ND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 105 of 2014 (DDJ)

BETWEEN:

(1) ARNAGE HOLDINGS LTD.
(2) BROOKLANDS HOLDINGS LTD.
(3) EAST FARTHING HOLDINGS LIMITED
(4) MS. KATIA RABELLO
(5) MR. FERNANDO TOLEDO

Plaintiffs

AND

WALKERS (A FIRM)

Defendant

Appearances:	Harry Matovu KC and Stuart Diamond of Diamond Law Attorneys on behalf of the Plaintiffs Mark Simpson KC, Sebastian Said, Nico Leslie, and Ryan Kuss of Appleby (Cayman) Ltd. on behalf of the Defendants
Before:	The Hon. Justice David Doyle
Heard:	8 June 2023
Draft Judgment Circulated:	12 June 2023
Judgment delivered:	16 June 2023

HEADNOTE

Dismissal of recusal applications – absent proper grounds for recusal the judge has a duty to continue presiding over a case – previous decisions or criticism against a party or dissatisfaction with evidence presented on behalf of a party are not, without more, usually proper grounds for recusal – judges are not required to sit mute while legal arguments are being presented and counsel are usually assisted by being informed as to the concerns of the judge in order that they have an opportunity to deal with them before judgment is delivered – attorneys should not make recusal applications unless they are satisfied that there are justifiable grounds for making them

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JUDGMENT

Introduction

1. These proceedings were started by the Plaintiffs in 2014 and assigned to former Chief Justice Smellie who recused in February 2021 and the case was re-assigned to me in March 2021. Some of the history of the proceedings is outlined in my judgment delivered on 28 October 2022. Following that judgment an order was made on 8 November 2022 dismissing the claims of the First to Fourth Plaintiffs for failure to comply with the Court of Appeal order made on 4 October 2021 that they provide security for costs in the sum of US$4.25 million by no later than 18 November 2021. On 5 September 2022 Stuart Diamond for the Fifth Plaintiff indicated that the Fifth Plaintiff's claim had been resolved. Settlement of the Fifth Plaintiff's claim was confirmed at paragraph 4 of the Defendant's skeleton argument dated 29 September 2022 and the Fifth Plaintiff's three-week trial was vacated. A hearing to deal with consequential issues following the order made on 8 November 2022 (an application by the Plaintiffs for leave to appeal against the Order made on 8 November 2022 and an application by the Defendant for interim payments, disclosure of funders and costs, including orders against the Fifth Plaintiff) is listed before me for hearing on 11-12 July 2023.

2. On 17 April 2023 the First to Fourth Plaintiffs and the Fifth Plaintiff filed summonses seeking an Order that I be recused from taking any further part in the proceedings "on the ground of apparent bias" (the "Recusal Applications"). No particulars were provided in the summonses.

The grounds for the Recusal Applications as specified in the Plaintiffs' Schedule

3. By email dated 4 May 2023 3:27pm Mr Diamond attached what he described as "the Plaintiffs' Short Schedule" as directed by the Judge. I refer to this document as the "Schedule."

4. At paragraph 4 of the Schedule it is stated that the factors on which the Plaintiffs rely are:

> "(1) the fundamental principle that justice must not only be done, it must be seen to be done;
> (2) the fact that judges, however conscientious, may be affected by unconscious bias;
> (3) the concern that the circumstances … regarding the management of the action before and after its assignment to Doyle J would cumulatively lead a fair minded informed observer to conclude that there was a real possibility of bias, including unconscious bias, against the First – Fourth Plaintiffs and the Fifth Plaintiff respectively if the matter were not assigned to another Judge."

6. The Plaintiffs provided no further detail in respect of the generalised points they raised at paragraph 4(1) and 4(2) but say at paragraph 5 that the facts and matters relied on in relation to paragraph 4(3) are the following:

(1) in relation to the applications covered in a judgment delivered on 25 January 2022 (concerning the Fifth Plaintiff):

> "(a) The judge criticised the Fifth Plaintiff unreasonably for failing to comply with the prior discovery order, notwithstanding:
>
> (i) the fact that the parties had agreed that evidence filed in the proceedings did not need to be relisted and re-produced for the purposes of discovery;
> (ii) the correspondence which had taken place with the Court prior to the expiry of the deadline for compliance with the order; and
> (iii) the fact that the Fifth Plaintiff had, in fact, already produced almost all of the documents in his possession which were relevant to his claim.
>
> (b) Furthermore, the Judge indicated in his written Ruling that he had been so personally affronted by the conduct of the Fifth Plaintiff (as he perceived it) that

he needed time for the 'dust to settle' and to give himself 'the luxury of some time for reflection' before finalising the reasons for the decision he had made.

(c) In addition, the Judge demonstrated antipathy towards the Fifth Plaintiff by:

(i) seeking in his ruling to blame him personally, but erroneously and without fair notice, for failing to comply strictly with the discovery order; and

(ii) failing to give due consideration to the fact that the Fifth Plaintiff was not a professional litigator, that he had no experience of the practice or procedure of the Grand Court, and that he had relied, and had been entitled to rely, throughout on the advice of his Cayman attorneys."

(2) In relation to the applications covered in a judgment delivered on 28 October 2022 (concerning the First to Fourth Plaintiffs):

"(a) The Judge demonstrated from the outset of the hearing a hostility towards the submissions on behalf of the Plaintiffs, which gave the appearance, both in itself and in in (sic) the context of the attitude previously demonstrated towards the Plaintiffs of pre-judgment of the applications and/or a predisposition against the Plaintiffs;

(b) In addition, in his judgment:

(i) The Judge rejected submissions which had been made by the Plaintiffs at the hearing concerning access to justice by reference to a large number of authorities which had not been cited by any of the parties, and on which the Judge had not invited submissions from the parties prior to handing down the Judgment.

(ii) The Judge also dismissed without proper foundation evidence which had been adduced by the Plaintiffs in support of their contention that they were unable to obtain funding for the provision of security for costs, and he unfairly accused them of playing "*litigation games*", even though the

evidence of their inability to obtain funding for security for costs was entirely uncontroverted and it had never been challenged or criticised by the Defendant prior to the filing of skeleton arguments before the hearing.

(iii) In dismissing the claims of the First – Fourth Plaintiffs in this action, and throughout the hearing of the Dismissal Application, the Judge steadfastly refused to consider their merits, even though he had an unfettered discretion and the merits and quantum of the claims were very strong.

(3) In the management of the case and in his criticism of the conduct of the Plaintiffs, the Judge gave the appearance of a one-sided approach, which had little or no regard to the conduct of the Defendant in this litigation over many years, which had been heavily criticised by the former Chief Justice."

The additional factors raised in the Plaintiffs' skeleton argument

11. In the skeleton argument dated 2 June 2023 the Plaintiffs seek to rely on additional factors in support of their Recusal Applications:

(1) the Plaintiffs have been disproportionately criticised and heavily penalised for their conduct in relation to applications which Doyle J has heard without proper regard to:

(i) the gravity and magnitude of their substantive claims; and/or

(ii) the culpability of Walkers for the delayed progress of the action over the previous 6 years and the heavy costs which had been incurred, as found by the former Chief Justice, who was uniquely placed to assess such matters. Instead Doyle J has focused in his Judgments on the prejudice that Walkers might suffer as a result of the continuing litigation and on its need for finality. This was a seriously unbalanced approach to this case (paragraph 29 of the Plaintiffs' skeleton argument dated 2 June 2023);

(2) the grounds of the Recusal Applications are set out in the Schedule (paragraph 30 of the Plaintiffs' skeleton argument dated 2 June 2023);

(3) in respect of the issues covered by the judgment delivered on 25 January 2022 the Observer would conclude that the Judge had displayed a "distinct animus" towards the Fifth Plaintiff and that "his reaction had been so unusual and extreme that he could not be guaranteed to be free from unconscious bias in the future management of the case" (paragraph 40 of the Plaintiffs' skeleton argument dated 2 June 2023);

(4) in respect of the issues covered by the judgment delivered on 28 October 2022 the Judge "displayed a clear impatience with the case that was being presented on behalf of P1 – 4":

(i) counsel had referred to the Defendant's skeleton argument describing the Third Plaintiff as a 'nominal applicant' and counsel assumed that the Defendant's claim for security for costs and the dismissal of the Third Plaintiff's claim therefore fell away and the Judge "immediately stopped further consideration of the matter" and said he did not want "all these little skirmishes going on". The question whether the Defendant was persisting in its application to dismiss a multi-million dollar claim against it by one of the Plaintiffs was not a petty point;

(ii) when counsel referred the Judge to the judgments of the former Chief Justice the Judge immediately questioned their value on the grounds that the order for summary judgment had been overturned on appeal and the former Chief Justice's judgment on security for costs had been "revisited" in the Court of Appeal;

(iii) the Judge made it clear that he was not interested in considering the merits and the gravity of the claims;

(iv) the Judge did not focus properly on the reasons why counsel sought to outline the nature and gravity of the substantive claims;

(v) when counsel sought to explain that the submissions as to the nature and gravity of the substantive claims had a greater importance than the Judge had suggested the Judge interrupted the submissions;

(vi) the Judge was "unnecessarily combative" in his challenge to counsel for the First to Fourth Plaintiffs in reply on the question of the adequacy of evidence as to inability to fund security for costs; and

(vii) the Judge did not once question or express any concern to counsel for Walkers as to how long his submissions might take;

(5) The judgment delivered on 28 October 2022 was "unusual" in the following respects:

(i) in the introductory section the Judge cited a number of authorities not included in the parties' list of authorities for the hearing;

(ii) the Judge chose not to address "the extraordinary facts which had given rise to the claim" and did not refer to the concerns expressed by the former Chief Justice about the Defendant's actions or the fact that the President of the Court of Appeal had expressed the view that the conduct of the Defendant was indefensible. The Judge made selected references to the history of the proceedings. The Judge unfairly characterised the evidence before the Court regarding attempts to obtain funding to provide security for costs and unfairly rejected Mr Macaulay's evidence;

(6) The Observer would be aware of the risk of unconscious bias in favour of "a preeminent international law firm on the Islands."; and

(7) "While some (albeit not all) of these concerns may not by themselves trouble the [Observer], cumulatively – and together with the knowledge of what had proceeded on the Discovery Application – they present an overall picture that would increase the concern of [the Observer] as to the ability of Doyle J to deal with further applications in this action completely free from any unconscious bias. The [Observer] would conclude that there was a real possibility of such bias." (paragraph 47 of the skeleton argument of the Plaintiffs dated 2 June 2023).

The evidence, judgments and transcripts of the hearings

12. I record that I have considered all the evidence that has been filed in respect of the Recusal Applications.

13. I have also considered the judgments and transcripts of the hearings which appear in the bundles. They speak for themselves.

Submissions

14. I record that I have considered all the written and oral submissions placed before the Court in respect of the Recusal Applications.

Law

15. The relevant law is largely common ground between the parties and I have considered the references to it by counsel and I have read the relevant judgments in the bundle of authorities.

16. I endeavoured to outline some of the relevant law in *Jian Ying Ourgame High Growth Investment Fund* (FSD unreported judgment 19 July 2022) and *In the matter of Principal Investing Fund I Limited and others* (FSD unreported judgment 21 November 2022) and do not set it all out again in this judgment but have full regard to it.

17. The relevant test is well established and common ground between the parties. It is whether the fair-minded and informed observer (the "Observer"), having considered all the facts, would conclude that there was a real possibility that the judge was biased (*Perry v Lopag Trust* CICA 19 November 2021; Sir Jack Beatson JA at paragraph 152).

18. I described some of the attributes and presumed knowledge of the Observer at paragraphs 72-78 of my judgment in *Principal Investing*.

19. Mr Matovu helpfully referred to the recent judgment of Hugh Sims KC (sitting as a Deputy Judge of the High Court of England and Wales) in *Ryan v HSBC UK Bank Plc* [2023] EWHC 90 (Ch) and the summary at paragraph 14 of the position of the Observer abbreviated to FMIO in that case. Mr Simpson agreed that this was a correct and helpful summary. The Observer:

> "a. is a member of the public who is reasonably balanced: "*neither complacent nor unduly sensitive or suspicious*"; *Johnson v Johnson* (2000) 201 CLR 488, 509

(Kirby J), approved in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at [14] (Lord Steyn), and in *Helow* at [2];

b. is not to be confused with "*the opinion of the litigant*" – the litigant lacks objectivity, and may think there is bias where the FMIO would not; *Harb v HRH Prince Abdul Aziz* [2016] EWCA Civ 556 at [69];

c. knows that "*judges, like anybody else, have their weaknesses*: and "*will not shrink from the conclusion, it if can be objectively justified, that things that they have said or done or associations they have formed may make it difficult for them to judge the case before the* (sic) *impartially*"; *Helow* at [2];

d. recognises a slip in judicial standards, or even apparent hostility to an advocate on one side may not equate to bias; "*From time to time, the patience of judges can be sorely tested by the behaviour of advocates. Sometimes, a judge will overreact and unwisely make an intemperate comment. But judges are expected to be true to their judicial oaths and not allow their feelings about an advocate to affect their determination of the case they are hearing*" *Harb v HRH Prince Abdul Aziz* at [71];

e. is "*informed*" such that she "*will take the trouble to inform herself on all matters that are relevant*", "*takes the trouble to read the text of an article as well as the headlines*", "*is able to put whatever she has read or seen into its overall social, political or geographical context*" and understands the importance of "*context*"; *Helow* at [3];

f. will be less inclined to consider there is a real possibility of bias where the issue is a hard edged question of law, but will recognise that bias may be more easily in play where the issue involves a discretionary, or fact sensitive process (this necessarily means concerns as to bias are likely to be more prevalent at first instance);

g. will consider the "tone" and "trenchancy" of past and present opinions expressed by, and language used by, a judge and whether these might be indicative of unconscious bias – these may be more influential than the actual substance of any findings, depending on the circumstances and facts of the case: *In re Medicaments* at [85] & [89];

h. will consider the proximity in time of any of the events or matters relied on: *Locabail* at [25];

i. "*always reserves judgment on every point until she has seen and fully understood both sides of the argument*"; *Helow* at [2];

j. understands that judges are "*trained to have an open mind*"; *El-Farargy v El-Farargy* [2007] EWCA Civ 1149 at [26];

k. will give significant weight to traditions of judicial integrity and of the judicial oath to "*do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will*"; *Helow* 2007 SC 303 (Extra Division, Inner House) at [35], *Helow* (House of Lords) at [57], and so may be said to initially approach an allegation of bias with some scepticism, particularly where it relates to present or past associations between the judge and a lawyer appearing before them (cf. *Harb* at [69]);

l. recognises the oath is not a complete answer and unconscious, or subconscious, bias may still be an issue; *Broughal v Walsh Brothers Builders Ltd and another* [2018] EWCA Civ 1610, [2018] 1 WLR 5781, at [23] (Patten LJ);

m. is not to be treated as having the same level of specialist knowledge as to the law or "*minutiae of procedure*" – the informed member of the public is not a lawyer; *Locabail* at [17]; and

n. overall looks at the matter on a "*broad view*" basis; *Davidson v Scottish Ministers (No 2)* [2004] UK HL 34, at [56]."

20. For my part I am also acutely conscious of the profound and insightful words of Benjamin Cardozo in *The Nature of the Judicial Process* (1921) which I quoted in the paper I delivered on 25 September 2013 "*Is your Latimer House in order?" Providing objectively independent courts in small jurisdictions* (available at www.courts.im):

> "We may try to see things as objectively as we please. Nonetheless, we can never see them with eyes except our own."

21. In dealing with the Recusal Applications in this case I have tried, insofar as humanly possible, to see the concerns raised by them through the eyes of the Observer, or as Mr Matovu put it "wearing the hat and the mindset" of the Observer.

22. The grounds for the Recusal Applications appear to include reliance on three main areas:

(1) judicial criticism against the Fifth Plaintiff for failing to comply with a court order;

(2) judicial rejection of evidence adduced by the Plaintiffs, criticisms and a decision against them; and

(3) judicial interventions during the hearing on 5 October 2022.

23. In the context of the Recusal Applications presently before the court it may therefore be useful to highlight the following non-contentious points:

(1) Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V.C. in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at page 480, although stressing that every recusal application must be decided on the facts and circumstances of the individual case, stated that they could not conceive of circumstances in which "previous judicial decisions" could soundly found an objection;

(2) The three judges in *Locabail* also added:

> "The mere fact that a judge, earlier in the same case or a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection." (quoted by Sir Jack Beatson JA at paragraph 163 of his judgment in *Perry v Lopag*; CICA judgment 11 November 2021 with errata 19 November 2021);

(3) "Third, it was perfectly proper for the judge to express preliminary views about the strength or weakness of each party's case during the proceedings and no criticism could reasonably have been made of him if his comments had been made in open court. There is nothing wrong with a judge indicating provisional views, and advocates are generally grateful for such indications as it gives them an opportunity to correct any misconception which the judge may have and to concentrate in their submissions on those points which appear to be influencing the judge's thinking. The expression of such views could only be thought to indicate bias if they are stated in terms which suggest that the judge has already reached a final decision before hearing all the evidence and argument. That was not the case here …"

(paragraph 34 of the judgment of Leggatt LJ in *Bubbles & Wine Limited v Lusha* [2018] EWCA Civ 468);

(4) "It is of course a fundamental principle of civil justice that everyone is entitled to a fair trial before an independent and impartial tribunal … The Board also has in mind that these are proceedings of a commercial nature and that the parties were represented by experienced leading counsel … There can be no doubt that the judge's remarks at the case management conference and during the trial were forthright and robust and it would have been better had he expressed himself in a more moderate manner. But they must be considered in context. Some of them were made in the course of interchanges with counsel in which the judge was seeking to make clear the aspects of the claim which, as a matter of principle, he found difficulty accepting; others were made so that counsel understood his preliminary views on particular issues. The remarks he made when handing down his judgment reflected the decision he had reached. It is also apparent from the transcript that all of these remarks were of a kind with which the counsel before him, both of whom were highly experienced, were well equipped to deal. The Board is satisfied that, having regard to the nature of these proceedings, the parties to them and the skill and experience of those representing them, a fair minded observer, who heard these remarks in the context in which they were made, would not conclude that the judge had set his mind against the Liquidators or had predetermined the case against them …"

(paragraph 36 of the judgment of Lord Kitchin, with whom Lords Kerr, Briggs and Leggatt and Lady Arden agreed in *Byers v Chen Ningning* [2021] UKPC 4);

(5) "93. However, I do not think that either the Judge's expression of her irritation and disapproval, or her indication (if such it was) that this pattern of behaviour on the part of the Appellant was relevant generally to the substantive case, was unfair or founds any suggestion that it caused the Appellant to perceive that the Court was irritated with its Counsel for no good reason. The fact is that the Skeleton Argument was late; the reason was characteristic of the Appellant's habit of disregarding its obligations whether procedural or substantive; it caused inconvenience to a no doubt over-stretched Judge. Judges may differ as to the extent of their irritation and the fierceness with which they

evince it. But these variations are human; and they do not render one trial fair and the other not.

94. Nor can it realistically be thought to have created an impression of a real risk of bias. The informed and realistic observer would appreciate that such judicial irritation is not ordinarily a sign of bias, but of the difficulties caused to the proportionate adjudication of a matter and to the smooth running of the lists of other matters when the Rules which are designed to facilitate the Court's task are not sufficiently complied with; and that judicial temperament varies without signifying bias or predisposition for or against a party.

95. In my judgment, the criticism, and some measure of judicial irritation, were justified; and whilst the latter was perhaps overdone the more generally disorganised state of the Appellant's case and the back history of non-compliance with the Court's directions (to which I have referred previously) is also to be borne in mind.

96. I do not consider that the fair-minded and informed observer, having considered the facts of the late instruction of solicitors and Counsel, and the consequent (very) late provision of the skeleton argument, would have concluded that the exchange indicated a real possibility of bias: that observer would in fairness have concluded that the Appellant's case had started badly because of shortcomings in its case and presentation of its own making, which it was neither impermissible nor unfair for the Judge to point out and criticise."

(Hildyard J in *M&P Enterprises (London) Limited v Norfolk Square (Northern Section) Ltd* [2018] EWHC 2665 (Ch));

(6) "29. The mere fact that a judge has decided applications or issues in the past adversely to a litigant is not generally a reason for that judge to recuse himself at further hearings: if that were not the case, the same judge could not make two successive interim decisions in a case without risking accusations of bias. It would make it impossible for there to be a designated judge assigned to the hearing of complex cases with multiple interim applications. The fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, that he or she will have pre-judged, or will not deal fairly, with all future applications by the same litigant. For example, in *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551 a designated trial judge who had previously held a litigant guilty of contempt (in the course of which he had made

adverse credibility findings against the litigant) was held by this court to be justified in not recusing himself from the hearing of the trial, where there was little overlap between the issues in the contempt proceedings and the trial.

30. The position might well be different if in the past the judge has expressed a final, concluded view on the same issue as arises in the application. However, the involvement which I have had with this case in this court has not required me to form a view on any of the issues which arise for decision on this appeal. The issues which I have dealt with have been concerned with whether there are grounds for challenging the judgment of HHJ Melissa Clarke on the substantive issues of trade mark infringement, and whether there were grounds for re-opening the appeal which met the demanding threshold in CPR 52.30. None of that can be relevant in any way to whether, at the earlier stage, Mr Recorder Campbell QC should have recused himself from hearing the summary judgment applications which were before him. I need hardly add that the fact that Ms Vanderbilt disagrees with the outcomes of her application for permission to appeal, and of her application to re-open the appeal, has no bearing on whether I should recuse myself from hearing this appeal. The same applies to her view that a judge who has refused permission to appeal should not determinate an application to re-open the appeal."

(Floyd LJ with whom Patten LJ agreed in *Zuma's Choice Pet Products Limited v Azumi Limited* [2017] EWCA Civ 2133); and

(7) "4. The other ground on which Mr. Simamba relies is what he describes as "*the history of this case*". It is true that two judges in this court, Beatson JA and Martin JA, have given rulings adverse to this applicant. But the idea that that gives rise to real or apparent bias on the part of any member of this court is baseless. Justices in the Grand Court have previously rejected Mr. Simamba's submissions, in proceedings which this court will, in part, have to consider. But it is fanciful to suggest that that provides any basis for challenging the impartiality either of those judges or the judges of this court. The fact that one judge has made adverse rulings in the past is no basis for an assumption that that judge will not deal fairly with future applications by the same litigant (see e.g *Zuma's Choice Pet Products Ltd v*

Azumi Ltd [2017] EWCA Civ 2133 at [29]). That principle applies *a fortiori* to members of this court who have had, in any event, no previous occasion to consider Mr. Simamba's litigation. The history of Mr. Simamba's failures to persuade other judges of the merits of his arguments affords no foundation for a challenge to the constitution of this Court, which, it ought to go without saying, will remain true to its office and to the oaths each member has taken. The members of this Court could not identify any basis for recusal."

(Moses, Rix, Birt JJA in *Simamba v The Attorney General of the Cayman Islands* CICA judgment delivered 10 November 2022 with errata on 24 November 2022; The Judicial Committee of the Privy Council (the "Privy Council") on 17 May 2023 refused permission to appeal in JCPC 2022/0114 because the appeal did not raise an arguable point of law).

The correct approach

24. The authorities establish that in considering a recusal application the court should adopt a two stage approach. First, establish the correct factual context. Secondly, apply the recusal test to that factual context.

25. Lord Bingham in *Prince Jefri Bolkiah v State of Brunei* [2007] UKPC 62 stated:

> "15. The common law has recognised that a judge may be disqualified from adjudicating on a case where, even though no actual bias on his part is shown, the circumstances are such as to give rise to an appearance of bias, that is, to an impression that the judge may be influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case. But who is to judge whether such an appearance exists? The answer is now clear. The court must judge. It must do so having ascertained all the circumstances which bear on the suggestion that the judge was (or would be) biased. And it must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias…"

26. It is important for the judge considering the recusal application to look at the issues arising from the perspective of the Observer.

Determinations in respect of the grounds for the Recusal Applications

27. Having considered the Recusal Applications, the evidence, the law and the submissions I have come to the conclusion that the Observer, having considered all the facts and circumstances of this case, would not conclude that there was a real possibility that the Judge was biased.

28. I set out my reasons for such conclusion below and do so by way of reference to the factors the Plaintiffs rely on in the Schedule provided on their behalf. Where relevant and appropriate I have also had regard to the additional factors relied upon in the evidence filed on behalf of the Plaintiffs and the written and oral submissions placed before the court on their behalf.

Factors 4 (1) and (2) of the Schedule – justice seen to be done and unconscious bias

29. In respect of factors 4(1) and (2) of the Schedule, the Observer would simply note these factors as obvious and trite.

Factors 5 (1)(a)(i) to (iii) of the Schedule – judicial criticism against Fifth Plaintiff for failure to comply with a court order

30. In respect of factors 5 (1)(a)(i) to (iii) of the Schedule, the Observer would note the criticisms and conclude that there was nothing untoward in a judge criticising a party for non-compliance with a court order.

31. The Observer would note that the Judge at paragraph 145 of the judgment delivered on 25 January 2022 expressly noted the submission that the Fifth Plaintiff had in effect "substantially complied with his discovery obligations and there was no need to provide a list or inspection as required by the May 2021 Order because he had agreed with the Defendant that the documentation he had provided to the Defendant from the commencement of the proceedings would be treated as his discovery and there was little else to discover". The Observer would also note how the Judge dealt with this submission in his judgment.

32. The Observer would also note from paragraph 146 of the judgment delivered on 25 January 2022 that the Fifth Plaintiff had not as required by the May 2021 Order filed "a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues by 4pm on 5 November 2021."

33. The Observer would also note that the Judge at paragraph 155 in his judgment delivered on 25 January 2022 expressly recorded that he "took into account the Fifth Plaintiff's evidence that … the parties had in effect agreed that formal lists of discovery were largely unnecessary and he had already provided most of the discovery." Moreover the correspondence that had taken place prior to the expiry of the deadline for compliance with the order had been fully set out and taken into account in the judgment delivered on 25 January 2022. Taking into account all the relevant facts and circumstances the Observer would not properly conclude that the Judge had criticised "the Fifth Plaintiff unreasonably and disproportionately for failing to comply with the prior discovery order." The Observer would be aware of the need for parties to comply with Court Orders and accept as inevitable judicial criticism against a party who had failed to comply with court orders. The Observer would not regard such as indicative of a real possibility of bias. The Observer would not conclude that the Judge had displayed a "distinct animus" towards the Fifth Plaintiff. The Observer would fairly note that Mr Potts at page 44 of the transcript of the hearing on 16 November 2021 submitted that the Fifth Plaintiff was "not himself a Cayman Islands lawyer or familiar with the intricacies of whether applications could be dealt with in correspondence or in an application."

34. The Observer would note the reasonable concerns expressed by the Judge in respect of the failure of the Fifth Plaintiff to comply with three paragraphs of the eight paragraph order made on 10 May 2021 namely paragraph 4 (discovery list), paragraph 5 (inspection) and paragraph 7 (the provision of a detailed and meaningful draft of proposed further directions to a main trial of all disputed issues). The Observer would note the response of the Fifth Plaintiff's attorney Mr Potts KC when he was questioned as to his duties as an officer the court. Mr Potts stressed (at page 91 of the transcript) that he was "an advocate for the client, the Fifth Plaintiff and I'm approaching matters in accordance with my instructions … my instructions were to approach the matters today in the way I have done …" The Observer would conclude that the Judge was entitled to accept such statements from an officer of the court at face value and that the Judge was also entitled, in the circumstances made known to the Judge at the time, to criticise the Fifth Plaintiff for failure to comply with the Order made on 10 May 2021. The Observer would conclude that nothing that

happened at the hearing on 16 November 2021 and nothing in the reasons delivered on 25 January 2022 gave rise to a real possibility of bias.

35. The Observer would not find it unusual or surprising that a Judge was stressing the importance of compliance with court orders and criticising a party for failing to comply with court orders. The Observer would note the fact that in law the primary responsibility for complying with court orders is on the parties in respect of whom the order is granted and that parties cannot justifiably hide behind their lawyers in an attempt to excuse non-compliance. The Observer would note the Judge's justifiable comment at paragraph 28 of the judgment delivered on 25 January 2022: "The failure of the Fifth Plaintiff to assist the Court is unsatisfactory and worthy of judicial criticism. I do not make that comment lightly."

36. The Observer would note that, in accordance with usual procedure, an advance draft of the reasons for decisions made on 16 November 2021 was provided to the parties not just 72 hours in advance as specified in Practice Direction No 1/2004 *Corrections to Judgments* but in fact 7 days in advance. The advance draft was circulated on 18 January 2022 and the judgment was not delivered until 25 January 2022 some 7 days later. The Observer would note as a fact that the Fifth Plaintiff did not raise any concerns in respect of the judgment which he now raises in support of his recusal application filed on 17 April 2023 some 15 months later. The Observer would note from page 131 of the transcript of the hearing on 5 October 2022 that when the Court of Appeal issued an advance draft of one of its judgments the Plaintiffs were not slow in providing their comments and "objected to or invited the court to review the narrative of facts which appeared in the judgment" and reference was made to the last line of the first paragraph: "The court took the view that the judgment does not make any findings and everything is up for argument at the trial."

37. In respect of factor 5 (1)(a) of the Schedule, at worst the Observer may think that this was the Judge oversharing his desire that court orders be strictly complied with (as had been made clear to the parties by the email dated 22 October 2021 4:40pm from the Judge's PA) and that parties co-operate to enable appropriate directions to be made for trial. The Observer would not regard such matters as indicative of a real possibility of bias.

Factor 5 (1)(b) of the Schedule – the Judge taking time to let the "dust to settle"

38. In respect of factor 5 (1)(b) of the Schedule, the Observer would consider that there was nothing improper, after the vigorous exchanges with counsel at the hearing, in taking time to let the "dust settle" before finalising the reasons for the Judge's decisions. The Observer would note that nowhere in the reasons delivered on 25 January 2022 did the Judge indicate that he had been "personally affronted by the conduct of the Fifth Plaintiff."

39. The Observer would not be unduly concerned with the delay in the production of the judgment or consider that such gave rise to a real possibility of bias. The Observer would not fairly conclude that the Judge's apology for the time taken to produce the reasons and his explanation that this was to allow the dust to settle so that his thought process was not adversely impacted by the Fifth Plaintiff's failure to comply with a court order and the court's direction to co-operate was, as submitted by Mr Matovu, an indication that the Judge "had lost self control … so much so that he had been unable to think straight." This was something of an exaggerated court-room forensic flourish that would, perhaps, have been better left in the mind rather than dropped from the lips of an attorney as a considered submission. The Observer would simply note that the Judge had properly taken time for reflection or as Mr Simpson put it demonstrated " moderation in the context of the full background facts of which the fair minded and informed observer would have been aware." The judgment dealt with serious issues which required serious consideration over a period of time, with the Christmas and New Year holidays intervening and other pressing judicial commitments to attend to. The Observer would note that decisions had been announced at the hearing on 16 November 2021, draft reasons circulated 18 January 2022 and reasons delivered 25 January 2022. The Observer would note that the time within which the reasons were delivered was well within Practice Direction No 1 of 2012 *Delivery of Reserved Judgments* which provides: "It is now the established practice that reserved judgments arising from cases in the Financial Services, Civil and Family Divisions of the Grand Court will be delivered within two to three (2-3) months" and "While it is the policy of the judiciary that these established practices shall be maintained, it must also be recognised that countervailing circumstances will sometimes arise." The Observer would not regard the timing or contents of the reasons as giving rise to a real possibility of bias.

Factor 5 (1)(c) of the Schedule – the Judge demonstrating antipathy towards the Fifth Plaintiff

40. In respect of factor 5 (1)(c) of the Schedule, the Observer would not conclude that the Judge "demonstrated antipathy towards the Fifth Plaintiff" but would simply note the Judge's valid criticism of a party who had failed to comply with a court order.

41. In respect of reliance on advice from attorneys the Observer would note the contents of the eighth affidavit of the Fifth Plaintiff sworn on 12 April 2023 before Mr Macaulay, described by Mr Matovu as the US attorney engaged by the Plaintiffs, and in particular paragraphs 15 and 19 and his instructions to issue the summons dated 4 November 2021. The Observer would also note page 91 of the transcript of the hearing on 16 November 2021 where the Fifth Plaintiff's attorney stated that he was acting on the instructions of the Fifth Plaintiff. The Observer would note the contents of the sixth affidavit of the Fifth Plaintiff sworn on 4 November 2021 before Mr Macaulay in which the Fifth Plaintiff does not seek to justify his non-compliance by indicating that he simply relied on his attorneys. In any event the Observer would also be aware that, in civil proceedings in general, the action or inaction of a party's legal representatives must be treated as the action or inaction of the party himself. Moreover, the Observer would be aware that a party is personally responsible for complying with court orders in respect of that party. The Observer would conclude that factor 5 (1)(c) of the Schedule does not give rise to a real possibility of bias. The Observer would also find the Fifth Plaintiff's explanation in a sworn affidavit that the non-compliance was "inadvertent" difficult to accept, as indeed did the Judge.

42. Although it had not been raised in the Schedule or in the skeleton argument of the Plaintiffs Mr Matovu in his oral submissions referred to page 92 of the transcript of the hearing on 16 November 2021 and the Judge's following comments to Mr Potts KC for the Fifth Plaintiff:

> "The order provides liberty to apply. If by any chance you get instructions from the Fifth Plaintiff for you to be at liberty to act as an officer of the court and to assist this court then no doubt you can liaise with Mr Simpson, you can come up with another provisional trial timetable and you can come up with further dates. Anything else you want to say in connection with the time periods I'm minded to impose on this order at this time?"

Mr Matovu suggested that such comments were laced with sarcasm, outside the normal standards expected from the bench and suggested a strong antipathy towards the Fifth Plaintiff. The Observer

would fairly put these comments in their proper context and appreciate that they arose from the understandable frustration of the Judge at the failure of the Fifth Plaintiff and his counsel to assist the court in respect of directions towards trial. The Observer would not regard such comments as indicative of a real possibility of bias.

Factor 5 (2)(a) of the Schedule – the Judge demonstrating hostility towards the submissions on behalf of the Plaintiffs

43. In respect of factor 5 (2)(a) of the Schedule, the Observer would conclude that an objective consideration of the hearing on 5 October 2022 (including the transcript of it) revealed that the Judge did not display a "hostility towards the submissions on behalf of the Plaintiffs" but on the contrary gave the First to Fourth Plaintiffs a fair hearing and permitted their counsel to present his submissions on their behalf.

44. The Observer would consider the facts and would not reasonably conclude that the Judge had demonstrated "hostility towards the submissions on behalf of the Plaintiffs" nor had he demonstrated an attitude of "pre-judgment of the applications and/or a predisposition against the Plaintiffs."

45. The Observer would fairly place the First to Fourth Plaintiffs' "little skirmishes" point in its proper context. The Observer would note that at the beginning of his oral submissions counsel for the First to Fourth Plaintiffs raised what he described as a preliminary point which he said arose from paragraph 4 of the Defendant's skeleton argument which described the Third Plaintiff as a 'nominal applicant'. The transcript reveals the following exchange:

> "Mr Matovu: … I read from that that the defendant's claim for security for costs and the dismissal of the third plaintiff's claim therefore falls away. I wonder if my learned friend could confirm that.
> Mr Justice David Doyle: I don't want all these little skirmishes going on. I really want to hear, in substance, what your submissions are on your application. If you want a skirmish on that, we can have one, but we're going to waste a lot of time and it's your time we're wasting.

> Mr Matovu: No, it was simply a sentence, yes or no, but I hear what your Lordship says and we can pursue that in correspondence. That's not a problem.
> Mr Justice David Doyle: Thank you."

46. The Observer would from that transcript reasonably and fairly conclude that it was wrong of the First to Fourth Plaintiffs to say that "the Judge immediately stopped further consideration of the matter." In fact the Judge expressly stated: "If you want a skirmish on that, we can have one …" The Observer would fairly and reasonably conclude that the exchange reflected a Judge wishing to take some control of the proceedings and encourage counsel to focus on matters of substance and properly use the time allocated for the hearing. The Observer would note that the Judge did not describe it as a "petty point". The Observer would note that the Judge was rightly keen that counsel focus on matters of substance and not be distracted by "little skirmishes".

47. The Observer would note the fact that the former Chief Justice's judgment on summary judgment was "overturned on appeal" (page 8 of the transcript) and that the former Chief Justice's judgment on security for costs was "revisited in the Court of Appeal." (page 13 of the transcript), as correctly stated by the Judge and that such statements did not give rise to a real possibility of bias.

48. The Observer would note the comment of the Judge at paragraph 162 of his judgment: "I agree with Mr Matovu that this is an important case and that there are serious issues to be tried … I appreciate that a dismissal is prejudicial to the Relevant Plaintiffs." Moreover the Observer would not consider the Judge's treatment of the submissions on the merits as indicative of a real possibility of bias.

49. The Observer would conclude that the complaints of the First to Fourth Plaintiffs that the Judge had interrupted their counsel in respect of his submissions as to the nature and gravity of the substantive claims were not indicative of a real possibility of bias. The Observer would note that day in and day out judges intervene during the submissions of counsel and the interventions in this case were not indicative of a real possibility of bias but rather indicative of a Judge who was trying to ensure that counsel utilised his time at the hearing appropriately. The Observer would also note that the Judge was fairly and transparently indicating to counsel the points of concern upon which he wished counsel to address him and was trying to understand the relevance of counsel's submissions on the "merits".

50. In respect of the complaint of the First to Fourth Plaintiffs that the Judge was "unnecessarily combative in his challenge to counsel" (unrealistically promoted by Mr Matovu in his oral submissions to the Judge commencing a cross-examination of counsel) on the question of the inadequacy of the evidence as to the inability to fund security for costs the Observer would note the following exchanges (at page 111 of the transcript):

> "Mr Justice David Doyle: I mean we have no evidence from them, have we?
> Mr Matovu: You have the evidence from Mr Macaulay.
> Mr Justice David Doyle: Sorry, we have no evidence from them, have we? We haven't.
> Mr Matovu: No, and you've got evidence, I reply, my Lord, from Mr Macaulay.
> Mr Justice David Doyle: I understand that.
> Mr Matovu: And Mr Macaulay's evidence is not controverted, it's not challenged. There's no reason why your Lordship should doubt what he is saying. No evidence has been put in which challenges, or changes the burden of evidence to him to rebut anything that may be said.
> Mr Justice David Doyle: So you say the authorities don't suggest that the court should expect to see evidence from funders?
> Mr Matovu: The authorities I come to now."

51. The Observer would note that the Judge then permitted counsel for the First to Fourth Plaintiffs to develop submissions on this point at considerable length (pages 112 – 117 of the transcript) which ended with the Judge at page 117 stating:

> "Thank you very much, that's very helpful. Thank you."

52. On those pages the transcript refers to a number of brief interventions of the Judge:

> "Yes, I have the bundle here" (page 112)
>
> "Yes" (page 113)
>
> "This is tab 8, is it?" (page 115)
>
> "Yes, I have it" (page 115)

53. The Observer would not conclude that the Judge had been "combative" or "unnecessarily combative" or had started to cross-examine counsel in his exchanges as to the lack of evidence as to funding. The Observer would note that the Judge fairly and transparently stated his concerns to counsel for the First to Fourth Defendants and gave him a full opportunity to address him on this important issue. Such was far from being "unnecessarily combative" or conduct that is indicative of a real possibility of bias. The Observer would note that the Judge in his judgment delivered on 28 October 2022 dealt with the evidence from Mr Macaulay at pages 35-38 and the Fourth Plaintiff at pages 38-39. The Judge also covered the relevant law in respect of relevant evidence and arrived at his conclusions for the reasons stated in his judgment. The Observer would conclude that the complaints of the First to Fourth Defendants as to the exchanges and determinations on the evidence were not indicative of a real possibility that the Judge was biased.

54. In respect of the complaint from the First to Fourth Plaintiffs that the Judge did not once question or express any concern to counsel for Walkers as to how long his submissions might take, the Observer would note that counsel for the Defendant did not give any suggestions or indications that he would overrun. There was therefore no reason for the Judge to express time concerns to him.

55. The Observer would note that the First to Fourth Plaintiffs at paragraph 2 of their skeleton argument dated 30 September 2022 had agreed with the time estimate of half a day for the hearing of their summons and the summons of the Defendant. The Observer would note at page 1 of the transcript, the Judge asked counsel if they had "both agreed a batting order and the allocation of time" but did not get a satisfactory response from either counsel and therefore at pages 4 – 5 set out the "batting order" and asked counsel "What are you thinking about time?" Counsel for the First to Fourth Plaintiffs referred to the hearing being allocated half a day but added "It's my view that we may trespass over that". The Judge then permitted counsel for the First to Fourth Plaintiffs to open his submissions (pages 5 – 20 of the transcript). Counsel at page 20 indicated that the Court was "rushing" him. The Judge at page 21 stated that it was his intention to provide a fair hearing and expressed his disappointment that counsel had not agreed time allocation amongst themselves. The Judge at page 21 stated:

> "… even if I give you an hour, that's going to slip into the afternoon, but I will give you an hour to open this. Is that rushing you?"

Mr Matovu accepted that the court was not intending to rush him.

56. At page 23 the following exchange took place:

> "Mr Justice David Doyle: How long do you think you reasonably require to open?
> Mr Matovu: At the moment, my Lord, it is now 10.30. I'm going to go as fast as I can to be done by 11 o'clock.
> Mr Justice David Doyle: Thank you."

57. As it transpired Mr Matovu did not finish his opening oral submissions until "just after 11.20" (page 54 of the transcript).

58. Mr Simpson started his submissions at 11.35am and finished these well before the luncheon adjournment (recorded at pages 55-103 of the transcript). Mr Matovu's opening submissions are recorded at pages 6-55 of the transcript. Mr Matovu made his oral submissions in reply (recorded at pages 104-118 of the transcript) with the court adjourning at 1.18pm. The court resumed at 2.30pm and heard from Mr Simpson in respect of the Defendant's application (pages 118-125 of the transcript). Mr Matovu replied (pages 125-144 of the transcript).

59. The Observer would note that the Judge permitted Mr Matovu to overrun his allocation of time. After the discussed cut off time of 11am Mr Matovu stated "I would ask your Lordship to allow me to make submissions on the facts knowing that your Lordship has read the affidavit" and the Judge responded "I will allow you to do that … I'm allowing you to continue for a short time." Mr Matovu, an experienced KC, continued until just after 11.20am in opening the summons of the First to Fourth Plaintiffs and despite prompting from the Judge (see page 55 of the transcript) did not seek any further time.

60. The Observer would conduct a fair and balanced consideration of the transcript of the hearing and the judgment delivered on 28 October 2022 and would not regard the contents as indicative of a real possibility of bias.

Factor 5 (2)(b)(i) of the Schedule – the Judge rejecting submissions made by the Plaintiffs concerning access to justice

61. In respect of factor 5 (2)(b)(i) of the Schedule, the Observer would not accept as fair or informed the criticism by the First to Fourth Plaintiffs that the Judge rejected submissions made by them concerning access to justice by "reference to a large number of authorities which had not been cited by any of the parties, and on which the Judge had not invited submissions from the parties prior to handing down the judgment."

62. The Observer would note that the well-known authorities referred to in the introductory section of the judgment simply recorded various trite principles of law and would further note that upon receipt of an advance copy of the judgment none of the parties expressed a desire to further address the court on these well established principles.

63. The Observer would note that the Judge in the introductory part of his judgment delivered on 28 October 2022 referred, amongst other matters, to issues expressly raised by or discussed at the hearing with counsel for the First to Fourth Plaintiffs namely (1) access to justice; (2) the overriding objective; (3) cards on the table from the outset and one bite at the cherry; (4) finality; (5) proportionality; and (6) policy considerations and security for costs.

64. The Observer would note at that pages 10-12 of the transcript the First to Fourth Plaintiffs' counsel is recorded as making submissions on the overriding objective and issues of proportionality and "access to the courts" which he says "is enshrined in the common law as well as the European Convention on Human Rights" and "Supreme Court authority" and "Article 6". The Observer would also note that on pages 35-36 of the transcript the First to Fourth Plaintiffs' counsel is recorded as accepting that in exercising its jurisdiction the court also has regard to "the principles of finality". The Observer would also note that the Judge at page 37 expressly raised with counsel for the First to Fourth Plaintiffs his multiple "bites of the cherry" concerns. The Observer would note many references throughout the transcript in respect of policy considerations and security for costs (for example pages 10-13, 28, 54, and 105). The Observer would note that counsel for the First to Fourth Plaintiffs had only referred to one authority (namely *Goldtrail* [2017] UKSC 57) in his skeleton argument dated 30 September 2022. The Observer would not regard reference to such

introductory matters in the judgment as surprising or as indicative of a real possibility of bias on the part of the Judge.

65. The Observer would note that under the heading "*Access to Justice*" in the judgment the only authorities referred to were the well-known *Unison* case [2017] UKSC 51 and the comments of Lord Reed at 68 and Section 7(1) of the Bill of Rights scheduled to the Cayman Islands Constitution. The Observer would also note that the First to Fourth Plaintiffs were, in accordance with the usual process, provided with an advance draft of the judgment on 21 October 2022 and made no complaints in that respect.

66. The Observer would note that at paragraph 84(1) of the judgment delivered on 28 October 2022 the Judge referred to the submission made on behalf of the First to Fourth Plaintiffs that: "this case is an important case for the Relevant Plaintiffs and the legal system of the Cayman Islands and it would be contrary to the overriding objective to stop it going to trial and being heard on its merits" and at paragraph 84 (5) and (9) noted the submissions on the stifling point and at paragraph 84 (10) noted the submission on behalf of the First to Fourth Plaintiffs that "it would be disproportionate to dismiss the claim without a hearing on the merits."

67. There is nothing in factor 5 (2)(b)(i) of the Schedule that would lead the Observer to conclude that there was a real possibility of bias.

Factor 5 (2)(b)(ii) of the Schedule – the Judge dismissing evidence which had been adduced by the Plaintiffs

68. In respect of factor 5 (2)(b)(ii) of the Schedule, the Observer would note from paragraph 150 of the judgment delivered on 28 October 2022 the Judge's reference to the need of the First to Fourth Plaintiffs to support their assertions "with evidence from those specific members of family and those specific friends who have funded." The Observer would note that no such evidence was presented to the Judge.

69. The Observer, having considered all the relevant facts, would not regard the Judge's comment at paragraph 151 of the judgment that "Litigants must take the legal consequences of "tactical" decisions or the "litigation games" they play" as unfair. The Observer would be aware of the facts and the changing position of the Plaintiffs on the stifling point. The Observer would note that at

paragraphs 71 – 79 of his judgment delivered on 28 October 2022 the Judge fairly referred to the evidence adduced by the Plaintiffs namely the evidence of Mr Macaulay and the Fourth Plaintiff and set out his reasonable concerns in respect of the evidence provided at paragraphs 153-154 of his judgment.

70. The Observer would note the Judge's comments in the judgment he delivered on 28 October 2022 (especially at paragraphs 150, 152, 153, 154) on the evidence adduced by the Plaintiffs and would conclude that such were not indicative of a real possibility that the Judge was biased.

Factor 5 (2)(b)(iii) of the Schedule – the Judge "steadfastly refusing" to consider the merits of the First to Fourth Plaintiffs' claims

71. In respect of factor 5 (2)(b)(iii) of the Schedule the Observer, on a fair and objective reading of the transcript of the hearing on 5 October 2022, would not consider the Judge's approach in respect of the "merits" arguments put forward on behalf of the First to Fourth Plaintiffs as indicative of a real possibility of bias.

72. The Observer would note that the Judge at page 23 of the transcript is recorded as indicating to Mr Matovu that there was no problem with him putting his clients' case "forcefully" and at page 24 that Mr Matovu should develop his submissions as he sees fit.

73. The Observer would note the following additional references from the transcript of the hearing on 5 October 2022:

(i) At pages 8 – 10 counsel for the Plaintiffs developed his submission that "the plaintiffs' claim in this action is a massive claim and a very serious one" and addressed the court on the merits of the claim through the eyes of the Plaintiffs and then took the Court to *Goldtrail*. Counsel for the Plaintiffs continued his submissions at page 17-19 on the "merits" and the Judge on page 20 having previously indicated that he needed to be addressed on material change of circumstance and the consequences of failing to comply with an order for security, intervened after hearing the submissions recorded on 19 pages of the transcript and tried gently to encourage counsel to get to the main points stating: "I'm not sure this is the best use of the limited time that you have available… going through the

claim. I'm not sure. I have read your skeleton which outlines the claim. I have looked at the pleadings. I'm not sure – it's a matter for you…";

(ii) At page 24 the Judge stated:

"You develop your submissions as you see fit …"
The Plaintiffs' attorney then continued his submissions on the "merits" stating that the claim should go to trial as it raised "really serious issues";

(iii) The Plaintiffs' attorney took the Judge to the former Chief Justice's judgment and the Judge read the paragraphs as requested (page 25 – 26 of the transcript); and

(iv) The Plaintiffs' attorney from pages 104 – 106 of the transcript also advanced his submissions on the "merits" and "the consequences for the administration of financial services" and stressed "This is a really important case."

74. The Observer would note that in the 11 page skeleton argument of the First to Fourth Plaintiffs dated 30 September 2022 there was detailed references to the merits of their case (at paragraphs 7 to 18 which occupied 4 pages) and their criticism of the approach of the Defendant (at paragraphs 18 to 24 which occupied nearly 3 pages) and a chunky quote from the former Chief Justice's security for costs judgment criticising the approach of the Defendant including criticism for playing cards "as closely to the chest as possible."

75. The Observer would note that the relevant law occupied one paragraph of 9 lines in the skeleton argument (namely paragraph 27) and the main submissions of the First to Fourth Plaintiffs occupied just 5 paragraphs. In respect of the criticism that the Judge failed to consider the former Chief Justice's criticisms of the Defendant in a judgment subsequently overturned by the Court of Appeal (paragraph 44(2) of the Plaintiffs' skeleton argument dated 2 June 2023) and had "steadfastly refused to consider" the merits of the claims of the First to Fourth Plaintiffs (paragraph 5(2) (b) (iii) of the Schedule) the Observer would note that the Judge at the outset of the hearing had stated "I have had a full opportunity of reading into the helpful bundles that have been filed in this case … and the skeleton arguments and the authorities, so I have fully read into the matter." (page 1 of the transcript). The Observer would note that the Judge had read the skeleton argument including the

detailed parts dealing with the merits of the claims of the First to Fourth Plaintiffs and the criticisms of the approach of the Defendant. The Observer would note at page 105 of the transcript the Judge says "I've got your submissions on that" where Mr Matovu refers to the merits, the consequences for the administration of financial services and the public policy and public interest issues. The Observer would also note the following exchange at pages 131-132 of the transcript:

> "Mr Justice David Doyle: … how can I possibly come to any considered view on the merits of this case or the merits of the defence, rigorously defended as it is?
> Mr Matovu: That's not my submission.
> Mr Justice David Doyle: I can't come to a view on that. I take your point this is an important case, it is important for the parties, it is important for this jurisdiction, I can understand all those points, but I'm not sure where we're going on the merits of the case.
> Mr Matovu: I'm not suggesting that your Lordship should make any determination of the merits. That is not my submission."

and at page 138:

> "So, my Lord, it does really raise very serious issues, not just for my clients, but very serious issues in the public interest. This case needs to go to trial …"

76. The Observer would note that at page 64 of the transcript the Judge commented "Absent any security for costs order, there are serious issues that could go to trial. That's common ground."

77. The Observer would note that the Judge had already agreed that the case was an important one with serious issues to be tried and this is reflected at paragraph 162 of the judgment delivered on 28 October 2022.

78. The Observer would not conclude that the Judge's treatment of the "merits" arguments raised by Mr Matovu was indicative of a real possibility of bias. The Observer would conclude that the Judge was simply doing his job in accordance with his judicial oath.

79. The Observer would have real difficulty in understanding the complaint of the First to Fourth Plaintiffs that "the Judge steadfastly refused to consider their merits, even though he had an unfettered discretion and the merits and quantum of the claims were very strong". Moreover, the

Observer would note that the Judge at paragraph 84 (1) of his judgment had recorded the submission on behalf of the First to Fourth Plaintiffs that the case was "an important case" and that it should go to trial and be "heard on its merits". The Observer, on a fair and objective consideration of the hearing and its transcript would conclude that counsel for the First to Fourth Plaintiffs had not been prevented from pursuing his submissions as he saw fit. The Observer would note from the transcript of the hearing at page 21 - 22 the Judge's desire for counsel at some stage to address him on material change of circumstances point (briefly touched upon at paragraph 26 of the skeleton argument of the First to Fourth Plaintiffs dated 30 September 2022) and the point concerning the normal consequences of a failure to comply with an order for security and expressly stated to counsel "So I think that's how your clients would be best served. If you think they are best served by using your time in another way, of course use your time in another way" and at page 24 of the transcript "You develop your submissions as you see fit." The Observer would note that such judicial remarks were not indicative of a Judge "steadfastly refusing" to hear submissions on the "merits".

80. The Observer would note that at the end of his submissions at just after 11.20am counsel for the First to Fourth Plaintiffs asked if he could assist the court further and the transcript records the following exchange:

> "Mr Justice David Doyle: No, that's been very helpful. We're just after 11.20. I hope you agree that you have been given a fair chunk of time to develop your submissions. You're not seeking any further time to do so?
> Mr Matovu: My Lord, those are my submissions.
> Mr Justice David Doyle: And you're not seeking any further time? No
> Mr Matovu: I have a right of reply.
> Mr Justice David Doyle: Of course you do, as indicated at the outset.
> Mr Matovu: Of course."

81. The Observer would note that at the beginning of Mr Matovu's reply the Judge stated (at page 104 of the transcript) "I don't want to rush things" and Mr Matovu's detailed reply submissions are recorded at pages 104 to 118 with few substantive interventions by the Judge.

82. The Observer would conclude that the Judge did not "steadfastly" refuse to consider the merits as relied upon by the Plaintiffs in factor 5 (2)(iii) of the Schedule, and that no real possibility of bias arises.

Factor 5 (3) of the Schedule – the Judge's criticisms of the conduct of the Plaintiffs

83. In respect of factor 5 (3) of the Schedule, the Observer would not conclude that in his "management of the case and in his criticism of the conduct of the Plaintiffs the Judge gave the appearance of a one sided approach, which had little or no regard to the conduct of the Defendant in the litigation over many years, which had been heavily criticised by the former Chief Justice." The Observer would not conclude that the Judge adopted "a seriously unbalanced approach to this case."

84. The Observer would note the Judge's brief and balanced overview of the case in his judgment delivered on 5 May 2021 which outlined the claims and defences. The Observer would note that at paragraph 95 the Judge agreed with counsel for the Plaintiffs that "these protracted proceedings must be progressed." At paragraph 100 the Judge reminded all the parties and their attorneys "that they have a duty to assist the court in achieving the overriding objective."

85. The Observer would note the Judge's judgment delivered on 25 January 2022 and in particular:

(i) his criticism at paragraph 25 of the attorneys acting for the Defendant for inappropriately writing to his personal assistant seeking judicial guidance and his criticism against the parties and their attorneys for attempting "to litigate matters informally via emails to the court" at paragraph 45;

(ii) his favourable comment at paragraph 46 that "wisely in this case once the Fifth Plaintiff had eventually filed his application in proper form of a summons he did not ask for it to be dealt with "on the papers."";

(iii) his refusal to grant an unless order against the Fifth Plaintiff (paragraph 147 of the judgment);

(iv) the Judge's favourable reference at paragraph 149 of the Fifth Plaintiff's counsel "powerfully" stressing a point against an unless order and fairly adding "In the context of the Fifth Plaintiffs' opposition to the imposition of an unless order that was a persuasive point."; and

(v) the Judge's findings at paragraph 155,

and the Observer would not regard such as evidence or indicative of the appearance of a "one sided approach" against the Plaintiffs.

86. The Observer would note that the former Chief Justice's judgments on summary judgment and security for costs had been overturned by the Court of Appeal. The Observer would note that the Judge in his judgment delivered on 28 October 2022:

(i) recorded at paragraph 24 that the former Chief Justice at paragraph 71 in his reasons for making an Order on 19 February 2020 stated "the granting of security would stifle what are now found to be meritorious and genuine claims";

(ii) recorded at paragraph 25 paragraph 1 of the reasons of Goldring P in granting the Defendant leave to appeal and noting that although the "acceptance of instructions from Dr Afonso Braga was indefensible, this appeal has a sufficient prospect of success for leave to be granted."

(iii) recorded at paragraph 29 the Plaintiffs' reliance on the former Chief Justice's findings;

(iv) recorded at paragraph 57 the Plaintiffs' argument, when seeking permission from the Privy Council to appeal, that the Court of Appeal failed to take proper account of the merits; and

(v) recorded at paragraph 155 that he did not accept a submission made by counsel for the Defendant that "the mere unwillingness by a third-party backer to fund proceedings, as opposed to inability, is insufficient to discharge the relevant burden in respect of stifling",

and would not regard such as evidence of or indicative of the "appearance of a one-sided approach" in favour of the Plaintiffs or indicative of a real possibility of bias against the Plaintiffs.

87. The Observer would regard the Plaintiffs' complaints of the Judge displaying antipathy and hostility and the appearance of "one-sided approach" against them as objectively misplaced.

88. The Observer would not conclude that there was a real possibility of bias simply because the Defendant was "a pre-eminent international law firm on the Islands". The Observer would be aware that "judicial experience, by its nature, conditions the mind to independence of thought and impartiality of decision" (see the words quoted at paragraph 18 of Lord Bingham's judgment in the *State of Brunei* case). The Observer would be aware that the Judge had first been appointed to a High Court position in 2003 and was not lacking in judicial experience. The Observer would see no room for unconscious predisposition or apparent bias in this case.

General

89. The Observer would note that the Plaintiffs themselves (at paragraph 47 of their skeleton argument dated 2 June 2023) expressly recognised that some of their concerns would not "trouble" the Observer. Mr Matovu in his oral submissions stated: "I accept that if one takes each point of complaint in isolation, each point alone may not establish a concern of apparent bias, but the point is that it is the picture overall that the fair-minded observer would have in mind, and by which the question of apparent bias is to be assessed from a starting point of everything that has gone before."

90. The Observer would consider all the concerns expressed by the Plaintiffs individually and cumulatively but would not conclude that there was a real possibility that the Judge was biased.

91. The Observer would conclude that the Judge did his best in accordance with his judicial oath to fairly and justly determine the legal issues before him having taken into account the evidence, the law and the submissions. The Observer would note that the Plaintiffs and their legal advisers are deeply disappointed and disagree profoundly with some of the issues determined against them but would conclude that such disappointment and disagreement is insufficient to establish a real possibility of bias.

92. The Observer would note that when the Plaintiffs first raised recusal concerns in March 2023 (after the Defendant has filed its summons dated 21 February 2023 for consequential relief in respect of all Plaintiffs) these were in relation to previous rulings of the Judge in January and October 2022 and that these developed over time into concerns in respect of:

(1) judicial criticism against the Fifth Plaintiff for failing to comply with a court order;

(2) judicial dissatisfaction with evidence adduced by the Plaintiffs, criticisms and a decision against them, and

(3) judicial interventions during the hearing on 5 October 2022

and the Observer would not conclude that such concerns raised a real possibility of bias.

93. It is well established that previous decisions or criticism against a party or dissatisfaction with evidence presented on behalf of a party are not, without more, usually a proper ground for recusal.

94. In respect of the judicial interventions the Observer would note that judges are not reasonably expected to sit mute while legal arguments are being presented. Counsel are usually assisted by being informed as to the concerns of the judge in order that they have an opportunity to deal with them before judgment is delivered. The Observer would conclude that the Judge's interventions in this case were motivated, not by partiality, but by a desire (1) to ensure that counsel made the most effective use of his time (pages 20-23 of the transcript); (2) to alert counsel to the need to address the Judge on the material change of circumstances issue as relied upon at paragraph 26 of the skeleton argument of the First to Fourth Plaintiffs dated 30 September 2022, the consequences of failure to comply with an order for security for costs issue and the jurisdiction issue (pages 15 and 16 of the transcript); and (3) to try and understand the reason for counsel's repeated references to the merits and the perceived strength of the Plaintiffs' case (pages 8, 13, 20, 105 and 131 of the transcript). The Observer would not regard these interventions, in the context of ordinary judicial practice, as unusual or giving rise to a real possibility of bias on the facts and in the circumstances of this case.

95. It may be that the Observer would not have delved into all the detail in the same way I have done. I am acutely conscious of the need to view the concerns of the Plaintiffs through the eyes of the Observer. In my judgment whether the Observer takes a detailed approach or gets into a helicopter and rises above the detail taking a high level broad brush overview approach, the Observer would reach the same conclusion, namely that in the circumstances and on the facts of this case a real possibility of bias simply does not arise.

96. Standing back and looking at all the relevant facts and circumstances the Observer would not conclude that there was a real possibility that the Judge was biased.

97. There are no proper grounds requiring recusal in this case. Absent proper grounds for recusal I am duty bound to continue to sit in respect of the outstanding issues in these proceedings.

98. I should record, for the sake of completeness, that I have considered the Precautionary Principle as outlined at paragraphs 85-89 of my judgment in *Principal Investing*. Mr Simpson submitted that the application of the Precautionary Principle in "association" cases (i.e. those cases where the judge is alleged to have some association with parties or witnesses and something else may arise at trial) is clear enough but it is difficult to see how it would apply in this case. Mr Matovu submitted that the Precautionary Principle was not just a "better safe than sorry" test and that it underlines the need that justice must be seen to be done. The Precautionary Principle does not require me, on the facts and circumstances of this case, to decline to sit in respect of the outstanding issues in these proceedings.

99. The Plaintiffs are right to stress that it is of fundamental importance that the local and international community's trust and confidence is maintained in the administration of justice. Such confidence will be maintained and indeed enhanced when judges rightly dismiss recusal applications which are not based on proper grounds. I am reminded of the words of Stanley Burnton J in *R (Toovey and Gwenlan) v The Law Society* [2002] EWHC 391 (Admin) at paragraph 80:

> "Applications for the court to recuse itself have become increasingly fashionable of late, regrettably often with no factual or legal justification. It may be tempting for a client to want to recuse the Court when he perceives his case is failing, but that is no justification for counsel to make the application … it is for counsel to satisfy himself that there are reasonable grounds for making such an application. It is also regrettable that the clients on whose instructions the application was made were solicitors."

100. I dismiss the Recusal Applications for the reasons stated in this judgment.

Ancillary applications

101. Any ancillary applications (such as costs) should be filed and served within 14 days of the date of the delivery of this judgment together with concise (no more than 5 pages) written submissions in support. Any concise (no more than 5 pages) written submissions in opposition should be filed

with 14 days of service of the relevant application. I intend to deal with such applications on the papers without the need for a further oral hearing.

Orders

102. The attorneys should file within 7 days from the delivery of this judgment draft orders reflecting the determination in this judgment namely that the Recusal Applications have been dismissed.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT