CA on appeal from the High Court of Justice, Chancery Division (Mr Justice Evans-Combe [2005] EWHC 276 (CH) before Lord Justice Mummery, Lord Justice Latham and Lord Justice Carnwath. 20th January 2006.

JUDGMENT : Lord Justice Mummery :

The appeal

1. This is an appeal against the decision of Evans-Lombe J on 1 December 2005 not to recuse himself from trying an action in the Chancery Division. He granted permission to appeal.

2. As the trial of the action was due to start on 6 December 2005 and is estimated to last for about 6 months, arrangements were made for the appeal to be heard urgently on 5 December. The case was very well argued at short notice by Mr Philip Marshall QC for the appellant, Mr Stephen McBrierty, and Ms Amanda Harington for the other appellant, Sir Alexander Morrison, (they are the defendants in the action) and by Mr Charles Aldous QC and Mr Charles Bear QC for the respondents (the two companies, who are the claimants in the action). After considering the written and oral submissions the court announced its decision that the appeal would be allowed. The judge was directed to recuse himself from hearing the trial. It was stated that reasons would be given in judgments to be handed down in due course.

Background facts

3. The circumstances of the application and the nature of the proceedings were helpfully summarised by the judge in the opening paragraphs of his judgment, which I quote verbatim. The summary is accepted by the parties as broadly accurate for present purposes, although Mr Marshall and Ms Harington had certain reservations about the accuracy of some of the details in paragraph 2 which are not material for present purposes:

"1. I have to deal with an application made by the defendants Sir Alexander Fraser Morrison ("FM") the 1st defendant and Stephen John McBrierty ("SM") the 2nd defendant, made on Wednesday the 30th November the week immediately preceding the intended commencement of the trial on the 5th December, that I should recuse myself from trying the case. The application arises in this way: in the course of my pre-reading into the case I noticed that it was intended to call as a witness for AWG Group Ltd ("AWG") Mr Richard Jewson ("Mr Jewson") who, at all material times until March 2002 was a director of AWG and chairman of the audit sub-committee of its board. Alerted by the name I then discovered that Mr Jewson is well known to me of which fact I then alerted the parties on the 29th November. The response of the claimants was to indicate that, rather than risk my withdrawal and the consequent delay in obtaining another judge and his completing the pre-reading process on which I had already spent a week, they would not call him to give evidence since they did not regard him as other than a relatively peripheral witness. The response of the defendants is contained in a letter from Messrs Dechert LLP of the 30th November the conclusion of which was to ask me to withdraw.

2. The case arises from the takeover by AWG of Morrison plc ("Morrison") in which FM and SM were respectively the chairman, and, in effect, the chief executive officer. They also held between them a substantial proportion of AWG's shares. In August 2000 AWG made an approach to Morrison with a view to bidding for the whole of the issued share capital of that company. In due course a bid was made which AWG declared to have gone unconditional on the 21st September 2000. It is AWG's case that it was procured to make the bid and to declare it unconditional as a result of a representation that Morrison's profits in the full year to March 2001 would be £30.5m, that that representation was made to the board of AWG by the defendants at a time when they had no bona fide belief that such a level of profit would be achieved, and that, in making the representation, the defendants fraudulently procured Morrison to conceal from AWG's "due diligence" inquiries, material facts from which AWG might well have concluded that that level of profit was unachievable and that they should withdraw their bid.

3. At the outset of the hearing of the defendants' application I described my connection with AWG and with Mr Jewson in the following terms: AWG is a company whose primary business is supplying water to industry and the public in East Anglia and in particular in Norfolk. My family are farmers/landowners in Norfolk and so in the area of operation of AWG. I have had dealings with AWG, not always harmonious, over the years on such subjects as access for the purpose of sinking boreholes and running pipelines. Mr Jewson lives in the next village to the village where I and my family live being approximately 1 mile distant. Our families

have known each other for at least 30 years. Our children are friends and we have dined with each other on a number of occasions. Mr Jewson and I in the past were tennis players. Mr Jewson has recently been appointed Lord Lieutenant of Norfolk. I would have the greatest difficulty in dealing with a case in which Mr Jewson was a witness where a challenge was to be made as to the truthfulness of his evidence.

4. As is apparent the case which the claimants seek to make out against the defendants involves serious allegations against prominent businessmen for whom, if those allegations are found proved, most serious consequences would follow both in the damages which they might be required to pay and in the consequences that such findings would have for their future careers.

The test for apparent bias

4. As Mr Marshall made clear, his client's sole objection to Evans-Lombe J trying the case was the real possibility of apparent bias. There was not, it should be emphasised, any suggestion of actual bias or personal interest. The judge had no personal interest, pecuniary or otherwise, in the outcome of the litigation. In no sense would he be a judge in his own cause. The detailed objections in Dechert's letter of 30 November 2005 (referred to in paragraph 1 of the judgment) were based entirely on an apprehension of the real possibility of apparent bias.

5. Upholding the bias objection on the eve of the trial would cause considerable disruption: the trial would have to be adjourned, as there would be practical problems in finding a new trial judge at such short notice; the parties would suffer additional costs resulting from the adjournment; and there would be delay in fixing a new trial date.

6. Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice, both at common law and under Article 6 of the European Convention for the Protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance.

7. The test for apparent bias now settled by a line of recent decisions of this court and of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask "*whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility…that the tribunal was biased*" : **Taylor v. Lawrence** [2003] QB 528 at paragraph 60. See also **R v. Gough** [1993] AC 646**; Re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700**; Porter v. Magill** [2002] 2 AC 357; and **Lawal v. Northern Spirit Ltd** [2004] 1 All ER 187.

8. As to the kind of circumstances in which there would be a real possibility of bias, the judge cited a pertinent passage from another leading case, **Locabail (UK) Ltd v. Bayfield Properties Ltd** [2000] QB 451 at 480:

"25. By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case…or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him…In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

9. Most of the leading authorities were appeals arising from hearings that had already taken place or were under way and an objection to the judge was based on facts discovered during the course of, or only after the end of, the hearing. Although this is a different case, as the hearing has not yet started, the same principle applies. Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle. If, as here, the court has to predict what might happen if the hearing goes ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising, prudence naturally leans on the side of being safe rather than sorry.

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Mr Jewson

10. Moving from the statement of general principle to its application to the particular case, the precise question is whether a fair-minded and informed observer of the circumstances of this forthcoming trial would conclude that there was a real possibility that Evans-Lombe J might be subconsciously biased by his long acquaintance with Mr Jewson: see **Lawal ...**also a case in which the objection was taken in advance of the hearing) at paragraph 21 per Lord Steyn, who had stated in paragraph 14 that "Public perception of the possibility of unconscious bias is the key." Lord Steyn also emphasised that high standards are set by the "indispensable requirement of public confidence in the administration of justice."(paragraph 22 of **Lawal).**

11. The defendants' principal point was that aspects of Mr Jewson's evidence are contentious, or might become so in the course of the hearing. The judge would then be confronted with having to decide whether his evidence was reliable. He recognised that he would have "the greatest difficulty" in dealing with that situation.

12. AWG's response was that the judge's potential problem with Mr Jewson's evidence was completely resolved by their decision, taken in order to avoid the judge's embarrassment, not to call Mr Jewson to give evidence. Instead they would call fellow executive directors, who were also members of the audit committee of AWG's board at all material times. Evidence would also be given by the executive chairman, Mr Gourlay. It was submitted that, by removing Mr Jewson as a witness at the trial, the risk of the judge's embarrassment at having to decide directly whether Mr Jewson's evidence was reliable would no longer be a real possibility.

13. The defendants did not agree with AWG's assessment of the situation. They ventilated a number of specific objections. As a result of the risk of embarrassment to the judge, which was the only reason for the claimants' decision not to call Mr Jewson, they would be denied the opportunity to cross examine Mr Jewson; they would be unable to ask the judge to draw inferences from his failure to give evidence; as he was chairman of the audit committee, any criticism of his fellow directors to discharge their duties was likely to constitute a criticism of Mr Jewson; and the defendants might even wish to call him as a witness, even if AWG did not.

14. In dealing with the scenario of a trial without Mr Jewson as a witness the judge referred to the test of apparent bias:

"11. In deciding whether I should recuse myself from the case I have first to decide, applying the test derived from the authorities which I have set out above whether all circumstances which have a bearing on the suggestion that I might arrive at a conclusion in the case through bias would lead "a fair-minded and informed observer to conclude that there was a real possibility" that that might be the result of my failure to withdraw."

15. The judge then concluded that his continuation as trial judge would not fail the test. He explained the position as follows:

"12. I have come to the conclusion that my continuation as judge in the case will not fail the test. Mr Jewson's witness statement is mainly directed to the issue of causation of loss and to the impression made on the board of AWG of the representations made by the defendants in the course of AWG's "due diligence" inquiries. I can see no reason why the proposed new witnesses will not be able to give the evidence which Mr Jewson would have given. The fact that they are giving it in his place should not constitute an unfair advantage to the defendants. The same is true of the evidence given by Mr Jewson of the impact of the letter of 11th September 2000 on the AWG board; see item (ii) in Messrs Dechert's letter of the 30th November. It does not seem to me that Mr Jewson's supervisory role as chairman of the audit committee and any recommendations that he may have given as to the treatment of financial information from Morrison in the accounts of the new AWG Group can have be relevant to any judgment that I give. It will be for me to decide, if necessary, whether the accounts properly record such information applying my view of the appropriate accounting principles which may or may not agree with the view of the audit committee of precisely the terms in which the financial information was provided to the auditors, or to the committee itself, the new proposed new witnesses are just as able to give that evidence as Mr Jewson.

13. It has always been within the discretion of the claimants as to which AWG board members to call to give evidence and it is not prima facie unfair to the defendants that late in the day they may elect not to call a

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witness who has given a witness statement but substitute other witnesses, provided proper notice is given of what those replacement witnesses are going to say. It will be open to the defendants to criticise the claimants' case if a comparison between the evidence given by the replacement witnesses diverges from the witness statement which has been delivered by Mr Jewson. In those circumstances my role will be whether any such divergence undermines the evidence of the replacement witnesses. I observe that if this happens the reliability of Mr Jewson's witness statement will come into question but I do not regard this as presenting a significant problem.

*14. It is point (iv) of Messrs Dechert's letter which seems to me to be the high point of the argument that I should recuse myself. However I have come to the conclusion that it does not drive me to do so. Mr Jewson was not an executive member of the board responsible for the day to day trading decisions of Morrison after the acquisition. The question will not be whether particular trading decisions were ill j**udged but whether or not they caused relevant loss. I do not think that** "a fair minded and informed observer" would conclude that I was less likely to decide that trading decisions of AWG during the post acquisition period were mistaken and causative of loss because at the time Mr Jewson was a non-executive member. In any event I am assured by counsel for the claimants that there is no record and no other evidence that Mr Jewson was party to any of the post acquisition trading decisions of AWG.*

16. The judge went on to consider what he described as "*a second stage*" of the exercise (paragraph 15 of his judgment). There was a possibility in a complex case with substantial disclosure of documents and large numbers of witnesses that new facts and a changed picture would emerge unexpectedly during the course of the trial, leading the judge to conclude that he ought not to carry on with a trial in which he would have to decide whether serious allegations made by the claimants were made out. He concluded:

"15 …I have to balance whether the apparent role of Mr Jewson in the overall circumstances of the case leads to a risk that such a changed picture might emerge. I have to balance such risk against the undoubted disruption of the administration of justice generally caused by having to find a new judge to try a case of this length at short notice and also the inevitable further cost imposed on the parties resulting from the ensuing delay. I have come to the conclusion that such a risk, which must always be present, is too small to drive me to the conclusion that I should recuse myself. For these reasons I must dismiss the application."

Discussion

17. This very experienced judge was faced with an unwelcome dilemma on the eve of a major trial, for which costly arrangements had been made. In his consideration of the objections to his trying the case and in his decision to grant permission to appeal he was sensitive to the situation of the parties and to the problems involved both in proceeding with the trial and in withdrawing from it at a late stage.

18. I appreciate that, having started to read into the case, he was in a good position to make an assessment of the circumstances. On the one hand, it was certain that his withdrawal from the trial would have serious consequences for the parties and for the administration of justice: delay, costs, listing problems. On the other hand, there were risks in his not withdrawing, which he fully recognised in his admission that his acquaintance with Mr Jewson would cause "the greatest difficulty", if there was a challenge to the truthfulness of his evidence. He came down in favour of remaining in the case.

19. What is the position of this court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.

20. As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.

Conclusion

21. In my judgment, the judge ought to have recused himself in the unfortunate circumstances in which, through no fault of his own or of anyone else, he was placed. This was the conclusion I reached at the hearing on 5 December 2005. My assessment of the circumstances bearing on the issue of apparent judicial bias is as follows.

22. First, the judge knew Mr Jewson and Mr Jewson knew the judge. It was not a fleeting acquaintance. They had known each other for 30 years. The judge recognised that this fact alone was potentially a valid ground of objection to his trying the case when he acknowledged that he would have "the greatest difficulty" if he had to deal with a challenge to Mr Jewson's evidence.

23. Secondly, Mr Jewson, in his capacity as a long serving and senior non-executive director (from 1991 to 2002), as deputy chairman of the AWG board at the time of and after the acquisition of Morrisons and as chairman of AWG's Audit Committee, was connected or associated with AWG at the time of the events, which have given rise to AWG's very serious allegations that the defendants are guilty of defrauding AWG. Whether or not he was to give evidence at the trial, Mr Jewson was, in terms of **Locabail,** "involved in the case."

24. Thirdly, the action by AWG against the defendants is very substantial and complex. It may take 6 months to hear. The documentation is voluminous (250 trial bundles). There are many witnesses. There is a great deal at stake on each side in terms of money and personal reputation. In those circumstances it is extremely difficult for anyone to predict with confidence at this stage what may, or may not, happen during the trial concerning, in particular, evidence of the role of Mr Jewson relating to relevant pre-and post-acquisition events.

25. Fourthly, Mr Jewson's position with AWG at the material time was such that it was considered that he could give relevant evidence at the trial. This was certainly the position up to the time when objection was made to the trial judge. Mr Jewson's evidence was potentially relevant to two issues: (a) reliance, that is whether AWG relied on the fraudulent representations alleged to have been made by the defendants about profit forecasts or whether AWG's decision to acquire Morrison was made for "strategic reasons" on the basis of independent research and not in reliance on the defendants' profit forecasts and calculations; and (b) causation, that is whether the losses which AWG allege that they have suffered were in consequence of the alleged fraud by the defendants or in consequence of AWG's post-acquisition mismanagement decisions, the integration of Morrison's construction business within AWG and other events unconnected with the alleged fraud of the defendants. AWG's counsel do not think much of the defendants' case on these issues and asserted that it was not necessary for Mr Jewson to give evidence at all. The fact is, however, that Mr Jewson made a witness statement, which the judge has read in full. But for the embarrassment of the judge's personal position, Mr Jewson would give evidence on behalf of AWG and would be available for cross examination by the defendants' counsel on the above issues.

26. Fifthly, I am not persuaded, although the judge was, that the problem of the real possibility of bias, which would arise from the above circumstances, can be completely resolved if AWG call other witnesses, instead of Mr Jewson, to give the evidence which he would have given. AWG's decision not to call Mr Jewson is itself a recognition by them that there would be a real possibility of apparent bias if Mr Jewson gave evidence, even if only in a corroborative role. The decision indicates that, at the very least, trial arrangements have already been affected by the perceived problem of the judge's difficulties stemming from his long acquaintance with Mr Jewson.

27. Indeed, it is my view that, even in the absence of Mr Jewson from the witness box, the real possibility of bias would remain. Mr Aldous and Mr Bear did not agree. They argued that Mr Jewson was not an essential witness for AWG; that, as a non-executive director, he was not involved in management decisions; that he could not give relevant evidence on any key matters, either in respect of pre- or post-acquisition matters relating to the defendants' liability to AWG; that, once Mr Jewson was removed as a witness, there was no real possibility of bias; that the judge could put out of his mind what he had read in the witness statement; that, if Mr Jewson did not give evidence, there was no risk

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of the judge having to resolve an issue which could reflect adversely on Mr Jewson's veracity or on him as a person. He would not have to make a judgment on Mr Jewson.

28. In my judgment, however, the calling of substitute or replacement witnesses (such as Mr Challon, Mr Morris and Mr Cronin) would not resolve the perception of a real possibility of apparent bias. Simply not calling Mr Jewson to give evidence would not remove him from the events which have taken place, in which he was, or might have been, involved and about which evidence will, or might, be given by others in chief and under cross examination. The replacement witnesses were members of the same audit committee of which Mr Jewson was the non-executive chairman at the material time. It is said that they could give the evidence which he would have given. If the evidence of fellow members of the committee were challenged and the veracity of their evidence became an issue, the judge might have to make a finding about the reliability or credibility of their evidence. If their evidence is the evidence which Mr Jewson would have given, there is a real possibility that the judge would be placed in an embarrassing position similar to that which he would have been in, if Mr Jewson had actually been called to give evidence. In that eventuality, from the vantage point of the fair-minded and informed observer, a real possibility of unconscious bias remains.

29. Sixthly, while I fully understand the judge's concerns (see paragraph 15 of his judgment quoted above) about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having.

30. Seventhly, even at the judge's so-called "second stage", I would not assess the possibility of apparent bias as so small that the court would be justified in taking the risk of allowing this judge to try the action. Adjourning the trial now is bad enough for all concerned, but an even worse disaster, such as having to abort the trial several months into the hearing and to start all over again, may be waiting to happen. That would be inefficient, as well as unjust. It is a potential disaster that can be avoided. A decision must be made now one way or the other. By far the safer course is to remove all possibility of apparent bias by the recusal of the judge before the trial even begins. There will be other judges available to try this case and there will be other cases available for this judge to try.

Result

31. With the greatest possible respect, the judge's well intentioned decision not to recuse himself was wrong. It is in the interests of all concerned that he does not hear this case. As already indicated, the appeal was allowed on 5 December 2005 and the judge was directed to recuse himself from the trial of this action. I hope that suitable arrangements can be made as soon as possible to find another judge to try the case early in 2006.

Lord Justice Latham:

32. I agree.

Lord Justice Carnwath:

33. I also agree

Miss Amanda Harington (instructed by Dechert) for the First Appellant
Mr Philip Marshall QC & Mr Deepak Nambisan (instructed by Olswangs for the Second Appellant
Mr Charles Aldous QC and Mr Charles Bear QC (instructed by Herbert Smith) for the Respondent

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