayed, and I am going to get a grip on this. If you want any latitude from now on you are going to have to file evidence and explain what latitude it is, and why you want it, and what you've done to avoid the need for it. Because from my perspective at the moment, in the absence of any evidence, I do not see good reason to give you any latitude whatsoever. Understood?
>
> MISS CLIFTON: Yes your Honour.
>
> THE JUDGE: Apologies. But they need knowing…they need to know."

92. The Judge was courteous here but I agree with the Appellant that this is partisan treatment. An onlooker would observe that the Appellant is being told in terms that prima facie it deserves no latitude whatsoever in future case management decisions. The same stricture is not levelled at the Claimants, who one might observe were perhaps more to blame for the 5 year delay (although in fact much of the delay was due to the lengthy criminal proceedings which in turn was due to the conduct of the HSE).

(c) The Judge's Comments About Liability

93. In addition to the comments above, at line 3 on page 5 the Judge described the Defence served in the Turton action as '*outrageous'*. He did not qualify this remark at all. This remark was unjustified. Notably the Claimant had not raised any issue with the Defence, despite having been served with it 18 months earlier. If it was indeed 'outrageous*'* one might have expected the legally represented Claimant to seek further information or an order striking it out.

94. Similarly, on page 6 line 15 the Judge asserts, in unqualified terms, that in its Defence the Appellant has "got the law wrong". He did however go on to state that it was his "provisional view" that "the proceedings in the Turton case are indefensible…at the moment I don't see that you've get a leg to stand on, on breach of duty in relation to Turton. But that is only a provisional view and I have seen no evidence and I have heard no argument*"*. Although it is not for me to express any concluded or indeed provisional views, it was far from clear that the Appellant had got the law wrong.

95. In my judgment, having regard to the strength of the language used, and in the context of the Judge's overall conduct of the hearing, a fair-minded observer would be concerned that the belated reference to the Judge's views on the merits being only 'provisional' was not sufficient to give one assurance that the Judge would be approaching the trial in a fair-minded way. It will have been noted that the Judge's first comment about the Defence in the Turton action was that it is "outrageous" without any qualification or statement that this is a provisional view.

96. Further, on page 13 line 31 the Judge said:

> "But I certainly don't see why the Claimants should suffer prejudice because of that [the length of time taken for the criminal proceedings], and if you deny liability now, 5 years down the line, they will suffer prejudice because the burden of proof is on them to prove the relevant facts…"

97. And he continued on page 14 line 2 that:

> "[I will] have to determine liability based on witness recollection of events six years ago. That isn't fair. And the parties to whom it is not fair are the Claimants, on who the burden of proof lies. And I am going to do my utmost to minimise that prejudice…And if anyone wants to say anything on the Defendant's part about this, with the greatest of respect to you Miss Clifton [D's Counsel], I suggest that the organ grinder is instructed to appear on the next occasion: that is the senior file handler of the Defendants. Nothing less will do. Do I make myself clear?"

98. Putting to one side what seems to me to be a rather unfair and inaccurate caricature (to the effect that the Appellant is suddenly and unexpectedly, for the first time, denying liability after 5 years) these remarks clearly suggest that the Judge considered that it was the Appellant who had prejudiced the Claimants and that he would

approach their position more favourably both during costs and case management stages and at trial.

Conclusion on apparent bias

99. Standing back and putting the three aspects of complaint together, I regret to say that, applying the Porter test, the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Judge was biased. Counsel for the Appellant put it aptly in his submissions when he described the Appellants as having had their "card marked" by the Judge.

VII. The Recusal Judgment

100. Given the nature of the Porter test, I considered it appropriate to approach the Second Appeal by focusing on the events and orders of 23 May 2019 and standing back to ask the question posed by the test. I did that without reference to the Recusal Judgment by which the Judge dismissed the recusal application.

101. I have however considered the Recusal Judgment in some detail and it was the subject of detailed submissions before me by Counsel for the Appellant. That was appropriate given that the Second Appeal is against that judgment. However, as I set out below, in my view the Recusal Judgment was vitiated by a number of errors which meant that I had to consider the application of the Porter test afresh.

102. As indicated above, the Judge insisted on hearing the application that he be recused himself. Although he was right to observe in the Recusal Judgment at [16] that there is no rule which precludes a judge from hearing such an application it does seem to me that in this case that would have been a more appropriate course.

103. I very much doubt that Garnham J (see his observations and directions I have set out above at paras. [23] and [27]) would have intended that the Judge would hear the application given Garnham J's direction that future management of the cases be transferred to the Senior Circuit Judge in Bristol.

104. The Judge concluded in [16] of the Recusal Judgment that only the judge whose recusal was sought could hear such an application. I do not agree. While it is often the case that this judge hears such applications, there is no principle that such an application cannot be made to another judge. Indeed, it is not hard to contemplate circumstances where that would be the more appropriate course.

105. Be that as it may, I need to address the Judge's reasons for dismissing the recusal application. The Recusal Judgment is a careful and lengthy judgment but its main feature is that it does not limit itself to application of the Porter test to the events of 23 May 2019.

106. Instead, in large part, the Judge has used the Recusal Judgment to explain his reasons, after the event, for making the orders and comments he made on that day. That cannot

be appropriate. The bias challenge either succeeded or failed on the basis of the events of 23 May 2019 and could indeed have been heard (and perhaps should have been heard) by a different judge with no history in the case. That judge would not have known of the personal observations of the original judge.

107. I recognise that the Judge did, however, address each of the three areas of complaint which are relied upon before me. I conclude however that he misdirected himself by not considering the matters in *combination* when applying the Porter test. For example, in isolation, the fact that certain provisional views have been expressed on liability would not, in and of itself, create an appearance of bias. But that is not what happened here for the reasons I have set out above. There were multiple issues which need to be considered together.

108. Aside from this misdirection, the Judge also erred in his Recusal Judgment at [13] in justifying the Unless Orders and Indemnity Costs Order by reference to claimed serious and unexplained procedural defaults (at [12]-[13] of the Recusal Judgment). These seem to be defaults by *all* parties (not just the Appellant) and could not justify the partial treatment. The Judge also did not confront the fact that these orders (aside from being one-sided) were not justified on the facts (for the reasons I have given in the First Appeal) and this fact was suggestive (with other matters) of apparent bias.

109. However, the more fundamental point is that, contrary to the Judge's impression, there were in fact no relevant procedural defaults in the form identified by the Judge. There were simply no defaults in the Dorman Action; and none of the defaults asserted by the Judge existed in the Turton action (save, as Counsel fairly identified to me, that there was arguably a technical default as regards Form Rs (by all parties) but this was not mentioned by the Judge). The Judge was under the impression that some form of relief from sanctions needed to be sought or explained. That was simply wrong.

110. The Judge also failed adequately to address the point in his Recusal Judgment that the nature and type of language when making the First Order was inappropriate; and that (as described above) a fair minded and informed observer might conclude that he appeared to wish to punish the Appellant and threaten future adverse actions.

111. Finally, on the issue of the views which the Judge expressed on liability issues, the Judge did not confine himself in the Recusal Judgment to considering whether those views suggested some form of prejudgment. Instead, as Counsel for the Appellant identified at the hearing before me, the Judge did his own independent additional legal research (in advance of the recusal hearing) to justify why he had expressed certain views as to the merits on 23 May 2019. So, at [41] he explained:

> "…I do not accept that a fair-minded and informed observer would regard my remarks on the issue of liability in the personal injury action as giving rise to a real possibility that I would not approach the trial of either action in a fair manner, and that is the application and allegation made by the defendant in this application. Firstly, I explicitly qualified the views that I expressed by saying that they were "provisional" and there is no evidence in support of the contention that doing so was "mere lip service" as opposed to proper judicial recognition

> that, at that stage, evidence and argument had not been heard. Secondly, *Greatorex*, as a first instance decision, albeit of a High Court Judge, for several reasons may neither support the contention relied upon nor determine it authoritatively. No consideration arose in that case of the vicarious liability of an employer for the self-infliction of risk upon himself by a fellow employee giving rise to a rescue. Moreover, the decision to contrary effect was made in *Harrison v British Railways Board* [1928] 3 All ER 679 and the persuasive opinion of the Supreme Court of Canada in *Horsley v McLaren (The 'Ogopogo')* 1970, 2 Lloyd's Reps 410 were not cited or dealt with either by Cazalet J in *Greatorex* itself, nor in the speech of Lord Ackner in *Alcock v chief Constable of South Yorkshire* [1922] 1 AC 310 on which he relied. Thirdly, the remark relied upon related only to the personal injury action and cannot, on any view, indicate a real possibility of approach to the trial in the fatal accident claim that would not be fair-minded."

112. The Judge's further legal researches as set out above on the issues of vicarious liability and rescue situations were, with respect, not relevant or appropriate. The issue was whether what he had said on 23 May 2019 engaged the Porter test, not whether there might have been sound additional legal reasons for the views he expressed on that day.

VIII. Actual Bias

113. Counsel for the Appellant put his case on the basis of both apparent and actual bias, recognising the seriousness of the latter allegation. He did however make clear that he was not seeking any finding of actual bias.

114. In my judgment, the argument of actual bias is not open to the Appellant. That is because of the nature of the permission to appeal granted by Garnham J (which I consider was granted on the basis of grounds of appeal and skeleton confined to apparent bias) and also because this was not the case advanced below.

115. I accept that some comments in the skeleton may have gone further than an allegation of just apparent bias (using the language of "animus" against the Appellant) but I do not regard, considering the terms of the Appellant's Notice as a whole, that a clear case of actual basis was pleaded. Had it been pleaded, and had I permitted argument, the shape and nature of the appeal would have been different.

IX. Conclusion

116. I will allow the appeals against the First Order and the Second Order. The material parts of the First Order will be set aside and I will make an order for recusal of the Judge as sought in the Appellant's Notice in relation to the Second Order.