CA on appeal from Chesterfield CC (Mr Recorder Ian McLaren QC) before The LCJ : Sir Anthony Clarke:: May LJ : 21st March 2006.

Lord Phillips CJ : This is the judgment of the court.

Introduction

1. This case came before the court as an application by Mr Smith for permission to appeal against a judgment on liability given against him by Mr Recorder McLaren QC, nearly 5 years ago, on 25 April 2001. There has been some procedural delay in bringing this application to a hearing, but it was made a little over 4 years out of time. It has been referred to the full court because of the importance of the issues that it raises and, for that reason, not merely has the respondent company been invited to appear on this hearing, but the Bar Council has been given an opportunity to intervene.

2. In a case such as this, where the respondent appears to resist an application for permission to appeal, the merits of the appeal itself tend to be fully argued. Accordingly, the normal practice is for the court to direct that the hearing will embrace both the application for permission to appeal and, if permission is granted, the appeal itself. On this occasion the court ordered that the hearing should be limited to the issue of whether permission to appeal should be granted. This was because of apprehension on the part of Mr Smith as to his potential liability for the costs that might be incurred on a full hearing. In the event Mr Smith has been represented, *pro bono,* by Mr Anthony Speaight QC and Miss Kate Livesey and we would like to record the appreciation of the court for their willingness to appear on this basis and for the assistance that they have afforded us. Mr Speaight developed full argument as to the merits of the appeal, as did Mr Philip Turton on behalf of the respondent, 'KCF'. In these circumstances, we suggested to counsel that it would be sensible, if we were minded to grant permission to appeal, to determine the appeal on the basis of the arguments submitted to us. Counsel agreed to this course, which we shall adopt.

The Recorder's decision

3. Mr Smith's claim is for serious personal injuries that he sustained in a road accident in Thailand on Christmas Eve in 1996. He was being driven in a car owned by KCF. The driver, Paul Andrew, who was aged 21, was killed in the accident. The sole issue at the trial was whether Mr Andrew was driving with or without the consent of Mr McIntyre, KCF's manager in Thailand and the person for whom the car in question had been provided by KCF. It was common ground that Mr Smith had the onus of proving that Mr Andrew was driving the car with Mr McIntyre's consent and that, if he failed to do so, his claim could not succeed. Mr McIntyre gave evidence that he had not given his consent and, although there were aspects of his evidence that were unsatisfactory, the Recorder held that Mr Smith had failed to prove that his evidence on the critical issue was not accurate. Accordingly, his claim was dismissed.

4. Mr Smith contends that the judgment should be set aside because there was an appearance that the Recorder was biased, for two quite different reasons. The first was that he was the head of the chambers to which both counsel for Mr Smith, Mr Dominic Nolan and counsel for KCF belonged ('the chambers point'). The second was that the Recorder had acted for companies in the same group as KCF in the past and was, furthermore acting for such companies in litigation that was still ongoing at the time that he heard Mr Smith's action, ('the client point). Both these facts were disclosed to Mr Smith shortly before the hearing. He made no objection at the time, but he contends that the circumstances were such that his consent to the Recorder remaining seized of the case did not amount to a waiver of his right to raise an allegation of bias.

The facts giving rise to the allegation of bias

5. Mr Speaight made it plain that it is not alleged that the Recorder was actually biased in reaching his decision. What is alleged is that there was an appearance of bias. The circumstances giving rise to that allegation are as follows.

6. The Recorder was the head of the chambers to which both Mr Nolan and Mr Turton belonged. Mr Smith's solicitors informed him of this on the morning that the case was heard, adding, according to Mr Smith, that because the Recorder liked both men he would be impartial.

7. In the course of Mr Nolan's opening, the following exchange took place:

"*JUDGE McLAREN:* *I should have added, Mr Nolan, that I have frequently acted for this company in this country in many mining accidents of relatively – there is a schedule, by the way, at 128 – I had better mention it, I forgot. I have acted for this – probably this insurance company but I do not know which insurance company it is – and I certainly acted for this company in various forms under the Cementation heading and am still acting for this company in litigation in this country. I should have mentioned that before I started.*

MR NOLAN: *Your Honour had because your honour had …*

JUDGE McLAREN: *I asked that a message be got to you, yes.*

MR NOLAN: *Through the offices of Your Honour's clerk, the message was transmitted to the parties. Your Honour, I am happy to indicate at this stage that Mr Smith has been fully informed of Your Honour's status as a Recorder and of the fact that Your Honour has acted and may in the future continue to act for an associated company, if not the defendant company itself, and Mr Smith, through me, indicates that he makes no application for any disqualification of the tribunal."*

The reference to a schedule at p 128 is not relevant in the present context. As is apparent from this exchange, the Recorder had taken steps before the hearing to inform Mr Smith of his professional involvement with KCF.

8. At the request of the court Mr Nolan has provided a statement dated 4 January 2006 setting out, to the best of his recollection with the help of a contemporary note, the advice that he gave to Mr Smith in conference before the trial. Mr Smith has waived privilege in relation to this. Mr Nolan advised on the basis that there was a continuing professional relationship, through solicitors, between the Recorder and KCF. While Mr Nolan referred to the fact that both he and KCF's counsel were in the same chambers as the Recorder, he did not advise him that this was something to which Mr Smith was entitled to object, for he could conceive of no basis upon which this could prejudice Mr Smith or the interests of justice. He did, however, advise Mr Smith that it was open to him to seek an adjournment and a trial before another judge on the ground that the Recorder acted for KCF. At this stage no distinction was drawn between that company and others in the same group. Mr Nolan counselled strongly against this course. He stated that it was an advantage that the Recorder was a member of his chambers as he knew his qualities and the nature of his approach. He was able to reassure Mr Smith that he could expect a fair trial and that there would be no question of the Recorder being biased.

9. At the request of the court the Recorder has produced a Memorandum dated 24 January 2006 setting out the result of a check that he has made of the extent of his professional relationship with companies in the KCF group. He was never instructed by KCF itself. In 1995 he was instructed for a company in the same group as KCF on an interlocutory appeal. In 1998 he advised in writing and settled a contribution notice for a company in the same group as KCF. In 1999 he began acting in group litigation for 34 different companies, three of which were in the KCF group. His last involvement with this litigation, prior to Mr Smith's trial, was in November 2000 but the litigation remained ongoing at the time of Mr Smith's trial. On each occasion that he was instructed for a member of the KCF group, his client had the benefit of insurance so that the insurers were primarily concerned with the conduct of the litigation.

10. It is apparent that the Recorder, who understandably did not have a precise recollection of the matters that we have just described, somewhat exaggerated his professional involvement with KCF at the trial. We do not think that this is material. Indeed, his own perception of his involvement at the time is probably more relevant to the issue of bias than the precise position as subsequently ascertained.

Submissions: the chambers point

11. Mr Speaight did not submit that an appearance of bias arises simply from the fact that a Recorder is a member of the same chambers as counsel appearing before him. Mr Bankim Thanki QC, instructed by the Bar Council, had come prepared, as his skeleton argument demonstrated, to meet such a submission. In the event he was not called upon to do so.

12. Mr Speaight drew attention to circumstances in which a Recorder might be financially affected by a ruling made against counsel in his chambers. Members of some chambers share expenses on the basis of contributing a percentage of earnings. In such circumstances, a ruling that reduced the earnings of counsel appearing before him could result in an increase of the contribution to expenses made by the Recorder. Examples were a strike out application or an application for permission to appeal. Such a situation could arise in a particularly acute form where the counsel in question was acting under a conditional fee agreement.

13. Mr Speaight made a further submission which, on analysis, did not relate to bias. He submitted that a fair trial was put at risk where a Recorder was the head of chambers of counsel appearing before him. Support, or lack of it, of the head of chambers could have a significant effect on the career of an individual member of chambers. Anxiety not to offend one's head of chambers might lead to a reluctance on the part of counsel to stand up to the Recorder, or challenge his rulings, to the detriment of the client.

14. Mr Turton and Mr Thanki challenged this assertion on the ground that it was at odds with the independence of and the high professional standards observed by the Bar. Mr Thanki, in particular, submitted that Mr Speaight's reasoning would apply equally to the attitude of counsel to a judge who might be in a position to influence counsel's application for silk. In neither case was the reasoning realistic.

Submissions: the client point

15. Mr Speaight said that he understood that it was common ground that the Recorder's professional connection with KCF precluded him from sitting as judge in the case unless Mr Smith had waived his right to object. He believed that the only issue was waiver. Mr Turton told us that the respondent was willing to concede that that was arguably the position. He put it that way because he had only been instructed on the application for permission to appeal. He told us that the respondent wished to reserve the right to argue on an appeal that this was an example of the borderline category of case referred to in ***Taylor v Lawrence*** [2003] QB 528 at 549 and that the professional connection between KCF and the Recorder was not so significant as clearly to disqualify the Recorder from sitting in the absence of waiver. Rather, this was one of those situations where it was right for the Recorder to raise the question of whether he should sit, but where that question could only be answered in the light of discussion with counsel.

16. After it had been agreed that the court should proceed to determine the appeal if permission was granted (as stated above), it was further agreed that the respondent should be permitted to make further submissions on the point in writing if it wished. In the event the respondent subsequently set out its stance in written submissions in which it adopted the written submissions made on behalf of the Bar Council and accepted (in our view correctly) that this was not one of those borderline cases and that the only issue was whether Mr Smith waived his right to object to the Recorder trying the case.

Discussion: the chambers point

17. We can understand why Mr Speaight did not contend that the mere fact that counsel and the Recorder were in the same chambers of itself gave rise to an appearance of bias. Judges in this jurisdiction, whether full time or part time, frequently have present or past close professional connections with those who appear before them and it has long been recognised that this, of itself, creates no risk of bias nor, to those with experience of our system, any appearance of bias – see eg ***Nye Saunders and Partners v Alan Bristow*** (1987) 37 BLR 92; ***Laker Airways Inc v FLS Aerospace Ltd*** [2000] 1 WLR 113; ***Taylor v Lawrence*** [2003] QB 528 and ***Birmingham City Council v Yardley*** [2004] EWCA Civ 1756. At the same time we can see the force of Mr Speaight's submission that changes in the way that some chambers fund their expenses and the fact that counsel can now act under a conditional fee agreement mean that, in some cases at least, there may be grounds for arguing that a Recorder should not sit in a case in which one or more of the advocates are members of his chambers. Indeed we understand that the Bar Council is currently considering the implications of conditional fee agreements in this context.

18. As Mr Speaight conceded, however, the special considerations to which he drew attention do not apply on the facts of the case before us. Accordingly there is no need for us to pursue further the suggestion that an appearance of bias arose simply from the fact that the Recorder and the counsel before him were in the same chambers.

19. We turn to Mr Speaight's submission that a fair trial will be put at risk if it is presided over by a Recorder who is the head of chambers of counsel appearing before him. We were not impressed with this as a general proposition. We felt that Mr Turton and Mr Thanki provided the answer to it. At the same time we do accept the force of certain further submissions made by Mr Speaight as to the significance of the fact that the Recorder was the head of counsel's chambers in the context of the issue of waiver, as we shall explain in due course.

Discussion: the client point

20. In ***Metropolitan Properties v Lannon*** [1969] 1 QB 577 at p. 600 Lord Denning stated a proposition which has never been challenged: *"No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge of that party in another proceeding. Everyone would agree that a judge, or a barrister or solicitor (when he sits ad hoc as a member of a tribunal) should not sit on a case to which a near relative or close friend is a party. So also a barrister or solicitor should not sit on a case to which one of his clients is a party. Nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased. "*

21. The Recorder's attitude was that his professional connection to KCF was a matter that Mr Smith could waive and that he would not have started the case unless satisfied that Mr Smith was aware of the connection and had no objection to his trying the case. Mr Nolan advised Mr Smith that he was entitled, if he wished, to apply for an adjournment so that the action could be tried before a different judge. Mr Thanki, on behalf of the Bar Council, has submitted that *"Mr Smith would have been entitled, had he chosen to do so, to object to the Recorder continuing to hear the case"*. We consider that all three of these reactions to the facts of this case were correct. It is plain that the Recorder considered that KCF was a longstanding and a current lay client, albeit that the connection proved to be with the group rather than the company itself and that in each case insurers played a significant part. In these circumstances, in the absence of waiver by Mr Smith, the Recorder should not have tried the case.

Waiver

22. Mr Turton submitted that, before the trial began, Mr Smith was informed of all the material facts and chose to allow the Recorder to try his action. He had received advice to adopt this course, but the advice was perfectly proper and the final decision was his. In these circumstances, he waived any right to complain that the Recorder was biased.

23. In a statement Mr Smith stated that his solicitor and subsequently his counsel told him that the Recorder was the head of his counsel's chambers and had appeared for KFC in the past, but that he accepted their advice 'that there would be no problem and that everything was above board'. When the Recorder made his comment it was unrealistic to expect him to take the initiative and stop the hearing himself. Only when he thought through what had happened after the hearing did he begin to perceive that there was something wrong with the Recorder's chambers and professional connections. He felt that he had been ***'set up'.***

24. Mr Speaight submitted that the events that occurred shortly before and just after the start of the hearing of Mr Smith's case fell far short of what the law required if a judge's connection with one of the parties was to be waived. He submitted that there were the following shortcomings in what occurred:
    i) Disclosure of the recorder's position was too informal. He should have stated this clearly at the start of the trial, not casually in the course of it.
    ii) Incomplete information was given of the Recorder's position.
    iii) No information was given to Mr Smith of the options open to him.
    iv) He had inadequate time for reflection.
    v) Inappropriate pressure was exerted by his counsel. This was accentuated by the chambers connection.

25. Mr Speaight referred us to a number of authorities in support of these submissions and we now turn to these.

26. The basic principle is that waiver requires that the person who is said to have waived 'has acted freely and in full knowledge of the facts' – per Lord Browne-Wilkinson in ***R v Bow Street Magistrate, ex parte Pinochet (No 2)*** [2000] 1 AC 119 at 137. In ***Locabail (UK)Ltd v Bayfield Properties Ltd*** [2000] QB 431 at p. 475 this court commented: *"a party with an irresistible right to object to a judge hearing or continuing to hear a case may…waive his right to object. It is however clear that any waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not."*

27. In ***Millar v Dickson*** [2001] 1 WLR 1615 at 1629 Lord Bingham of Cornhill observed: *"In most litigious situations the expression "waiver" is used to describe voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression."*

28. Finally we should refer to an unreported decision of this court which is particularly relevant having regard to its facts. ***Jones v DAS Legal Expenses Insurance Co*** [2003] EWCA Civ 1071 involved a claim by a litigant in person before an Employment Tribunal. At the start of the hearing the chair informed the claimant that her husband was a barrister and was occasionally instructed by the respondents. She stated that she did not consider it a problem and the claimant then said that he had no objection. The Court of Appeal did not consider that in these circumstances the claimant could be said to have acted freely in waiving his right to object. They were left with a nagging doubt that he had been 'hustled into' his decision. The court went on to find, however, that he had subsequently waived his right to object to the chair. The court provided the following 'guidance' for a judge who becomes aware of circumstances which might give rise to an appearance of bias:

"i) If there is any real as opposed to fanciful chance of objection being taken by that fair-minded spectator, the first step is to ascertain whether or not another judge is available to hear the matter. It is obviously better to transfer the matter than risk a complaint of bias. The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties.

ii) Some time should be taken to prepare whatever explanation is to be given to the parties and if one is really troubled perhaps even to make a note of what one will say.

iii) Because thoughts that the court may have been biased can become festering sores for the disappointed litigants, it is vital that the judge's explanation be mechanically recorded or carefully noted where that facility is not available. That will avoid that kind of controversy about what was or was not said which has bedevilled this case.

iv) A full explanation must be given to the parties. That explanation should detail exactly what matters are within the judge's knowledge which give rise to a possible conflict of interest. The judge must be punctilious in setting out all material matters known to him. Secondly, an explanation should be given as to why the problem had only arisen so late in the day. The parties deserve also to be told whether it would be possible to move the case to another judge that day.

v) The options open to the parties should be explained in detail. Those options are, of course, to consent to the judge hearing the matter, the consequence being that the parties will thereafter be likely to be held to have lost their right to object. The other option is to apply to the judge to recuse himself. The parties should be told it is their right to object, that the court will not take it amiss if the right is exercised and that the judge will decide having heard the submissions. They should be told what will happen next. If the court decides the case can proceed, it will proceed. If on the other hand the judge decides he will have to stand down, the parties should be told in advance of the likely dates on which the matter may be re-listed.

vi) The parties should always be told that time will be afforded to reflect before electing. That should be made clear even where both parties are represented. If there is a litigant in person the better practice may be to rise for five minutes. The litigant in person can be directed to the Citizen's Advice Bureau if that service is available and if he wishes to avail of it. If the litigant feels he needs more help, he can be directed to the

chief clerk and/or the listing officer. Since this is a problem created by the court, the court has to do its best to assist in resolving it. "

29. This is useful guidance but, as the court made plain, it should not be treated as a set of rules which must be complied with if a waiver is to be valid. The vital requirements are that the party waiving should be aware of all the material facts, of the consequences of the choice open to him, and given a fair opportunity to reach an un-pressured decision.

30. In this case, while there was compliance with some of these requirements, we do not consider that there was compliance with all. We think that the facts giving rise to the appearance of bias were adequately explained to Mr Smith. Before the hearing began his lawyers told him that the Recorder acted for KCF, and the Recorder's recorded comments included the statement that he was still acting for the company in litigation in England. As we have already commented, this in fact exaggerated the professional connection between the Recorder and the defendant.

31. Mr Smith was not, however, given any information as to how quickly his case could be tried if he insisted that it should be transferred to another judge. No attempt appears to have been made to find this out. We think that the Recorder should at the outset himself have explained to Mr Smith what the options were and made quite sure that he was content that the Recorder should try the case.

32. We also agree with Mr Speaight that the strong advice that Mr Nolan gave to Mr Smith was inappropriate in the circumstances, albeit that we accept that Mr Nolan thought that he was acting in his client's best interests. This is how Mr Nolan described his approach to advising Mr Smith:

"23. To my mind on the morning of trial the ultimate and overriding question which I had to address in deciding what advice to give Mr Smith was this: Given all that I knew did I believe that there was any real risk that Mr Smith would not have a fair trial if the trial were heard by the Recorder?

24. I clearly recall advising Mr Smith that an advantage of my being from the same Chambers as the Recorder was that I knew the particular Recorder's qualities and the nature of his approach. I clearly recall advising Mr Smith that from my own knowledge of the Recorder and his approach to his judicial responsibilities Mr Smith could expect an open-minded and objective approach and a proper methodical and analytical assessment of his claim. That was the feature underpinning my advice: I felt confident in assuring Mr Smith that he would obtain the fair hearing to which he was entitled.

25. … My personal knowledge of the Recorder's qualities and approach to his judicial responsibility – gained as it happens from the fact that he was Head of my Chambers – was precisely what enabled me to give Mr Smith the reassurance that he could expect a fair trial and thus to dissipate any concern about bias that might arise from the Recorder's declaration that he acted for Kvaerner. I was aware of the need to reassure Mr Smith of the absence of any real danger or real possibility of bias. My knowledge of the qualities of this Recorder gave me the confidence to do so. Thus my familiarity with the Recorder's approach to his judicial responsibility arising from my being in his Chambers served to eliminate any concern that might otherwise arise from his acting for Kvaerner."

33. Where facts exist that raise an appearance of bias on the part of the judge it is right that counsel should advise his client of all the implications of the situation, including the implications of an adjournment. He can advise about the judicial oath and explain that judges are trained in considering cases objectively and disregarding any personal views that they may hold. But it is not appropriate for counsel to expound on his knowledge of the personal integrity of the individual judge. We have no doubt that Mr Nolan's vigorous recommendation of the qualities of his head of chambers was one that was entirely justified, but it made it very difficult for Mr Smith to opt for an adjournment without appearing to slight that recommendation and the object of it. This difficulty was the greater by virtue of the fact that the Recorder was Mr Nolan's head of chambers.

34. Mr Nolan also felt it his duty to draw attention to the costs that would be thrown away if the trial had to be adjourned, costs which in the normal course of events would fall to be born by the unsuccessful party. Mr Smith's costs were being funded by his Union, but Mr Nolan commented: *"in the normal way I had a duty to limit the Union's potential exposure to costs the existence and recognition of such duty being one of the terms upon which the Union would have been providing the valuable costs indemnity to Mr Smith."*

35. It is proper for counsel, where litigation is being funded by a Union or insurer, to have regard in the conduct of litigation to the question of whether any action that will incur additional costs is justified. But, as the Code of Conduct of the Bar of England and Wales provides (and we quote from the 2004 Edition): *"A barrister owes his primary duty as between the lay client and any professional client or other intermediary to the lay client and must not permit the intermediary to limit his discretion as to how the interests of the lay client can best be served."*

36. In the circumstances of this case, Mr Smith's Union could have no valid complaint if he declined to waive his right to have a trial that was seen to be fair and it was not appropriate for Mr Nolan to seek to dissuade Mr Smith from asking for another judge by referring to the costs that would be thrown away if he adopted this course.

37. More fundamentally, in a case such as this, we do not think that it is part of counsel's duty or appropriate for counsel to seek to influence the decision to be taken by the lay client. The choice is the client's and, while it is proper for counsel to inform the client of the implications of the choice, it is not appropriate for counsel to urge the client to waive his right to object to the tribunal. We are sure that Mr Nolan gave the advice he did with all good intentions, but his reassurance was, we think, directed to encouraging Mr Smith to waive his right to object.

38. For these reasons we have concluded that Mr Smith's decision to agree to the Recorder continuing to try his case was not made freely. Moreover, it was not made with knowledge of all relevant information because Mr Smith was not told when the trial could take place before another judge. In consequence it did not amount to a waiver of his right to complain of bias. If we give permission for this appeal to be brought out of time, the appeal is one that we will allow.

The extension of time

39. The following provisions of the Civil Procedure Rules are relevant to the application:

CPR 52.4 provides that, in the absence of any direction to the contrary, an appellant must file an appellant's notice within 14 days of the decision of the lower court that the appellant wishes to appeal.

CPR 52.6 provides that an application to vary the time limit for filing an Appeal notice must be made to the appeal court.

CPR 3.1(2) provides: *"Except where these Rules provide otherwise, the court may –*
(a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)"

CPR 3.9 provides:

"(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –
a) the interests of the administration of justice;
b) whether the application for relief has been made promptly;
c) whether the failure to comply was intentional
d) whether there is a good explanation for the failure;
e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;
f) whether the failure to comply was caused by the party or his legal representatives;
g) whether the trial date or the likely date can still be met if relief is granted;
h) the effect which the failure to comply had on each party; and
i) the effect which the granting of relief would have on each party.

(2) An application for relief must be supported by evidence."

40. The Rules impose no express sanction for failure to file an appellant's notice in time, but it is implicit that, unless an extension of time is obtained, the application for permission to appeal will not be entertained. CPR 3.9 is applicable to consideration of an application for an extension of time to file an appellant's notice - see ***Sayers v Clarke Walker*** [2002] EWCA Civ 645; [2002] 1 WLR 3095 at paragraph 21.

41. The first criterion to be considered, (a) is the interests of the administration of justice. These would normally militate strongly against an extension of time as long as that sought in this case. It is an important principle of the administration of justice that legal process should be finite. To reopen this case after a delay of four years plainly runs counter to that principle. But this is a case where Mr Smith has been denied the right to which Article 6 of the European Convention on Human Rights ("the Convention") entitled him – to a fair hearing before an independent and impartial tribunal. This, in our view, is the paramount consideration so far as the administration of justice is concerned.

42. Turning to the next criterion, (b), this weighs strongly in favour of KCF. The application for relief has been made only after very great delay.

43. The next criterion, (c), is not really germane in the present context. While it can be said that it was open to Mr Smith to seek relief more promptly, this is not a case of deliberate delay on his part. This is apparent when we turn to the next criterion.

44. Turning to (d), is there a good explanation for Mr Smith's failure to move more swiftly? We think that there is. Almost from the moment that judgment was given against him, Mr Smith was convinced that he had been the victim of an injustice. His attempts to persuade others of this were, however, rejected. On 30 April 2001 he wrote to his Union setting out the facts. His Union's response, on 22 May, stated that there were "no prospects whatsoever" of his claim succeeding on appeal. In these circumstances, Mr Smith wrote to KCF's parent company urging that he had been unfairly treated. His complaint was rejected on 20 July 2001 on the ground that the matter had been determined by the Recorder. There followed further correspondence between Mr Smith and the KCF group, to no avail.

45. In October 2002 Mr Smith wrote to his MP, setting out the facts, including those giving rise to a case of bias. On his MP's advice he wrote again to his Union. The Union replied in February 2003, stating in effect that Mr Smith had waived his right to complain of bias. Further correspondence ensued with his Union until May 2004, but the merits of his case were not recognised.

46. Mr Smith then applied for help to the Solicitor's Pro Bono Group, but in July 2004 was turned down for lack of merit. A similar result followed an application to the Bar Pro Bono Group in December 2004 and again in March 2005.

47. Finally, Mr Smith sent an email to Liberty and, on the 19 May 2005 received a response stating that his case raised questions of apparent bias and that it was likely that he had a case that he might wish to pursue by an appeal. On receiving a response which, for the first time, recognised that he had a case that justified an appeal, Mr Smith lost no further time in filing an appellant's notice, though in the first instance he erroneously sought to file this in the High Court rather than the Court of Appeal.

48. It might be said that it was open to Mr Smith to seek permission to appeal as a litigant in person as soon as his claim was rejected. To this contention Mr Speaight responded that the Court of Appeal has far too many applications from litigants in person who pay no regard to advice from lawyers that their proposed appeals are wholly without merit. It should not be held against Mr Smith that, in the face of the discouragement that he received from all to whom he turned, he did not seek to pursue an appeal until, finally, he was advised that his case had merit.

49. We have decided that there is force in Mr Speaight's submissions. Mr Smith has been badly let down by the system. He did not receive a trial that complied with the fairness requirements of Article 6 of the Convention, but received no recognition that this might be the case when he turned to those from whom it was reasonable to seek advice. There is a good explanation for his failure to pursue an appeal earlier than he did.

50. There are no relevant matters to be considered in relation to the next criterion, (e). There is nothing to add in relation to the next criterion, (f), that we have not already dealt with in relation to (d). Criterion (g) has no relevance on the facts of this case as the trial has already taken place.

51. We turn to criteria (h) and (i), which it is convenient to consider together. The effect of granting relief would be that a retrial would have to be ordered. That would ensure that Mr Smith had a trial that satisfied Article 6 in place of a trial that did not, but Article 6 also entitles the respondent to a fair

hearing ***'within a reasonable time'***. Will a retrial so long after the material events satisfy that requirement? It seems to us that, in the unusual circumstances of this case it will, provided only that a fair trial remains possible. This leads to consideration of criterion (h) and the effect of the delay that has occurred on KCF.

52. The sole issue of fact in relation to the trial on liability was whether or not Mr McIntyre consented to Mr Andrew driving his car on Christmas Eve 1996. The circumstances in which this issue arose are material. The car that Mr Andrew was driving belonged to KCF and was insured by Thai insurers. The insurance cover applied only if the person driving the car at the time of the accident was authorised to do so. Under the instructions of Mr McIntyre a claim was made on the Thai insurers. That claim was brought not only on behalf of KCF as owners of the damaged vehicle, but on behalf of the passengers in the vehicle, or their dependants. Mr McIntyre offered to add to these claims any claim that Mr Smith wished to advance. The basis of the insurers' liability to meet such claims was that KCF was liable in respect of them.

53. When Mr Smith brought a claim against KCF on the basis that they were vicariously liable for Mr Andrew's negligence, the company, backed by its liability insurers, adopted an approach inconsistent with the position that had justified claims on the Thai insurers. It contended that Mr Andrew had been driving without authority and called Mr McIntyre to give evidence to that effect.

54. Mr McIntyre was strenuously cross-examined on the contrast between his evidence at the trial and the basis upon which he had permitted a claim to be made on the Thai insurers. The Recorder did not find in favour of KCF on the basis that, having heard Mr McIntyre give evidence, he was satisfied that he was a witness of truth. He commented that he dealt with his evidence on the basis that there was ***'an element of economy with the truth when dealing with the insurers'*** and that he considered him on the whole to be ***'a somewhat tentative but careful witness'***. In the end he identified five factors that bore on the probabilities of what had happened which persuaded him that Mr Smith had failed to prove his case.

55. So far as this reasoning of the Recorder is concerned, there is no reason to think that a similar approach will not be possible at the re-trial. That approach may lead to the same conclusion, but, if so, the judge reaching that conclusion will not have an appearance of bias. The transcript of Mr McIntyre's evidence will be available to the judge. This is not, however, to discount the desirability of evidence of Mr McIntyre being heard by the judge on the re-trial. As to this, Mr McIntyre is no longer employed by the KCF group. He is employed in South Africa by a South African cementation company and his family are in Thailand. He has co-operated with the solicitors acting for KCF to the extent of providing them with a witness statement. This states that he does not welcome being asked to repeat the exercise of being asked to travel to England to give evidence again, and concludes as follows: *"I am now employed by a different company in a different continent. My present employers have no interest in the subject matter of this litigation. Further, my job is not a 9-5 one at a desk. I am a Mining Engineer and I travel around South and Southern Africa as part of my duties. I have not approached my present employers about this and I do not intend to do so as the prospect of having to take time off work at short notice will not be well received. Even if they agreed, the time would come out of my annual leave.*

As my family are in Thailand, my leave is spent travelling to stay with my family in Thailand. Neither my employment nor leave take me to England. Accordingly, I do not consider that I am being unreasonable in not being prepared to travel again to Chesterfield to give evidence as I did from Thailand in 2001."

56. We are not persuaded by this evidence that it will not be possible for KCF to procure that evidence from Mr McIntyre is adduced at a re-trial. There is no reason to believe that he is ill-disposed to his previous employers, and it may well be that they have contacts with Mr McIntyre's current employers. Even if arrangements cannot be made that would enable Mr McIntyre to come to England without suffering any prejudice, we can see no reason why it should not be possible to arrange for him to give evidence by video link.

57. Mr Turton also argued that KCF would also be prejudiced if quantum now had to be determined so long after the date on which Mr Smith received his injuries. We were not persuaded of this. As Mr

Speaight observed, it is often easier to determine quantum with the benefit of hindsight rather than on the basis of a prognosis of what is likely to happen in the future.

58. We have not found it easy to balance the prejudice that Mr Smith will suffer if he is left bound by a trial that did not comply with Article 6 of the Convention and the possible injustice that KCF may suffer if they are unable to arrange for Mr McIntyre to give evidence at a re-trial. We have, however, reached the conclusion that the interests of justice will best be served if there is a re-trial of Mr Smith's claim.

59. Accordingly we give permission to Mr Smith to appeal, we allow his appeal, we quash the Recorder's decision and we direct that the issue of KCF's liability be re-tried by another judge.

Mr Anthony Speaight QC and Miss Kate Livesey (instructed by the Bar Pro Bono Unit) for the Appellant
Mr Philip Turton (instructed by Kennedys) for the Respondent
Mr Bankim Thanki QC for the Intervener