Case No: J90PE914 AND K00LU633

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PETERBOROUGH DISTRICT REGISTRY
SITTING IN THE COUNTY COURT AT NORWICH

Date: 29 JANUARY 2025

Before :

HHJ KAREN WALDEN-SMITH

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Between :

(1) ABBOTSLEY LIMITED **Claimants**
(2) VIVIEN INEZ SAUNDERS
- and -
(1) PHEASANTLAND LIMITED **Defendant**
(2) KEITH MALCOLM BLACKALL
(3) CHRISTINA BLACKALL
(4) JOHN ALAN GEARING
(5) VIRGINIA LYNN MELESI
(6) STEPHEN JOHN NEWLAND
(7) LAURENCE ANTONY HONEYWILL
(8) DARREN HONEYWILL
(9) ALAN JAMES STEELE
(10) VALERIE ANNE HOLLIMAN
(11) JOY CARROLL SEILLER
(12) NEIL RAYMOND WARREN (Deceased)
(13) JEREMY CHARLES IAN BRINDLEY
(14) A PERSON KNOWN AS COLM

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KERRY BRETHERTON KC and SAMUEL WARITAY (instructed by way of **DIRECT ACCESS)** for the **FIRST AND SECOND CLAIMANTS**
RICHARD BOTTOMLEY (instructed by **DEBENHAMS OTTAWAY LLP**) for the **FIRST DEFENDANT**
MOHAMMED HAFIAZ (of **LEEDS DAY**) for the **FIFTH DEFENDANT AND THIRTEENTH DEFENDANT**
SECOND, THIRD, FOURTH AND NINTH DEFENDANTS IN PERSON

Hearing dates: 6 and 7 JANUARY 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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HHJ KAREN WALDEN-SMITH:

Introduction

1. These are the judgments on the applications made in the application notice dated 28 November 2024 heard over 2 full days on 6 and 7 January 2025. The judgment with respect to the consequences of the consolidation of the proceedings, particularly with respect to whether costs budgeting is to be revisited, will be dealt with in a separate judgment.

2. Originally, 6 January 2025 was listed for the hearing of the CCMC in this case. That one day listing was extended to two days (6 and 7 January 2025) in order to additionally deal with the applications made by the first and second claimants on 28 November 2024 and also to deal with the first and second claimants' appeals against the determination of the DJ Falvey, together with a renewed application for permission on ground 2 of the notice of the appeal.

3. As matters transpired, and given the level of dispute between the claimants and the defendants, by 6pm on the second day the only issues that had been argued in full before me were the three applications contained in the claimants' application dated 28 November 2025 and the arguments with respect to whether the consolidation of the proceedings ordered on 3 April 2024 enabled the claimants to re-argue costs budgeting so that the claimants could contend that the budgeting should allow for senior and junior counsel.

4. It is clear that this is a case which takes a great deal of court time and resource. It is also clear to me that because this case does require court time and resource it is essential that the court focusses on the need to provide that time so that further delays do not occur in resolving the issues in dispute.

Confusion after 3 April 2024

5. At the hearing on 3 April 2024 the court refused the application for a preliminary issue, consolidated the two sets of proceedings and listed this matter for a 15-day hearing commencing on 6 January 2025. The court did so having asked for, and received, dates of availability from the two counsel the second claimant wishes to instruct on her behalf and on behalf of the first claimant to act at trial, counsel for the first defendant, solicitor for the fifth and thirteenth claimant and the other defendants. At the hearing on 3 April 2024, it was agreed that the case would be listed for a CCMC in June 2024 and that the court would contact the parties for details of their dates of availability for the CCMC.

6. Unfortunately, the day after the hearing Mr Waritay, junior counsel instructed by the claimants (who had not been present at the hearing), wrote to my clerk to indicate that he was not in fact available for the 15-day hearing that had been fixed for hearing from 6 January 2025. That 15-day listing had been obtained after some considerable efforts by the court to find a mutually convenient period for the hearing.

7. In his email dated 5 April 2024, Mr Waritay wrote in the following terms:

> "Unfortunately there has been some misunderstanding of my dates to avoid. My clerk was initially asked to provide dates to avoid up to and including December 2024. This was done. It does appear that just before the Easter rush my clerk was later asked for further dates to avoid in January and February 2025 but unfortunately he misread the email as simply a confirmation of the earlier request for dates to avoid up to December 2024. I unfortunately was not privy to this further request and did not know that the further dates to avoid had been requested."

8. That email was referred to me and I responded as follows:

> "We will look at the court diary and see if it is possible to suggest another date but it will require the moving of other cases and it may not be possible for the other parties. If we can accommodate this request we will endeavour to do so, but it may not be possible. It is why we had these discussions at the hearing. Given the need for all the parties to achieve resolution in this matter we will be looking at listing it at about the same time although it may require listing into March and we do not know whether that will be possible for all the parties."

9. As I indicated at the hearing on 6 January 2025, with hindsight I would not have been so generous and left the case listed as it had been. The only reason the trial moved from commencing on 6 January 2025 was because of Mr Waritay's request to break the fixture as he was not available, his dates of unavailability in January 2025 not having been given to court as a result of a breakdown in communication between him and his clerk. I was trying to assist, bearing in mind that the first claimant had decided not to instruct solicitors and there are additional difficulties in changing counsel when counsel is instructed by Direct Access. The consequence of endeavouring to alter the dates of the trial to accommodate Mr Waritay's other commitments is that many months were wasted before the notice of the new trial date starting on 27 February 2025 was sent out on 3 October 2024. I am not suggesting that is the fault of Mr Waritay, but it is a fact that had there not been any request to change the dates the trial would have commenced as planned on 6 January 2025. Of course, had the trial stayed in the diary for the fifteen days commencing on 6 January 2025 then either alternative counsel would have been instructed or Mr Waritay would have altered his own diary in order to accommodate this case (as he did to enable him to attend court for the hearing that did take place on 6 and 7 January 2025).

10. I am not clear as to why it took so long to refix the trial dates. I had said on 16 April 2024 (within 2 weeks of the fixing of the trial and the request to break the fixture) that I was going to finalise the order, including the dates of the trial, on 17 April 2024 so that the parties had until the close of business on 16 April 2024 to let the court know of their availability "otherwise the trial will go in for the dates arranged (at no small effort) at the hearing".

11. In addition to not knowing why the court did not send out an order fixing the new trial date at a much earlier stage than 3 October 2024, I am not clear as to why the CCMC was not listed as it should have been in June 2024 in accordance with

the original order made at the hearing on 4 April 2024. Obviously, I do not deal with my own listing and it was for the court to send out the hearing notice and to check with the parties their dates of availability for the June CCMC.

12. I have not seen any correspondence from the parties asking for the CCMC to be listed as the CCMC did not first require the notice of the trial date and could, and should, have been fixed. Had there been such communication then that may have resulted in the CCMC being listed. It was not listed and no steps were taken by the court to find dates of availability. I can only apologise for this oversight by the court. It is important to understand that my clerk is dealing with numerous different matters and that while it is understood that this case is of the utmost importance to the parties, it is just one of many, many cases that this court is dealing with.

13. When I was first informed of the issue of the failure to list the CCMC when the notice of hearing was finally sent out, I endeavoured to find a resolution by ensuring that the parties were written to and asked if a CCMC was still needed. Despite the efforts to draft potential directions by the first defendant, it was apparent that a hearing would be needed as those directions were not agreed and that led to the listing on 6 January 2025 which was then expanded to deal with the' applications made on 28 November 2024, the appeal (including the renewed application for permission and appeal if permission is granted), and whether costs budgets have been reopened as a result of the 4 April 2024 order consolidating the proceedings.

14. As a consequence of the detail of arguments between the parties, the hearing took more time than envisaged. By 6pm on the second day I had determined

(i) that the application for me to recuse myself was a distinct issue that required determination at the outset;

(ii) that I was refusing the application that I recuse myself, and that application was totally without merit;

(iii) that I was not granting a transfer to the Central London County Court;

(iv) that I was granting the adjournment of the trial and that the trial from 27 February 2025 to 19 March was to be vacated and that it would be listed from 29 April 2025 to 23 May 2025 save that 3 of the 4 days 12 to 15 May 2025 may be days that the court would not sit due to counsel's unavailability;

(v) subject to when the main trial completes, the trial of the issues involving the thirteenth defendant be listed for hearing on 27 and 28 May 2025;

(vi) directions re the consolidated trial comprising the claimants and the defendants, save the thirteenth defendant whose trial is being dealt with separately at the end of the main trial, including that the obligation to redraft the statements of case is dispensed with – those directions are contained in the order from the hearing on 6 and 7 January 2025;

(vii) that I would provide a separate judgment dealing with the issue as to whether the claimants were able to re-argue an entitlement to costs budgeting to cover the costs of instructing a senior junior and leading counsel where the decision had been made not to instruct solicitors.

Recusal as a distinct application

15. The claimants, represented by Kerry Bretherton KC and Samuel Waritay, were keen for the application to recuse to be heard by together with the application to transfer and the application to adjourn. The submission was that the recusal application was interlinked with the application for a transfer and an adjournment and that the application made on 28 November 2024 should be treated as one application rather than one notice containing three separate applications to (i) adjourn; (ii) that I recuse myself from hearing the case any further; (iii) there be a transfer to the Business and Property Court List (BPB List) at Central London County Court. Counsel for the first defendant, Richard Bottomley, supported by the solicitor for the fifth and thirteenth defendants, Mr Hafiaz, and the other defendants who were present, contended that the recusal application should be heard as a preliminary matter and separately to the application to transfer and adjourn.

16. In my judgment, the application to recuse is clearly a distinct matter which involves the party seeking such a determination in establishing that there is either an actual or, as in this case, apparent, bias on the part of the decision maker. By endeavouring to include, as part of the application to recuse, the applications to transfer and adjourn, the claimants were seeking to bolster what I found to be an application which was totally without merit.

17. As Mummery LJ set out in *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, the disqualification of a judge for apparent bias is not a discretionary matter. There is either the real possibility of bias, in which case there was no valid objection to trial with that judge, or there was no real possibility of bias in which case there was no valid objection to trial with that judge:

> "What is the position of this court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.
>
> As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the

> relevant circumstances and then decide whether there is a real possibility of bias."

18. Whether a case needs to be adjourned or transferred to another court, because of delays in the original court, has nothing to do with whether "the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased." (see *Porter v Magill* [2001] UKHL 67). Delays in the courts' processes, and even mistakes on the part of court staff, cannot be interpreted as creating a "real possibility" of bias by a "fair-minded and informed" observer. The hypothetical informed observer would be aware of the reasons for the delay and being fair-minded could not logically infer that delays were evidence of a real possibility of bias.

19. It ought to have been abundantly clear from the authorities and the facts of this matter that the delays, relied upon for the adjournment of the trial fixed to commence on 27 February 2025, could not support a recusal application made on the basis of an allegation of apparent bias. The disqualification of a judge for apparent bias is not discretionary and the court needs to consider what it is that the judge has done that could be interpreted by a fair minded and informed observer as creating a real possibility of bias. The assertion that the application for an adjournment and the application for recusal were intertwined was not well made. The delay by the court in sending out notices with the formal listing of the claim, and the failure of the court to obtain dates to avoid for the purpose of a CCMC in June 2024, is a very real issue and led me to conclude (as I will set out below) that there was really no alternative but to adjourn the trial of this matter. By relying on those delays, which have resulted in an adjournment of the trial, the claimants have sought bolster their application for me to recuse myself from continuing to hear this case. That was not appropriate.

20. Having determined that I should deal with the recusal application as a separate issue, it was clear that the issue of whether I should recuse myself from hearing this matter should be dealt with as a preliminary point. While the Court of Appeal left open the issue of whether case management orders can be made by a judge pending a determination of recusal, that could only be in exceptional circumstances. See *Mireskandari v Law Society* [2009] EWCA Civ 864:

> "We have been reminded of a number of well known authorities on the issue of recusal and apparent bias … It is not in dispute that the judge correctly applied the relevant principles in deciding to recuse himself. The general question raised is what a judge should do where a recusal application has been made and is unresolved. It is not suggested that he should never continue to make case management orders pending resolution of the recusal issue, but it is submitted that he should not do so save in exceptional circumstances. It appears to me that, as ever, all depends upon the circumstances. In such a case a judge should give careful thought to the question whether he should continue to make case management orders or whether it would be better not to do so until the recusal issue is resolved. This is because in a case where a judge subsequently decides to recuse himself, it might be right to set aside an order made in the meantime.

> There is indeed scope for argument as to the correct approach. Should orders made in the meantime be set aside as of right or is there a more general discretion, and if so, in accordance with what principles should it be exercised?" per Lord Clarke MR

If I had needed to recuse myself, that was something to deal with at the outset of the hearing as it would have impacted upon my ability to further case manage the case or make determinations with respect to transfer and adjournment. It was plain that the recusal application needed to be dealt with before other matters requiring determination. It was not a single application with three elements.

Recusal

21. Parties are entitled to an independent and fair tribunal and a judge who has exhibited actual or apparent bias must recuse themselves in order to allow a fair trial to take place in accordance with the overriding objective. It is inappropriate for a party to allege bias as a means of "forum shopping" and just because a judge may have made previous decisions against a party does not exhibit bias.

22. In this matter, the claimants do not allege actual bias but apparent bias. It is also alleged that I saw some correspondence from some of the defendants with respect to the early neutral evaluation (ENE) that I had ordered to take place before a specialist property Recorder. It is said by the claimants that I should not have seen that correspondence and that, consequently, I should not hear this case further.

23. The parties to any dispute are entitled to an independent and fair trial and if there is apparent or actual bias then the judge must recuse themselves. As set out above, it is, of course, inappropriate for a party to use allegations of bias as a way to seek a change of judge. Similarly, any concerns of the judge about the potentially prejudicial effect of deciding to withdraw from a case – both on the parties and on the administration of justice (delays and listing) – is not a reason to refuse recusal. Efficiency and convenience are not determinative legal values when considering a recusal application (see *AWG Group v Morrison)*

Timing of the application

24. The first defendant (adopted by the other defendants) submits that the claimants are out of time for making this recusal application. The matters the claimants appear to rely upon to establish apparent bias in their application dated 28 November 2024 arose on 17 May 2023 and 10 August 2023. I will deal with the various allegations and assertions made with respect to what occurred on those two days, and the second claimant's perceptions, when dealing with the specific allegations. Dealing with the delay in the application being made, the claimants (who rely on various allegations to support a course of behaviour rather than a single incident of apparent bias) waited 15 months for applying for recusal.

25. In *Bates v Post Office Limited (No. 4: Recusal Application)* [2019] EWHC 871, where the Post Office applied for Frazer J (as he then was) to recuse himself from being the managing judge in the group litigation led by Alan Bates, with respect

to what have become known as "the Horizon issues". In his judgment, Frazer J made it clear that even if he had found that there were grounds of apparent bias on the face of the particular judgment (Judgment No. 3) he would not have recused himself:

> "This is because of the fact that the Post Office waited until almost two weeks after it had received Judgment No, 3 before it did anything in respect of making an application to recuse.
>
> Here, there was not only silence by the Post Office, and continuing participation in proceedings, but there was active involvement in the actual Horizon Issues trial"

26. In *BMF Assets v Sanne* [2022] EWHC 140 Ch., Miles J referred to *Miley v Friends Life Ltd* [2017] EWHC 1583 where Turner J had cited *Baker v Quantum Clothing Group* [2009] EWCA Civ 566 for the proposition that:

> "recusal applications should be made promptly and may be dismissed if there is inordinate and inexcusable delay in raising the point; such applications go to the heart of the administration of justice and must be raised as soon as reasonably practicable"

and Miles J held that *"applications of this kind should be made as soon as possible as they affect the administration of justice."*

27. The claimants did not make the application for recusal until many months after the hearings that are now complained about, and approximately 7 weeks after the (late) notice of the hearing date. While the claimants allegation of apparent bias is not with respect to a single incident but an alleged course of conduct, that does not excuse the delay in bringing the application.

28. As has been set out by Baker LJ in *In re H (A Child) (Recusal)* [2023] 4 WLR 64, where a party argues that a particular decision during proceedings was unfair, his remedy is to seek to appeal against that decision. The claimants have not sought to appeal the decisions that are now complained about, and are now many months out of time for doing so. However, as Baker LJ explains, where a party argues:

> "that the judge's treatment of his case was unfair over the course of the proceedings and that he should therefore recuse himself … it is necessary to consider the whole of the proceedings to determine whether the judge's approach to the aggrieved party has been unfair."

The unfair approach alleged arises from the hearings on 23 May 2023 and 10 August 2023 and no explanation is given by the second claimant in her statements in support of the application for that delay. I cannot say why she decided to bring the application on 28 November 2024 to recuse, alongside her applications for a transfer and adjournment, but it is clear that the application has not been made promptly. The delay in bringing the application is a reason for it to be dismissed, but for completeness I have considered the points raised on behalf of the claimants to establish apparent bias, including the alleged impact of the emails sent by some of the defendants.

Apparent Bias

29. There is no suggestion of actual bias, the allegation is of apparent bias. Apparent bias, as is set out in *In re H,* "means a prejudice against one party or its case for reasons unconnected with the merits of the case."

30. The test for apparent bias involves the two stage process summarised by Leggatt LJ in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468:

> "The court must first ascertain in all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased: see *Porter v Magill"*

31. The first matter the second claimant (acting for herself and the first claimant) relies upon to establish apparent bias at the hearing on 17 May 2023 when there was an allocations hearing before me. The first defendant appeared by counsel and the thirteenth defendant by solicitor. The other defendants, save for the twelfth defendant, who died in the course of this litigation, appeared in person.

32. The second matter the claimants rely upon is the CCMC on 10 August 2023 which she describes as being a very intimidating hearing.

33. The claimants contend that by considering those two hearings together *"there was a real possibility that the tribunal was biased." (In re H)*. It is submitted on behalf of the claimant that there was, *"a disparity in treatment"* and that taking those two hearings, together with the complaints the second claimant has made against the court, means there is an appearance of bias.

34. I will deal with the specifics of those allegations, as set out in the second claimant's witness evidence, in due course. As I have set out already, the claimants did not appeal the determinations made at either of those hearings. The fact that decisions are made, which are for or against a particular party, does not, without more, give rise to an appearance of bias. It is inevitable that in any dispute where there are differing views on matters, at least one party is going to be disappointed with the outcome, and the fact that one party has been more successful than the other is by itself not relevant – if the case management decisions themselves are not consistently wrong, it is hard if not impossible to demonstrate consistent unfairness:

> "… judges should not fear that their professional conduct will be impugned because management decisions, taken one by one, with reasons given and no eye on the scorecard of the parties' respective successes and failures to date, are felt by one party to be unreasonably favourable to the other" per Sir Thomas Bingham MR *Arab Monetary Fund v Hashim & Ors* (1993) Times, 4 May.

35. In her fifth witness statement, the second claimant sets out a concern that she had applied to enter judgment in default on 8 March 2023 as she had not received

defences from eight of the defendants. The court would not have known whether or not the claimants had been sent those defences. She further complains that the claimants had not been notified of the fact that the court had received the defences and didn't receive any response from the court in response to a chasing letter on 26 April 2023 that defences had been received. That application to the court and the chasing letter were not referred to me and, indeed, given the volume of work that the court deals with there is no reason as to why I would have seen the application or the chasing letter at that time or that administrative staff would have had the time to examine the file to ascertain whether or not defences had been filed. It is unrealistic to think that the county court is resourced to undertake such work. It was dealt with at the May 2023 hearing.

36. At the hearing the defendants represented that they had filed the defences and, due to their own misunderstanding, had understood they would be sent to the claimants by the court. The defendants who had not served their defences were ordered to provide copies of the defences to the second claimant in order to ensure that she had seen all the defences. This was an appropriate case management decision and was not appealed. There was no basis upon which a judgment in default in this matter could be entered when there were defences filed. While the claimant expresses concern that there was no order made on the application in default, the only order that could have realistically been made would have been for the application for judgment to be entered in default to be struck out.

37. The next complaint of the claimants is that she did not receive defences on the 24 May 2023 as ordered and so she wrote on 25 May 2023 saying that she had received undated signed notes from 5 of the defendants and nothing from the other 3. She complains that she did not receive a response to that letter. Again, that letter was not referred to me and the matter was dealt with at the hearing on 10 August 2023. That is entirely standard.

38. The fourth defendant explained to the court in the course of the recusal application that the unrepresented defendants had in fact tried to deliver the defences to the second claimant but she was refusing to receive anything by email, had her gates locked, and no letter box on the gate and so the defences were thrown over the fence in an attempt to serve her.

39. With respect to the complaint raised by counsel on behalf of the claimants with respect to the application made in default with respect to the defences, the highest it was put was that the second claimant's "perception" was that she was being treated in a different way. That, of course, is not the test for apparent bias and does not give any basis for making an application for recusal for apparent bias – whether standing alone or with other assertions. It provides no evidence of apparent bias. The most it provides evidence for is the claimants' anxiety to obtain judgment in default on this relatively complex issue. The second claimant expressed her disappointment during the hearing on 10 August 2023 but accepted that she had seen documents from the defendants. The case management orders made were appropriate in order to ensure that matters were progressed in a proportionate manner and no appeal was made against the orders made.

40. The claimants' next complaint relates to the fact that she was served with 6164 documents on 24 July 2023, two days before the exchange of witness statements

due on 26 July 2023. The claimants do not suggest that the alleged late disclosure by the first defendant can be any evidence of apparent bias on the part of the court. The complaint seems to be that this was "hugely unfair and a sanction ought to have been applied against the First Defendant. This did not seem to register with the court at all. I have no doubt that had I behaved in this way that the court would have penalised me." I do not know on what basis she makes the final statement that she would have been treated differently but it does appear that the reference to the disclosure of 6146 pages made by the second claimant (in a hearing which lasted from 10.56 to 16.27, excluding judgment) was limited to this reference included in the transcript:

"*Judge Walden-Smith: -- that is fair; and that means that a little more sympathy and empathy on both sides will just help the case proceed in a better way; OK?*

Second Claimant: Yes, your Honour

Judge Walden-Smith: Yes? I mean that makes sense, does it not?

Second Claimant: Yes. I mean, I – you know, when I read the emails that – the woman here trying to get my OBE removed and fingers crossed they get a conviction and this sort of thing, I mean it is very – it is quite distressing and this all came in a very late disclosure: 6,146 disclosed two days before we were due to exchange witness statements, on the basis that Pheasantland's chairman has a law degree and Debenhams Ottaway had maintained that all the correspondence going back was privileged because he had a law degree. So two days before, we are exchanging witness statements, and I have – receive all this: it is very, very distressing.

Judge Walden-Smith: OK

Second Claimant: Fortunately, I still have my OBE and please let me go on having it. Thank you, your honour."

41. The reference to late disclosure was made in a matter of seconds in a hearing which took many hours of court time and was raised, not on the basis that the defendants should be sanctioned or that they were late in their disclosure, but that in the course of seeing the disclosure the second claimant said she had seen something that made her believe the defendants wanted to have her OBE removed, and that caused her distress. In those circumstances it may well be that this "did not register with the court at all". Again, this plainly does not give rise to any basis for alleging apparent bias, either on its own or in combination with other matters. The perception of the second claimant is not the test for apparent bias. Had the second claimant been seeking a sanction against the first defendant at this point, she could have asked for one. If she did not accept the lack of action by the court she could have appealed. She did not.

42. The next basis for the claimants alleging apparent bias is that the court ordered "modified" costs budgets to be filed by the claimants. A litigant in person is not under a duty to file and exchange a costs budget or any agreed budget discussion report thereon (CPR r 3.13 (1) and (2)). In this case, the second claimant was formerly a solicitor and has made the decision not to instruct a solicitor and instead to carry out the work that a solicitor would undertake both for herself and

for the first claimant. As she is not currently practising she is acting as a litigant in person but has decided that, when she considers it appropriate, she will instruct two counsel – both a senior junior and a silk. Given the size of the fees being sought, particularly by leading counsel, it was appropriate for a modified costs budget to be filed by the second claimant and the power to do so is contained in CPR r 13.3.

43. There is no disparity of treatment between the claimants and the defendants who are acting in person. The purpose of the costs budget is not to prohibit a party from instructing whoever they may wish to instruct but, where a party has decided not to instruct solicitors – with all the benefits that would bring that party, and the court, in the smooth running of the case – but has decided instead to expend very large sums of money on having expensive counsel (£357,600 for what was then a 12-day trial out of a total sum of £377,899) , the court has the power to manage the budgets so that there is some control on the sums that the opposing party may have to pay in costs if unsuccessful in their defence. In this case the first and second claimants are free to instruct as many counsel as they wish on direct access and at whatever cost they are willing to spend. If unsuccessful in their claim, the first and second claimants will be liable to pay their own costs and the budgeted costs of the defendants (subject to assessment) regardless of whether there is any cost budgeting of the claimants' costs. If the claimants wish to spend more than they can recover from the defendants if successful then again, that is entirely a matter for them.

44. It is submitted on behalf of the first and second claimant that there is a disparity of treatment with respect to the defendants who are acting in person. There is no such disparity. The defendants who are acting in person are not expending large sums on leading and senior junior counsel. There is nothing to cost budget. With respect to the costs budget of the first defendant the claimants, through the second claimant, decided not to challenge the costs budget of the first claimant despite my attempts to get her to do so. She told the court that she did not wish to challenge either the represented first defendant or the thirteenth defendant's precedents. That was a ultimately a decision for her.

45. Again, it was submitted before me by Ms Bretherton that it "appeared to her client" that it was desperately unfair to her. That is not the test for apparent bias. This point, either in isolation or combined with the other matters raised does not provide the basis for an argument that there had been apparent bias.

46. Finally, on the issue of apparent bias, the second claimant contends that when the court raised the issue of the possibility of an ENE, it being part of the overriding objective to consider alternative means of resolution of the case, that she felt that she was being laughed at by the defendants present in court. The exchange started with my asking the second claimant if she needed to take a moment:

"Second Claimant: Yes, I would like to take a moment because I just feel I am being run over by them all.

Judge Walden-Smith: OK, I will rise for five minutes.

Second Claimant: They are laughing; they just think it is so funny.

Unidentified Defendant: I do not think anybody is laughing.

Judge Walden-Smith: I will – Do not say anything. I will rise for five minutes.

(short adjournment)

Judge Walden-Smith: OK. Are you alright?

Second Claimant: Yes. Yes, I am, your Honour, thank you.

Judge Walden-Smith: OK. Well I am going to leave it like that …"

47. As I set out to Ms Bretherton in the course of her submissions, the advantage of being the judge in the court is that you have an ability to see everything that is happening – not least because the judge is facing the rest of the court. Someone standing addressing the court, as the second claimant was, is facing in the wrong direction and could not have seen the defendants. I consider it essential that parties are mutually respectful and this case is one which has plainly engendered a great deal of bad feeling between the parties. I was therefore particularly alert to the behaviour of all the parties and there was absolutely no laughing or inappropriate behaviour directed towards the second claimant. The allegation made by the second claimant is that:

> "I have stated the atmosphere of this hearing on 10 August 2023 was intimidating for me. It is difficult to emphasise how intimidating it was. I was distressed and outnumbered and my sense of injustice was increased by the fact that the judge appeared to be to bend over backwards for the Defendants and failed to intervene when the jeering and smirking was occurring. The clear impression I was given was the judge approved of this conduct."

48. It is difficult for me to understand how the second claimant came to the conclusions that she has. There was no "jeering and smirking" as alleged and had there been any behaviour of that sort then I would, of course, have intervened. The short part of the transcript I have referred to above shows that I was concerned that the second claimant was visibly finding it difficult to represent herself, despite her decision to do so, and therefore gave her time to compose herself. There was nothing beyond what the second claimant was imagining. I could see what was happening and there was certainly no "jeering and smirking" or anything like it. I utterly refute any suggestion that I "approved of this conduct".

49. Again, the second claimant alleges that she has been unfairly treated. That is plainly not the case. There was nothing to admonish the defendants about, whereas the second claimant (who was unwilling to accept service of the defences by email) had sent emails to the first defendant's solicitors in these terms:

> "Presumably you forgot to book Bottomley. Your actions stink. And he was pompous. Wouldn't trust you as far as you could be

> thrown. What a complete and utter disgrace you are. Vivien Saunders. (11 August 2023 08.06)
>
> The judge did NOT ask your firm to contact our counsel's clerk. You are absolutely appalling and a complete disgrace and I will notify the court of your tactics. It was for me to contact our counsel. Not you. Frankly if Pheasantland had got proper advice instead of you as a trainee stupidly writing to Anglian Water … (11 August 09.12)
>
> [An aggressive and unpleasant email to the defendants] (Wed, Aug 16 2023 at 11am]
>
> [to Mr Bottomley, counsel for the first defendant] You complete plonker – you are so up your own bottom that you can't even get the name of the court correct and the case number. Egg dribbling down your precious tie. That's another one for my book "The Law is a[n](sic.) Ass" with a picture of you. Jolly well done. Your email went to my junk folder which is where it belongs. (August 16, 2023 12:03:04)."

50. I am not clear as to whether the second claimant is contending that her language in those emails was appropriate for someone who had been a solicitor and who had decided to act on behalf of herself and the first claimant. The claimants' counsel describes the second claimant as an elderly lady, who is acting in person. Plainly her age does not inhibit her views and her decision to act in person, when she is financially able and chooses to instruct both expensive leading counsel and a senior junior, is not something she can then rely upon as a reason not to act with common courtesy. I asked all the parties to recognise the strains caused by litigation and to show each other sympathy and empathy.

51. The allegations made by and on behalf of the second claimant clearly do not support an assertion of apparent bias, either individually or collectively. It was not submitted that the test in *Porter v Magill* was met, namely that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. The allegations were all based on the second claimant's own perceptions and making a number of allegations of the nature she did does not make the application any less weak. It was an application which was totally without merit.

The ENE correspondence

52. The allegation made on behalf of the second claimant is that some of the defendants have sent correspondence to the court, apparently to notify the court that the trial would need to proceed, that included comments on the ENE hearing.

53. I made it clear in the hearing that I had been careful, both with reading the court bundle and the witness evidence that had been provided by the second claimant, not to read the contents of any correspondence which the second claimant was saying I should not read. I am careful not to leave myself open to any allegations

that I may have seen correspondence which a party is saying I should not have seen as that is a way in which I could be forced into a recusal situation by a party.

54. I had, therefore, not read the correspondence that the second claimant was concerned about. I think it was felt that I have time to read all the correspondence that is sent to my clerk. There was not correspondence to me but to my clerk. The reason why I need a clerk is that I simply do not have the time to read all the correspondence that comes into the court and matters relating to the listing of cases, for example, are not matters that my clerk would refer on to me as it for her, and others, to arrange my diary. The only time I would see correspondence relating to listing is where, for example, a party is seeking to break a fixture as Mr Waritay did in his email on 5 April 2024. Normally, if I have seen correspondence then there will be a response from me. As there was no correspondence from me (and indeed the second claimant complains I did not write to the defendants telling them to desist in their correspondence) is clear evidence I did not see the letters from the defendants complained about by the second claimant.

55. This limb of the recusal application cannot, therefore, have any prospect of success. Even if I had seen this correspondence, from what I have been told, the correspondence contains nothing which would result in conclusions being drawn against one party or the other. The matters alluded to seem to be exactly those sorts of issues that a judge is able to put to one side.

56. Consequently, this second limb of the application for me to recuse myself is also totally without merit.

Transfer

57. The claimants did not seek to advocate for a transfer of the proceedings subsequent to the decision not to recuse.

58. There was no justification for a transfer to either the High Court Business and Property Court or to the Business and Property Court List at Central London County Court.

59. The reason for the application to transfer was due to the delays in the Peterborough District Registry resulting from the failure to provide the date of the new trial more promptly and the failure to list the CCMC. That does not give a good basis for a transfer. The Advisory note at PD57AA and paragraph 3.11 and 3.14 of the Chancy Guidelines provides guidance to when a case should be listed at a particular court, namely:

1. One of more of the parties has an address or registered office in the circuit (particularly if the party is not represented); at least one or more of the witnesses is located in the circuit;

2. At least one of the witnesses expected to give oral evidence is located in the circuit;

3. The dispute occurred in a location within the circuit;

4. The dispute concerns land, good or other assets located in the circuit;

5. The parties' legal representatives are based in the circuit.

60. Save for point 5, with counsel for the first and second claimants and counsel for the first defendant based in London, with Mr Hafiaz and the unrepresented defendants all being within the region of the Peterborough District Registry, there is no connection between these cases and Central London. The parties themselves are within the region of Peterborough District Registry; and all those expected to give evidence are within the region of Peterborough District Registry; the property in dispute is within this region and the claimants seek a site visit.

61. Having made enquiries, any transfer to the Central London County Court would have, in any event, caused further delay to the proceedings being heard which is contrary to the interests of all the parties. A transfer of the consolidated cases was not appropriate, regardless of the determination on the recusal application and not transfer is ordered..

Adjournment

62. The two trials were consolidated at the hearing which took place on 4 April 2024. As I have set out above, it was ordered by me that there should be a CCMC in June 2024 subject to the court obtaining the dates of availability of the parties. Unfortunately, in the circumstances I have set out above, by error of the court the CCMC was not listed in June 2024. While the hearing originally listed for 6 January 2025 was extended to 7 January 2025 and was originally for the hearing of the CCMC it was used for hearing the application made by the claimants on 28 November 2024, namely recusal, transfer and adjournment. Some directions were given with respect to the furtherance of the consolidated claims, which I will deal with below, but the cost management was not touched.

63. The court always has to work in accordance with the overriding objective set out in CPR 1 whereby the court deals with cases justly and at proportionate cost.

> "… in deciding whether or not to grant an adjournment, the court must have regard to the overriding objective of the Civil Procedure Rules set out in CPR 1.1, an in particular at subrule (2) of that rule. Having regard to the overriding objective requires the court to deal with a case, so far as is practicable in a manner which saves expense, is proportionate to the amount of money involved and allocates it to an appropriate share - - but no more than an appropriate share – - of the court's limited resources. Courts are directed (by CPR 1.4) to have the overriding objective in mind when managing cases. " per Chadwick LJ in *Boyd & Hutchinson (A Firm) v Foenander* [2003] EWCA Civ 1516.

64. The parties are also required to assist the court with fulfilling that overriding objective (CPR 1.3).

65. In *Fitzroy Robinson Limited v Mentomore Towers Limited* [2009] EWHC 2070 (TCC) Coulson J (as he then was) set out the relevant principles governing an application to adjourn, with the starting point being the overriding objective with the court ensuring that the parties on an equal footing and that the case is dealt with proportionately, expeditiously and fairly:

> "and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases.
>
> More particularly, as it seems to me, a court when considering a contested application at the 11th hour to adjourn the trial, should have specific regard to:
>
> (a) The parties' conduct and the reason for the delays;
>
> (b) The extent to which the consequences of the delays can be overcome before the trial;
>
> (c) The extent to which a fair trial may have been jeopardised by the delays;
>
> (d) Specific matters affect the trial, such as illness of a critical witness and the like;
>
> (e) The consequences of an adjournment for the claimant, the defendant, and the court."

66. This case is taking a great deal of court resource. It is the consequence of a case involving so many parties and there being little common ground. In order for the case to be dealt with justly and proportionately it is necessary for it to be heard as soon as possible, with the parties obtaining determinations from the court.

67. The most important factor for the court to determine is whether, in accordance with the overriding objective, the parties could have a fair trial from 27 February 2025. It was clear to me that, unfortunately, it would not be possible for the trial to take place so quickly after the hearing on 6 and 7 January 2025. I do not consider it was appropriate for leading counsel for the claimants to describe the directions proposed by the first defendant, drafted in a genuine attempt to keep the trial date, as being "utterly absurd". It is that sort of pejorative language which is adding to the heat in this matter and I would be grateful if counsel who are instructed could exercise some restraint. However, given the unfortunate inability of the parties to co-operate, I do consider those directions to be unworkable. That need for time was even more apparent when the submissions on the recusal application took a day of court time, before dealing with any other issues, which has had the consequence of needing even more time of the court for the resolution of other matters (such as the appeal) which has an impact upon when the parties can be ready for trial. For example, as a consequence of the time taken on the unsuccessful recusal application, other matters, including the appeal, could not be reached.

68. The delay to this trial being able to be met is ultimately due to the court's own failure to send out the order providing for the date for the hearing and the failure to list a CCMC. Neither party can be blamed for the delay (although it does not appear that the parties were pushing for the CCMC to be listed) and that delay does, in my judgment, jeopardize a fair trial. The first defendant had been preparing disclosure and has started to prepare witness statements in readiness for the trial, however the fact that the claimants have not been preparing in the same way is not something they can be criticised for. There had been no CCMC and no directions with respect to what was needed in preparation for the trial.

69. I fully appreciate the issues with respect to the costs incurred by the first defendant already in preparation for the trial commencing on 27 February. That is why I have made efforts to ensure that the trial is back in the diary as soon as is possible, which is difficult given the length of the trial. I am therefore ordering an adjournment of the trial until 29 April 2025.

70. Directions were given on 7 January 2025, including an order that I dispensed with the need for the claims, as consolidated, to be repleaded, directions for disclosure and inspection, witness statements and trial bundles. Provision was also made provision for the potential of the need for a further hearing to deal with any future specific disclosure application. The directions are designed to ensure that the trial can proceed without any further difficulties from the date fixed for trial from 29 April 2025.

71. There are further hearings in this case on 17 February 2025 and on 20 and 21 February 2025. This is a total of 5 additional days for various preliminary, case management and appeal issues before getting to the 15 day trial. This is a considerable amount of court resource.

72. The judgment with respect to the cost budgeting issues will follow this judgment in the next day or so.