Case No: A3/2013/1198

Neutral Citation Number: [2013] EWCA Civ 1003
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT
(CHANCERY DIVISION)
MR JUSTICE PETER SMITH
HC10C01299

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/08/2013

Before :

LADY JUSTICE ARDEN
LORD JUSTICE PATTEN
and
LORD JUSTICE MCFARLANE

- -

Between :

(1) MULUGETA GUADIE MENGISTE **(2) ADDIS TRADING SHARE COMPANY**	**Claimants**
v	
(1) ENDOWMENT FUND FOR THE REHABILITATION OF TIGRAY **(2) ADDIS PHARMACEUTICAL FACTORY PLACE** **(3) MESFIN INDUSTRIAL ENGINEERING PLC**	**Defendants**

-and-

IN THE MATTER OF AN APPLICATION FOR WASTED COSTS

Between :

(1) ENDOWMENT FUND FOR THE REHABILITATION OF TIGRAY **(2) ADDIS PHARAMACEUTICAL FACTORY PLC** **(3) MESFIN INDUSTRIAL ENGINEERING PLC**	Respondents to Appeal/Applicants
Against	
RYLATT CHUBB	Appellants/ Respondents to Application

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Graeme McPherson QC and Richard Liddell (instructed by **Reynolds Porter Chamberlain LLP**) for the **Appellant**
Andrew Spink QC and Oliver Assersohn (instructed by **MS-Legal Solicitors**) for the **Respondents**

Hearing dates : 29 -30 July 2013
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Judgment

Lady Justice Arden:

1. This appeal is primarily about judicial recusal and wasted costs orders. The appellants are Rylatt Chubb, formerly the claimants' solicitors in this action. The respondents are the defendants in this action.

2. Judicial recusal occurs when a judge decides that it is not appropriate for him to hear a case listed to be heard by him. A judge may recuse himself when a party applies to him to do so. A judge must step down in circumstances where there appears to be bias, or, as it is put, "apparent bias". Judicial recusal is not then a matter of discretion.

3. The doctrine of judicial recusal is a subject of wide importance: see *Judicial Recusal - Principles, Process and Problems*, Grant Hammond J, (Hart) (2009). An independent judiciary is an essential requirement if the rule of law is to be maintained. Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially. Judges who have a financial interest in a case are automatically disqualified. Depending on the circumstances, judges can also be disqualified by other matters, such as an involvement with one of the parties in the past. The ability of the judge to deal with the matter uninfluenced by such matters is not the issue: it is a question that, to maintain society's trust and confidence, justice must not only be done but be seen to be done. Hence it is common ground in this case that a judge should recuse himself from hearing an application if there appears to be bias.

4. The test for determining apparent bias is now established to be this: if a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased, the judge must recuse himself: see *Porter v Magill* [2002] 2 AC 357 at [102]. That test is to be applied having regard to all the circumstances of the case. For the purposes of this case, there is no need to analyse the test for determining apparent bias further.

5. The court may make a wasted costs order against a party's legal or other representative for payment of costs incurred by the applicant as a result of the improper, unreasonable or negligent act or omission of the representative (section 51(6), (7) of the Senior Courts Act 1981).

6. There are usually two stages in such an application. At Stage 1, the applicant for the order has to show cause, that is, satisfy the court that there is a strong *prima facie* case for the respondent legal representative to answer. This involves showing, so far as relevant, a strong *prima facie* case that (1) the representative was guilty of a significant breach of a serious professional duty and (2) costs were incurred as a result of that breach of duty. At stage 2, the court decides whether the grounds are made out and whether it is just to make the order sought.

7. In *Phillips v Symes* [2005] 1 WLR 2043, Peter Smith J held that a wasted costs order could be made against an expert witness.

Brief account of the circumstances leading to the order staying the litigation

8. This litigation has a short but complex history. The claimants began these proceedings for the following reasons. They had held a substantial equity investment in an undertaking in Ethiopia. On their case, they were deprived of that investment by a false case which the defendants or some of them raised against them. The claimants say that the defendants falsely alleged in proceedings primarily that the claimants had agreed to supply goods to that undertaking and procure payment from it without actually having fulfilled their supply obligations. Proceedings were started in Ethiopia. Judgment was given against them. Appeals left the judgments almost unchanged. Execution was levied on their investment which was sold to the defendants, who were their partners in the undertaking.

9. After execution had taken place, the claimants acquired new evidence in the shape of an inventory, signed by the defendants, of stock found at the premises of the undertaking. The claimants' case was that this was the self-same equipment as the defendants had said in the Ethiopian courts had not been delivered by the claimants. The claimants brought a claim for compensation in the English courts. The defendants sought to stay their case on the basis that there was an insufficient link with England and Wales to found jurisdiction.

10. It is common ground that the natural place for the issues in this action to be tried would be Ethiopia and that England and Wales is not, therefore, the convenient forum. The only question in issue on the defendants' stay application was whether the claimants would obtain a fair trial in Ethiopia.

11. The claimants' Ethiopian law expert was known in this litigation under the alias of Mr Jones. Peter Smith J, before whom the stay application was listed, gave careful directions to preserve Mr Jones' anonymity because he was fearful, if he gave evidence, for the safety of himself and his family.

12. The case was ultimately heard over eleven days. The hearing days were not consecutive. The matter was adjourned on two occasions. In all Mr Jones served four reports. They contained a large amount of inadmissible material. Mr Jones was, in the judge's judgment, destroyed as a witness in cross-examination. However, the judge accepted a small amount of the evidence which Mr Jones gave, namely evidence as to the existence of a legal precedent for the Federal Supreme Court of Ethiopia hearing an application to set aside a judgment on the basis of evidence obtained after the conclusion of the action.

13. On 22 March 2013, Peter Smith J determined that this action should be stayed on jurisdictional grounds. There is no appeal against that order. In his judgment (the "stay judgment"), the judge rejected almost all of Mr Jones' evidence. He also considered whether Mr Jones' evidence had complied with the rules of court.

14. Experts' reports are required to comply with procedural rules contained in the Civil Procedure Rules and Practice Directions and Protocols issued as part of those Rules or Practice Directions. Their overriding duty is to help the court. The procedural requirements prescribe, for example, that an expert's reports should make it clear whether the facts stated are within the expert's own knowledge. If they are in dispute, the expert should give an opinion on each version of the facts. In litigation,

experts are often instructed by solicitors who will seek to ensure that reports comply with all procedural requirements.

15. Under CPR 35.10(2), the report of an expert must state that he understands his duty to the court and has complied with it. The reports of Mr Jones contained this declaration.

16. It is common ground that the expert reports of Mr Jones which the claimants had filed did not comply with CPR 35.

17. The expert gave his evidence poorly. The judge in the course of Mr Jones' cross-examination asked Mr Jones if he understood his duties to the court and whether he appreciated that he might be vulnerable to a wasted costs order. Mr Jones replied that he was aware of his duties but did not appreciate that he was liable to a wasted costs order.

18. The judge concluded that Mr Jones' evidence did not comply with the rules and that Mr Jones did not understand his duties as an expert to the court.

19. The judge went further. In his judgment, the judge made clear and outspoken criticisms of the appellant solicitors for the poor quality of Mr Jones' evidence. He further held:

> "These duties and his potential exposure if his evidence was given recklessly or negligently was not explained to him by the Claimants' lawyers when he signed his experts report (contrary to the Expert Witness Protocol). This latter point I found particularly concerning. In effect Mr Jones was thrown to the wolves without any proper protection or advice as to the nature of his role and his duties and his potential liabilities." (stay judgment, paragraph 32(3))"

20. In the context of a long passage answering perceived criticisms of rulings he had made in the course of the trial, the judge continued later in his judgment:

> "84. I am criticised in the Claimants' closing for the way in which it is alleged I treated Mr Jones.
>
> 85. The problem with Mr Jones was that he was an inexperienced expert witness. He had never given evidence before in any jurisdiction. That was known to the Claimants' lawyers. Despite that no attempts were made to assist him in the giving of evidence as an expert in that regard. It is plain that he did not understand his duties as an expert to the Court and as will be seen in my detailed analysis in the confidential judgment he repeatedly strayed into the argumentative. Further he made strongly worded criticisms which were simply not sustainable on the thought processes in his report and this was cruelly exposed by Mr Spink QC in his thorough and comprehensive destruction of him as an expert witness.

86. It is plain from the exchange that took place before lunch on 14th August 2012 that Mr Jones simply did not understand his role as an expert witness. Further it was plain that he did not understand the consequences that might flow personally to him if he gave evidence which I found to be reckless or negligent. The reason for this was once again he had not properly been assisted by the Claimants' lawyers in respect of his evidence. It seemed to me that it was actually unfair to Mr Jones to be giving evidence being cross examined vigorously by Mr Spink QC. I reject that criticism set out in paragraph 84 above. It seemed to me clear that Mr Jones was blissfully unaware of the potential consequences. Mr Ashworth QC in his closing criticises me for that but Mr Jones was labouring under difficulties which were caused by his lack of understanding of his duties and the consequences of a finding that he broke his duties. The fault for this lies entirely with the Claimants' lawyers and examination of the transcript shows in my view that my concerns were legitimate and that I was right to raise them. It is not my fault that Mr Jones did not understand how he should give his evidence and the consequences if he failed to give his evidence in a proper way.

87. I reject the submissions of the Claimants that this intervention affected Mr Jones' evidence as they submit. In fact my conclusion about Mr Jones is that he gave his evidence honestly but was of no help to me as an expert because of his lack of expertise and because of the weakness of his evidence. It was important for me to get across to Mr Jones that he was giving large parts of his evidence in an improper way. The purpose of that is to see what evidence was left after his pejorative observations were stripped out. The answer was nothing much of any credibility. I was not surprised his answers were ***"improved"*** after my warning. He thought more carefully about his answers because he understood his role for the first time.

88. The difficulty was that Mr Jones clearly had something worth to say. He was honest in his evidence, but his answers were coloured by his clear desire to argue the case on behalf of the Claimants and his lack of training as an expert. The exercise of stripping away the irrelevancies in his reports to find something of worth was very time consuming. It is unfortunate (to put it mildly) as I have said, that he was permitted by the Claimants' solicitors to appear as a witness without any proper understanding of the nature of his role and his obligations. That considerably lengthened his evidence. The fault lies entirely with the Claimants' lawyers."

21. When he made his findings on the expert evidence, the judge held in relation to Mr Jones' reports that:

> "Anyone reading the reports who is familiar with litigation within this jurisdiction would know that the tenor of the reports was inappropriate. He admitted in cross examination that he had gone beyond what he should have said as an expert (after only becoming aware of his duties in that regard in my view as a result of the cross examination in this issue)." (paragraph 229)"

Events leading to the non-recusal and wasted costs orders

22. In accordance with the court's usual practice, the judge circulated his draft stay judgment to the parties and invited them to draw his attention to typing errors and obvious errors before the judgment was finalised. The judge refused the appellant solicitors' request to modify the passages in which he criticised their handling of the case.

23. On 8 March 2013, the defendants' solicitors wrote to the appellant solicitors stating that they were considering applying for a wasted costs order against them and asking a large number of questions. The appellant solicitors wrote a long letter responding to the criticisms in the judgment. The appellant solicitors informed the judge that a wasted costs order might be sought against them on 11 March 2013.

24. On 18 March 2013, the defendants' solicitors confirmed that they would be making an application for wasted costs.

25. The appellant solicitors then wrote to the judge. This was the first intimation that the judge had that the appellant solicitors would apply to the judge to recuse himself. He asked for an explanation as to why they did not inform him earlier, but the appellant solicitors did not provide an explanation.

26. On 20 March 2013, the defendants formally applied for a wasted costs order against the appellant solicitors on the grounds that they should have withdrawn from this case in the light of the defects in the Ethiopian law evidence.

27. On the same day, the appellant solicitors applied to the judge for an order recusing himself from hearing that application. The judge ordered them to file a skeleton argument within 24 hours, which they did.

28. On 22 March 2013, the judge announced his decision to refuse to recuse himself for reasons to be given subsequently. He also made a Stage 1 wasted costs order. He directed that the Stage 2 application be heard by himself with an estimate of 3 days, with one day for pre-reading.

29. In his recusal judgment, the judge expressed concern about late notice of the recusal application. However, in my judgment, had the judge been seriously embarrassed, he would not have given a decision on the application as he did. It was, in my judgment, unnecessary to criticise the appellant solicitors. They were not obliged to

inform the judge until it was clear that their response to the defendants had not headed off the application against them.

30. The judge then repeated grounds for criticising the appellant solicitors' conduct in relation to the expert evidence. He described the examples of Mr Jones' failings as "legion".

31. The judge inferred from the absence of an explanation that the reason why he was not given notice of an application to recuse himself on 8 March 2013 was that:

> "this was done to further obstruct the resolution of the wasted costs application and to put further obstacles in its process in the hope that further delay would put matters off. I also believe that the recusal application, if successful, could lead very easily to a fresh judge concluding that it was no longer appropriate for the wasted costs application to be considered because it had not been dealt with summarily. This is not unheard of. The courts have indicated, quite properly, that this procedure is a robust procedure which must be dealt with, in fairness, in a robust way, and should not become another mini-trial with huge accusations and counter-accusations.
>
> **[26]** The consequence is, of course, that, if I remove myself from the case, a new judge, before he can even consider the wasted costs application, will have to understand the nature of the claim which took place over ten days before me. He will have to understand the nature of Mr Jones' evidence and, to do that, he will have to read his four expert reports, his memorandum, he will have to read his cross-examination, he will have to read the comprehensive closing submissions, and he will have to then read the judgment and deal with the application. None of that, of course, is necessary for me, because I have delivered the judgment, I heard all the evidence and I have formed my conclusions, and they are fresh in my mind at the moment."

32. The appellant solicitors later made it clear to the judge that they would not contend that another judge could not deal with the wasted costs application in the expeditious manner such applications should be dealt with.

33. The judge considered the authorities. He considered that there was an inevitable collision between the principle of a wasted costs order and an application for recusal because a wasted costs application could not be made unless there was some criticism of the party or his representative. He held that the criticism would have to be in "extreme and unbalanced terms" (per Lord Bingham in *Locabail (United Kingdom) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451), which was not a proper description of his criticism.

34. In a section which followed, headed "The Need for Criticism", the judge set out his grounds for criticising the appellant solicitors, culminating in the following paragraph:

> "**[39]** Given my assessment of Mr Jones, there was, therefore, a clear indication that he was not properly prepared and, on the evidence before me, I formed the view that that was because RC had not properly prepared him. I accept that I criticised RC in the six instances given by Mr McPherson in his skeleton. But I reject his submission that such criticism was extreme, and I reject that it was unbalanced. Given my view of Mr Jones, having seen him and having concluded that he was neither reckless nor grossly negligent, there was on the material before me no other basis for my conclusion than that he had not been properly prepared. I did have the evidence of the lack of warning. Coming to this conclusion was an essential part of the decision process necessary at trial. It would have been insufficient, in my view, given my assessment of Mr Jones, simply to have heaped all of the criticism on Mr Jones, and left him open to a wasted costs application himself. I did not believe, as I have found in this judgment, that he was reckless or grossly negligent. I believe that I have said in this judgment that he did the best he could, bearing in mind his limited understanding."

35. The judge then held that the appellant solicitors misunderstood the grounds of the wasted costs application. The defendants' complaint was that the appellant solicitors had associated themselves with Mr Jones' evidence when their proper course had been to withdraw. The judge accepted that this was "quite a short point" (paragraph 41). Their wasted costs application was thus not simply on the basis of his findings.

36. The judge went on to hold that he was bound to consider how it had come about that, Mr Jones, who was neither reckless nor grossly negligent, had come to give his evidence as he did. His comments about the appellant solicitors were therefore part of his judicial duty and the fair-minded observer could not draw an inference as to a real possibility of bias from this.

37. The judge assured the solicitors that in hearing any wasted costs application, in the required summary way, they would be given the fullest benefit of the doubt.

38. The judge examined three authorities, which are considered below, and extracted five principles:

> "1) A judge has a duty to discharge his judicial functions. In discharging those judicial functions, it can regularly involve delivering judgments which are critical of the parties and the witnesses. I am afraid that is part of the judicial function. In so many cases, ultimately cases are decided on the credibility of the parties and the witnesses. In cases like that, just like the present case, acceptance or rejection is not enough.
>
> 2) Such criticism cannot give rise to a basis for recusal, as the judge is discharging his judicial function.

> 3) On a wasted costs application, a judge who has heard the case is the only person who should hear such an application, because of his extensive knowledge of the case, despite criticism in the judgment, unless there is some exceptional reason to depart from that. Those are the words, of course, referred to in the *Bahai* case, which I have already set out.
>
> 4) Mere criticism is not sufficient. It must be extreme or unbalanced to lead a fair-minded observer to consider the judgment might not give the Respondent to the application for wasted costs a fair hearing.
>
> 5) This is even if criticism addressed is addressed to witnesses, as opposed to parties. I reject Mr McPherson's submission that there is some kind of divergence. If there is an application against a party for a wasted costs order, then the criticism of the party in the judgment is not, of itself, a basis for the judge to recuse himself. If an application is against a witness for a wasted costs order, as the headnotes in the *Bahai* show, it is the same test. Mere criticism of that witness is not, of itself, enough for a judge to recuse himself. Equally, an application for a wasted costs order against solicitors arising out of criticisms of those solicitors in the judgment, which is, of course, a necessary precursor to any application, is, of itself, not enough to require recusal."

39. In the concluding paragraphs of his judgment, the judge held:

> "**[61]** RC, who, of course, as a firm of solicitors, are well-known to me and have appeared regularly in these courts in front of me, and indeed, have appeared virtually exclusively in front of me since the end of October in a number of cases, ought to know full well that I strive to give everybody the fairest opportunity to defend themselves in respect of any allegation. This is to ensure that parties who leave a court where I am the judge, whatever the result, are able to say they had the fullest opportunity to present their case.
>
> **[62]** I am and remain open to persuasion, if RC are able to do that, bearing in mind their potential restrictions, for them, if it becomes relevant, to persuade me that, on the fresh material that they would put forward, my criticisms of them were wrong, and to such an extent, in the alternative, that they do not give rise to a basis for an application for a wasted costs order. If they are unable properly to present their case for the reasons that I have already said, they would be given the fullest possible credit for that inhibition. I am not in the game of beating solicitors over their heads, because solicitors often have difficult jobs."

40. On 1 May 2013, the judge gave a short judgment on the application to make a Stage 1 wasted costs order. He set out the requirements for such an order:

> "29. For a wasted costs order to be made (a) the Applicant must be able to demonstrate that the Respondents have been guilty of conduct which is (i) negligent (ii) unreasonable, or (iii) improper and (b) the Applicant is able to demonstrate such conduct has resulted in costs being incurred by the Applicant which would otherwise have been avoided; and (c) it is fair just and equitable for the court to exercise its discretion so as to make an order against the Respondent in favour of the Applicant (White Book 48.7.3)."

41. The judge summarised the case against the appellant solicitors. The defendants' case was that the content of Mr Jones' reports was inappropriate and tendentious, and that his reports demonstrate that he did not understand his duty to the court. The defendants say that it should have been clear to the appellant solicitors at the outset and prior to serving particulars of claim that Mr Jones' reports were inappropriate and tendentious. Moreover, they contend that, as the trial progressed, it should have been clear that Mr Jones was unable to grasp his duties under CPR 35. The defendants contend that the appellants' solicitors should have withdrawn at each of these stages. Therefore they say that the entirety of their costs was caused by improper conduct on the part of the appellants' solicitors.

42. The judge held that the defendants had satisfied the onus on them:

> "45. Nevertheless the evidence put forward by the Defendants which is derived from a consideration of Mr Jones' performance clearly in my view satisfies the requisite threshold at this stage namely that there is a strong prima facie case that Mr Jones' evidence was so extraordinarily poor that the Defendants are entitled to contend that Rylatt Chubb should not have associated themselves with this litigation at all or in the way that they did."

43. As explained, the judge went on to give directions for the Stage 2 hearing but that hearing has not been held due to this appeal.

44. The appellant solicitors now appeal against the judge's refusal to recuse himself, and his Stage 1 wasted costs order.

Recusal application - submissions

45. Mr Graeme McPherson QC, for the appellant solicitors, submits that apparent bias is demonstrated by the circumstances. In the stay judgment, the judge made findings about the solicitors without hearing evidence as to what they had done and without any prior warning. Accordingly, they had had no chance to address him.

On the contrary the judge indicated in the course of Mr Jones' cross-examination that he was not attaching any blame to the claimants' solicitors for the inadequacies of Mr Jones' performance in the witness box.

46. Mr McPherson contrasts the decision of this court in *Bahai v Rashidian* [1985] 1 WLR 1337. In this case, the trial judge had been very critical of the evidence given by a solicitor, whom the judge considered had an overriding desire to see that his client won the case and that he was prepared to act improperly if he thought it would assist his objective. The judge went on to deal with a costs application. This was before the creation of the wasted costs procedure. This court held that a costs application should normally be determined by the trial judge. Further, this court held the judge who criticised the conduct of a witness in the proper exercise of his judicial function could not be said to be biased. Accordingly, the judge was right to refuse to recuse himself on the application for costs.

47. Mr McPherson further submits that the criticisms which the judge made of the claimants' solicitors were wholly unnecessary for the purposes of the stay judgment.

48. Mr McPherson also relies on *Oni v NHS Leicester City* [2013] ICR 91, a decision of the Employment Appeal Tribunal. In the decision under appeal, the Employment Tribunal had held that the proceedings had been conducted unreasonably. There was then an application that the Employment Tribunal should recuse on a consequent application for costs. The Employment Tribunal refused to recuse itself. The Employment Appeal Tribunal held that the Employment Tribunal should not have expressed concluded views which really anticipated argument on the question of costs. Therefore it held that the Employment Tribunal should have recused itself and allowed the appeal.

49. Mr McPherson also relies on *Re Freudiana Holdings Ltd*, 28 November 1995, Court of Appeal, unreported. In this case the trial judge (Jonathan Parker J) made stringent findings against the solicitors following a trial lasting 165 days. There was then a wasted costs application. The judge concluded that no other judge could hear it and held that he was himself disqualified from hearing the application. An appeal against his ruling was rejected by this Court. Rose LJ held that it should almost always be for the trial judge to adjudicate on a wasted costs application. In the normal way, it would not be an objection that the judge had criticised the solicitors in question in his substantive judgment. However in that case, the judge had made express findings which were not couched in provisional terms and amounted to grave criticisms of solicitors and counsel. Rose LJ therefore concluded that this was an exceptional case in which it might have been extremely difficult for there to be an appearance of fairness if the trial judge had conducted the wasted costs application. Accordingly, he held that at its lowest there was ample material to justify the judge in disqualifying himself.

50. *Re Freudiana* raises the question of the proper appellate test where the appeal is brought against non-recusal rather than (as in *Re Freudiana*) against recusal. Mr McPherson accepts that in the present case the question is not whether the judge was entitled to hold that he was not disqualified from sitting. This court had to decide whether or not he should have recused himself as a matter of law. If the relevant conditions for recusal are satisfied, the judge does not have a discretion whether to recuse himself or not.

51. Mr McPherson submits the judge did not correctly analyse the authorities. He also submits that the judge did not need to criticise the solicitors. He took it upon himself to make criticisms that were not within his knowledge. He was anticipating an application against the expert for wasted costs and therefore his comments were necessarily unnecessary.

52. Mr McPherson submits that there is a clear link between the wasted costs application and the judge's criticism.

53. Mr Andrew Spink QC, for the respondents, submits:

    i) the issues on the application were (a) whether the Ethiopian courts would review an earlier judgment and (b) the risk of injustice in Ethiopia due to lack of fair trial and bias. Only a very limited part of Mr Jones' evidence was relevant to these issues.

    ii) Mr Jones' evidence - and the inadequacy of his evidence, both oral and written – was crucial.

    iii) the hearing of the stay application had to be adjourned twice to accommodate Mr Jones. The first hearing, for instance, had to be adjourned because Mr Jones had failed to deal with a point, namely the consequences of an inventory of the equipment in question, which was signed by the defendants, was not conclusive that the equipment had been delivered.

    iv) the defendants made considerable criticisms about Mr Jones' reports. The defendants were entitled to take the view that it was not appropriate to apply to strike out Mr Jones' evidence.

54. As to the authorities, Mr Spink submits that there is no rule that because a judge has already determined an issue in the litigation he has to recuse himself from hearing subsequent applications. In support of this proposition he cites *JSC BTA Bank v Ablyazov* [2013] 1 WLR 1845, at paragraphs 69 –70. However, I do not consider that that case assists since the application in issue was for committal for contempt of court of a party who had given evidence. He had already given evidence before the judge and had the opportunity to make submissions and file evidence. The standard of proof on committal proceedings is the criminal standard, providing greater protection for Mr Ablyazov. Neither protection was available to the appellant solicitors in this case.

55. Mr Spink goes so far as to submit that the true principle is that convenience affects the question whether a judge should recuse himself. He even submits that this principle would apply even if a third party brought proceedings against a party with regard to issues in the same case. I do not myself see how convenience comes into the question of apparent bias: either there is, or there is not, apparent bias.

56. This leads to Mr Spink's submission on necessity. Mr Spink submits that the defendants have to show only that it is justifiable for the judge to have made the finding, not that it is absolutely necessary. In this case, the judge felt that it was necessary to decide that the witness was not fraudulent. Part of his reasoning was that the fault lay with the solicitors. Mr Jones had made extraordinary statements in

his reports displaying a misunderstanding of his role, and a political agenda. He purported to withdraw one such statement because of the judge's indications but then came back to it.

57. In any event, Mr Spink submits that the findings of the judge about the appellant solicitors were not relevant to the issue on the wasted costs application. His case is that it is not relevant whose fault it was that Mr Jones gave inappropriate evidence. The basis of the wasted costs application is that it was a breach of duty of the appellant solicitors to file reports which were in breach of CPR 35. The respondents' alternative case is that there were stages reached when the appellant solicitors should have withdrawn. Even if they should not have withdrawn instead of filing the reports, they should have withdrawn after he had given his evidence at various stages.

Recusal Application – discussion and conclusions

58. In almost every case, the judge who heard the substantive application will be the right judge to deal with consequential issues as to costs, even if he made findings adverse to a party in the course of reaching his conclusion. But there can always be exceptions, as in *Re Freudiana*, summarised above. The fact that it might be difficult or even impossible for another judge to hear an application for costs does not mean that the principles for recusal should be in any way tailored. The same test applies. I would not, therefore, accept the judge's analysis that there is some conflict between the principles applying on a recusal application and an application for a wasted costs order based on criticisms made in a judgment.

59. In this case, I have reached the clear conclusion that this was an exceptional case and that there was apparent bias stemming from the facts of the case which meant that the judge should have recused himself from hearing the wasted costs application. I reach this conclusion principally for the following reasons:

i) *No necessity to make the findings:* the judge's criticisms were not in my judgment necessary to enable the judge to evaluate Mr Jones' evidence. The only issue that needed to be decided was whether Mr Jones' evidence should be accepted: the judge held that it should not be accepted because of its inherent inconsistencies and unreliability. The question why his reports contained inadmissible material or he performed poorly as a witness – which I accept were likely to increase costs – were primarily relevant when it came to costs. As it seems to me, the judge, in making criticisms against the solicitors over their explanation to Mr Jones about his duties was concerned to ward off an application for a wasted costs order against Mr Jones (see paragraph 39 of his recusal judgment, above paragraph 34). That was to anticipate an application that had not yet been made. Even if this were not the case, there was no need to make these criticisms without inserting an appropriate qualification that they were provisional views, or views made on the limited evidence available to him, thus being seen to leave the door open to the possibility that there might be another explanation. The fair-minded observer would ask rhetorically why that had not been done.

ii) *Criticisms expressed in absolute terms*: The judge's failure to leave the door open for the possibility of some explanation when he had not heard evidence

or submissions from the appellant solicitors gives rise to an impression of bias because it suggests that no explanation will be considered. The impression of bias is further confirmed by the making of findings of this nature when it can be foreseen that an application for a costs order, with serious consequences for the solicitors, may result.

iii) *Repetition, further criticism and concern to meet criticisms of the judge's conduct*: again, while I might not have reached the same conclusion if a criticism had been made in absolute terms on a single occasion, here the judge accepted that there were six criticisms of the appellant solicitors in the stay judgment. The judge recapitulates the criticisms in his recusal judgment. He also goes on to make a fresh criticism of the appellant solicitors for their failure to inform him of a possible recusal application as soon as they have wind of an application for a wasted costs application against them. I have the gravest difficulty in following the judge's criticism here since the appellant solicitors were not obliged to make the application any earlier than they did. While the judge drew the inference that this failure was tactical, it is difficult to see why it is not equally open to the explanation that they were waiting to see if an application was actually made and then needed time to consider how they should react. The judge points out that findings have to be "extreme and unbalanced" before they meet the severity required for recusal. There is no doubt that these were criticisms of high gravity for a solicitor. That makes them extreme. As I see it, where material is presented in this way, the effect is that they become unbalanced. I do bear in mind paragraphs [61] and [62] of the recusal judgment, quoted above, but these paragraphs look like afterthoughts. A fair-minded observer would of course wait until the end of the judgment before considering whether there was a real possibility of bias. Nonetheless, these paragraphs were too little and too late for the reasonable observer to redress the impression that had by then been given and reinforced by the recusal judgment. They did not redress even for the fair-minded observer the cumulative effect of the criticisms that had by then been made.

60. The judge expressed a concern that there was no advocate to assist him but this obscured the real issue that he was also a judge in his own cause so far as the recusal application was concerned. In that very privileged position, the applicant for recusal must be given the benefit of the doubt. Because of the implications of this point I am inclined to agree with Mr McPherson, that if a party has grounds for appealing against a Stage 1 order on the grounds of apparent bias this would form one of the exceptional cases in which such an appeal should lie: see *Crabtree v Ng* [2011] EWCA Civ 1455, discussed at paragraph 66 below.

61. The defendants seek to avoid the possibility of recusal by relying on the fact that the case which they seek to mount on the wasted costs application was not directly the subject of the judge's criticisms. However, their case on the wasted costs application is based on the same material as moved the judge to make his criticisms. The case on the wasted costs application and the judge's criticisms are so closely connected that it would be unrealistic to say that, although the judge might have been bound to recuse himself if his criticisms had been the basis of the wasted costs application, he was not obliged to do so in the light of the subtle change in the case

put against the appellants' solicitors. Either way, there were real grounds for a perception that he would have a predisposition to find against the solicitors.

62. In those circumstances, I consider that, applying the test in *Porter v Magill*, the judge should certainly have recused himself from hearing the wasted costs application.

63. I do not consider that it is necessary for me to produce my own version of the judge's five principles. It was no doubt useful to try to formulate the principles but I do not consider that they are satisfactorily encapsulated in the judge's principles. The first principle does not call for comment. The second principle is that a judge who is doing no more than discharge his judicial function does not create an impression of bias, which is well established. What occurs in that situation is adjudication, not unsought findings. The third principle is in my judgment too narrow since there are circumstances where a judge's criticisms in his substantive judgment will cause him to be disqualified on the grounds of apparent bias from hearing a wasted costs application: *Re Freudiana*. To call those circumstances "exceptional" does not define them. When there is an issue of apparent bias, the test in *Porter v Magill* must be fearlessly applied by this court. The fourth and fifth principles overlook the possibility that mere criticism expressed in absolute terms may of itself be extreme and unbalanced because the impression to even the fair-minded observer that the door has not been left open for whatever explanation the party or non-party who has not yet had the chance of providing that explanation may have to say. These are immediate observations based on the facts of this case and should not be treated as comprehensive.

64. The effect of my conclusion is that, if my Lords agree, the judge's ruling on the wasted costs application must be set aside. That raises the question whether the court should go on to direct that the wasted costs application should not be heard at all.

Wasted Costs Application - submissions

65. In order to succeed on this appeal, the appellant solicitors have on their own case to show that no judge could come to the conclusion that the requirements for a Stage 1 order were satisfied.

66. There is a preliminary issue. In *Crabtree v Ng* [2011] EWCA Civ 1455, Lord Neuberger MR, with whom Carnwath LJ and I agreed, held:

> "Normally, almost invariably, it would be wrong for this court to entertain an application for permission to appeal or to grant the appeal in relation to such an order; it is a far more efficient use of time for the lawyer concerned to show cause and for the application for wasted costs to be dealt with on its merits, and only then for this court to be troubled."

67. In error this authority was not drawn to the court's attention at the permission stage in this case.

68. Mr McPherson was minded to submit there is no good reason for that holding, and furthermore it is unclear what constitutes an exceptional case. However we are bound by this holding, which must almost in every case be the appropriate approach for this court to take when the argument is simply whether grounds existed for a Stage 1 order. If the appellant is right that those grounds were not there, that can most conveniently in the judicial system be dealt with at Stage 2 and the delay caused by an appeal will be avoided. Practice must be seen as developing and it is nothing to the point that this court has in the past accepted Stage 1 appeals.

69. Mr McPherson then submits that it is convenient to have an appeal at Stage 1 as there is already an appeal against the judge's failure to recuse himself before hearing that application. He goes on to submit that, because of the judge's time estimate for Stage 2, it would more cost efficient to have an appeal in the Court of Appeal against Stage 1 than to have to await the outcome of Stage 2 before being able to amount an appeal.

70. Mr Spink submits that many of the objections that will be relied upon to a Stage 1 order are really points which ought to be made at Stage 2.

71. In my judgment, as I have already indicated, these are exceptional circumstances because of the linked recusal appeal. In addition, the wasted costs appeal is rightly pursued on a very limited basis.

72. I now move to the substantive submissions. Mr McPherson accepts that the report did not comply with CPR 35. He also accepts that the appellant solicitors must have known of that and that there is a strong *prima facie* case on breach of the requirements of that rule. However, he submits that the judge did not apply the right test. The necessary *prima facie* strong case of improper, reckless or negligent conduct is not satisfied. First, leading counsel had worked on the basis of Mr Jones' first report in drafting the particulars of claim. Second, the judge had found that there was some use in Mr Jones' report. Third, the respondents took no steps to have Mr Jones' evidence ruled inadmissible. Fourth, the judge had given detailed directions to enable Mr Jones evidence to be given, having seen his first report. Fifth, lawyers are not to be criticised for pursuing weak or hopeless cases. It would have to be shown that there had been an abuse of process, which there was not in the present case: see *Ridehalgh v Horsfield* [1994] Ch. 205, and *Re Freudiana.*

73. Mr McPherson further submits that in paragraph 45 of the judge's judgment on the Stage 1 wasted costs order, the judge did not deal separately with the question of causation. There is not enough to show that there was a possibility that costs would have been saved. If the appellant solicitors had withdrawn, the claimants may well have continued in person.

74. In addition, Mr McPherson submits, there was another option open to the judge: he might simply have ruled inadmissible those parts of the reports which he did not accept: see generally *Vickrage v Badger* [2011] EWHC 1091.

75. Mr Spink submits that, once the appellant solicitors conceded that the reports did not comply with CPR 35 and that they must have known that, there is a strong *prima facie* case on breach of duty for the purposes of the Stage 1 hurdle. The further submissions made by the appellant solicitors really amount to Stage 2

arguments. For instance, they rely on the fact that some of the documents to which they would need to refer to exculpate themselves are privileged. Mr Spink assures the court that it is not the respondents' intention to delve into privileged matter. There is a pending application for disclosure against the claimants, but it does not relate to privileged material.

76. Mr Spink accepts that there is no authority that a solicitor who was acting so as to facilitate a breach of CPR 35 must withdraw but he submits that that proposition follows or at least is well arguable. He further submits that it must follow from the Expert Evidence Protocol that both experts and solicitors have a duty to see that the requirements of CPR 35 are complied with. It must, in his submission, be a breach of duty for solicitors to seek to circumvent the requirements for expert evidence.

77. The second matter which the defendants would have to show is that they suffered cost as a result of the appellant solicitors' breach of duty. Mr Spink submits that the judge set out the correct test at paragraph 29 of his judgment and so it is quite clear that he must have had causation in mind, even though he did not identify it separately in paragraph 45. On his submission, it is reasonably arguable that the claimants would not have felt strongly enough to proceed if their lawyers had withdrawn. Either the case would have collapsed or it would not have got off the ground.

78. I now turn to my conclusions on the wasted costs application appeal. What the appellant solicitors have to set out to show is that no judge could have concluded that a Stage 1 order ought to be made.

79. In my judgment, that test sets a high hurdle which is not met:

    i) It is apparent that any decision as to whether the requirements for a Stage 1 order are met has to be made on the totality of the material.

    ii) The appellant solicitors admit breaches of CPR 35, and they are on the face of it serious breaches. The appellant solicitors did not invite the judge to disregard the passages in Mr Jones' reports that went beyond his proper role as an expert witness. Mr Jones' evidence was central to the case.

    iii) There was no misdirection by the judge. In paragraph 45 he was compendiously dealing with the test he had correctly set out at paragraph 29 of his judgment.

    iv) On causation, it must be a question of fact capable of being proved whether the claimants would have continued without professional representation. They would have been pursuing complex claims in a jurisdiction with which they were not familiar. On that basis, the court can infer that it is inevitable if a sufficient case is shown that some costs must have been incurred, even if not the totality of the costs of the action which the defendants claim.

80. I am of course giving no indication either way as to the outcome of any wasted costs application made before another judge.

81. In those circumstances, I would dismiss the appeal against the Stage 1 wasted costs order. To summarise, the appellant solicitors in effect seek a direction from this court that no further application should be made because no order could be made. That test is not met. Whether such an application should be made is a matter for the respondents, not this court.

Overall conclusion

82. If my Lords agree, the result of this appeal is that:

- the recusal appeal will be allowed with the consequence that the Stage 1 wasted costs order will be set aside but
- the application on the Stage 1 wasted costs appeal - that no further Stage 1 wasted costs application should be made - will be dismissed.

Lord Justice Patten

83. I agree.

Lord Justice McFarlane

84. I also agree.