CA on appeal from Chancery Division (Mr Justice Peter Smith) before Sir Anthony Clarke MR; Sir Igor Judge, President QBD; Buxton LJ. 4th July 2007.

Sir Anthony Clarke, MR:

Introduction

1. On the afternoon of Monday 2 July we heard an appeal from a decision of Peter Smith J made on Friday 29 June refusing to recuse himself from hearing what I understand is known as a Beddoe application in which trustees seek directions from the court with regard to the operation of a trust *("the application")*. We gave permission to appeal and allowed the appeal and said that we would give our reasons today, Wednesday, 4 July.

2. This is a most unusual case. The three claimants in the application are trustees of two settlements. The first claimant is a Mr Paul Howell, who is a partner in the solicitors firm of Addleshaw Goddard ("AG"). They are a large and well-known firm with some 178 partners and 400 fee earners. The recusal application that led to this appeal arises out of exchanges between some members of AG and Peter Smith J in his personal capacity in the recent past. They culminated in two emails which he sent to Simon Twigden of AG on 26 and 31 May, which was of course not much more than a month ago. The Beddoe application was assigned to Smith J ("the judge") some time last week. AG learned on Wednesday that he was to hear the application which was due to begin on Friday 29 June. On Thursday 28 June leading counsel for the claimants, Mr Peter Crampin QC, wrote to the judge asking him to recuse himself. The judge refused by letter dated the same day. He said in the letter that if Mr Crampin wanted to renew the application he should make it on Friday supported by evidence.

3. The application was heard on Friday and the judge refused to recuse himself. He handed down a judgment containing reasons for his decision on Monday. We heard submissions in support of the claimants' appeal from that decision on Monday afternoon. Mr Le Poidevin and Mr Steinfeld QC indicated, on behalf of the first and second defendants, respectively, that their clients were neutral. I will consider the questions raised by the appeal under these heads: the principles, communications between the judge and AG, the application, the recusal hearing and the judgment.

The principles

4. The claimants' submission is that this is a case of apparent bias. The relevant test is now well established. In ***Porter v Magill*** [2002] 2 AC 357, especially per Lord Hope at paragraphs 102 to 103, the House of Lords endorsed the approach set out by Lord Phillips MR giving the judgment of this court in ***Re Medicaments and Related Class of Goods (No 2)*** [2001] 1 WLR 700 at [85] as follows: *"The court must first ascertain 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, or a real danger, the two being the same, that the tribunal was biased."*

   In ***Lawal v Northern Spirit*** [2003] UKHL 35, [2003] ICR 856, Lord Steyn, giving the opinion of the appellate committee, said this: *"The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in **Porter** has at its core the need for 'the confidence which must be inspired by the courts in a democratic society … public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in **Johnson v Johnson** [2000] 201 CLR 488, 509 [para 53], by Kirby J when he stated that 'a reasonable member of the public is neither complacent nor unduly sensitive or suspicious'. "*

5. This court, comprising Mummery, Latham and Carnwath LJJ recently summarised the principles in ***AWG Group v Morrison*** [2006] EWCA Civ 6, [2006] 1 WLR 1163, as follows:

   i) A judge is automatically disqualified from hearing a case on the ground of apparent bias if, on an assessment of all the relevant circumstances, the conclusion was that the principle of judicial impartiality would be breached [AWG at 6]."

   i) This disqualification is not a discretionary case management decision reached by weighing various relevant factors (such as inconvenience, costs and delay) since there was either a real possibility of bias or there was not [AWG at 6]."

   ii) The test is, having ascertained all the circumstances bearing on the suggestion that the Judge was (or could be) biased, the court must itself decide 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased' [AWG at 7]."

   iv) 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 [AWG at 20]."

   *v) An example of a real danger of bias is where 'there was… animosity between the Judge and any member of the public involved in the case **Locabail UK Limited v Bayfield Properties Limited** [2000] QB 451 (CA) at 25; the categories of such danger are not closed, "if for any other reason there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections" then recusal would be necessary."*

*vi) In most cases, the answer, one way or the other will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal (**Locabail** at [25])."*

vii) Where the hearing has not yet begun, there is scope for the sensible application of the precautionary principle. Prudence normally leans on the side of being safe rather than sorry [AWG at 9]."

7. The material circumstances to be considered by the fair-minded and informed observer will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where such an explanation is proffered, the reviewing court does not have to rule whether or not the explanation should be accepted or rejected; rather, it has to rule whether or not the observer would consider that there was a real danger of bias notwithstanding the explanation advanced (see in ***Re Medicaments*** at [86], [92] and [93]. I would add that as in that case the reviewing court here is this court. The correct approach to the views of the judge can be seen from this passage in ***Locabail*** at [19]: *"While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability of the statement; sometimes, although inclined to accept the statement, it may recognise the possibly of doubt and the likelihood of public scepticism. All will turn on the facts of a particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."*

8. The Guide to Judicial Conduct issued by the Judge's Council, First Supplement, June 2006, indicates at paragraph 7.2.3 that: *"A current or recent business association with a party will usually mean that a judge should not sit on a case."*

The passage of time between the events said to give rise to the apparent bias and the hearing or trial is a relevant factor. This is apparent both from paragraph 7.2.3 and [25] of ***Locabail*** where the court comprising Lord Bingham CJ, Lord Woolf MR, and Sir Richard Scott Vice Chancellor said that: *"The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."*

9. The mere fact that a judge has decided a case adversely to a party or criticised the conduct of a party or his lawyers will rarely if ever be a ground for recusal. However, a real danger of bias might be thought to arise if there were personal friendship or animosity between the judge and a member of the public (see eg ***Locabail*** at [25]. The same would, I think, be true if there were personal animosity against a firm of solicitors or his partners.

Communications between the judge and AG

9. Between November 2006 and May 2007 there were quite lengthy discussions between AG and the judge about the possibility of the judge joining AG. It is not, I think, necessary in order to determine this appeal to set out the nature of those discussions in any detail. It is sufficient to refer to exchanges between Mr Simon Twigden, who is a partner and head of the contentious group at AG, and the judge which show how their discussions came to an end and which demonstrate the judge's reaction to their termination by AG.

10. On 21 May 2007 the judge emailed Mr Twigden as follows:

"I thought I might have heard further from you as you said. I am a little concerned over the time frame. There are some decisions that I have to make by the end of June which will be affected by our discussions so I do need to progress the matter as soon as possible so I can see where we are going."

Mr Twigden replied on 25 May saying that for financial reasons AG could not take the matter any further. He set out some of the financial detail, to which it is not necessary to refer, and concluded:

"Regrettably, although there was agreement that this was an innovative and good idea, we concluded that the level of investment required cannot be supported in the context of the overall priorities for our business. Our Banking and Corporate practices are our immediate priorities as we seek to build the firm to deliver on our strategy.

"I am sorry that it has taken longer than we originally anticipated to revert to you but a combination of year end, my absence from the office, and very careful consideration of this at the highest levels in our firm, have all contributed to that.

"I wish you all the best for the future."

11. The judge replied on the next day 26 May. His reply shows considerable disappointment. He said that he did not think that the senior management of AG had given *"a fair appraisal to my proposal"*. He complained that AG had treated his proposal as one of partnership, whereas it was not. He then stressed the considerable advantages of being associated with him as a judge who had recently given judgment in *"a landmark decision on corruption"* which "*also has an impact on Banking and Corporate"*. He thus stressed the value of the contribution he could make to the firm but concluded by saying that, if it was too late, please would Mr Twigden let him know and he would go elsewhere. On 31 May Mr Twigden replied setting out the financial position as AG saw it and concluded:

"As we discussed at our last meeting, we have tested this with our key litigation partners and, of course, Mark is fully aware of this from a management perspective. We have concluded after very careful deliberation and with regret that, at this time in the firm's development and mindful of its current investment priorities, we cannot support this innovative prospect.

"Kind regards."

12. Some four hours later the judge replied: *"I found your first email insulting and your second one condescending. I do not think the response should have been from you by such emails. You really should have had the courtesy to speak to me."*

He then again reverted to the financial position and said of the figures which had been referred to in AG's earlier email: *"They are just artificial figures. It is galling that these are used to knock down a proposal that emanated from you, which was never discussed with me and I would never have agreed it with you if presented in this way. We all agreed it there ought to be substantial benefits if properly sold but at this stage they would be difficult to assess."*

He then made some further observations on the figures and concluded: "*I feel you have wasted my time for several months. I am extremely disappointed because contrary to your fine words you have allowed the bean counters to prevail. I am not very impressed with you or your firm at the moment and I do not think the tone of your emails enhances the position."*

13. Mr Flint submits that these exchanges show that the judge was plainly upset with AG, to put it no higher. I agree. To my mind they show disappointment and some animosity towards Mr Twigden and AG. I can understand the real concern subsequently demonstrated by AG when they learned that the judge was to hear the Beddoe application. I will return to this in a moment after considering so far as necessary the role of AG and their partners in the application.

The application

14. In the ordinary Beddoe application the trustees will not be ordered to pay the costs personally even if the application fail. The costs will be directed to come out of the fund. However, in this case the defendants to the application, who I think included former trustees and a beneficiary of the trusts, have made it clear through their solicitors that they will be seeking an order that the trustees personally pay both their own costs and the costs of the other parties to the application and indeed the costs of proposed substantive litigation. The correspondence shows that this will be a hard-fought application and that efforts will be made to impose costs liabilities on the trustees personally. As I have already indicated, one of those trustees is Mr Howell, who is a partner of AG. Although I should make it clear, as is accepted by Mr Flint, that this is not a case in which the honesty of Mr Howell is impugned it is a case in which his conduct is impugned. It is not just a run of the mill case in which the trustees can necessarily look to the trust for the payment of costs.

The Recusal Hearing

15. As I said earlier, on 28 June Mr Crampin QC wrote to the judge to ask him to recuse himself. He referred to the fact that the application was hotly contested and to the discussions between the judge and AG, including the contents of the emails referred to above. He said that he had advised his clients that, in view of the short time since the discussions ended on 31 May and the tone of the judge's comments in the emails, the judge was under a duty to recuse himself. He referred to paragraphs 5, 6 and 20 in ***AWG*** and quoted this passage from a recent decision of this court in ***Drury v the BBC*** [2007] All ER (D) 205, 14 May 2007; *"The mere fact that the judge had made a finding against a party on a previous occasion even if he had been critical to that did not found a later objection to the judge sitting in another matter. It was however also plain that where there was any room for doubt as to which course to adopt that doubt should be resolved in favour of recusal."*

Mr Crampin concluded his letter as follows:

"For the avoidance of doubt, it is not being suggested that you should never again hear a case in which Addleshaw Goddard are the solicitors on the record. However, it is my advice in this case that in view of the shortness of time since the discussions ended, the tone of the comments you made in your email 31 May and the fact that a partner in Addleshaw Goddard is himself a party, you have no alternative but to recuse yourself.

I have written to my opponents to inform them that I have invited you to recuse yourself for reasons which I am not at liberty to disclose to them."

Mr Crampin wrote to counsel for the other parties saying that he had written to the judge asking him to recuse himself for reasons which he was not at liberty to impart.

15. The judge replied as follows on the same day:

"Thank you for your letter of 28 June 2007.

I have considered the contents of the letter most carefully and I do not accept that there is any reasonable perception of judicial impartiality in this case. I do not know Mr Howell and although the litigation as you say is hotly contested he is a party in a professional position and there is no issue which might affect his credibility so far as I am aware.

Your letter rightly observes that it would be impossible to suggest that I would have to recuse myself whenever Addleshaw Goddard is on the record. I do not see how the shortness of time (or for that matter the passage of time) makes any difference to this decision.

If you wish to renew your application then you must make it tomorrow supported with evidence.

I am sure you will appreciate that the discussions you refer to in your letter were confidential. I would hope that you would also keep the contents of those confidential for reasons which should appear to you to be self-evident.

I have copied this letter to your opponents."

16. I would accept Mr Flint's submission that the penultimate paragraph of that letter was a clear indication that the discussions including the emails were confidential and that they should not be shown to the other parties, at any rate without the consent of the judge. It was for that reason that Mr Twigden prepared a short witness statement in which he said that the relevant matters were contained in *"a schedule of confidential facts"*. That seems to me to have been an entirely sensible approach. The schedule contains ten paragraphs in which Mr Twigden describes meetings and discussions with the judge and exhibits the emails. The matter then came on for hearing before the judge.

17. We have a transcript of the hearing, which does not make entirely happy reading. The judge began by saying that the hearing was confidential. Mr Twigden gave evidence. In examination-in-chief he confirmed the truth of his statement and of the confidential schedule. Counsel for the defendants did not ask him any questions. He was then asked a number of questions by the judge, which read very much like a cross-examination. Mr Twigden agreed that disclosure of information would be a contempt of court. He accepted that his schedule was not a full record of everything which took place. He was asked a number of questions about the discussions. They included the judge asking him about the figures which had been discussed by way of remuneration. It is again not necessary for me to refer to the figures in this judgment.

18. The judge then put to Mr Twigden two previous occasions in which he, the judge, had made strong criticisms of AG; one when he was a QC and one when he was a judge. Mr Twigden agreed that the judge had asked whether those criticisms would have any adverse impact on his joining the firm and said that they would not. The judge put to Mr Twigden that his criticisms of AG on those two previous occasions were much more serious than those contained in the emails. Mr Twigden said that the emails were sent only a month ago. The judge then turned to a different topic, namely Mr Twigden's familiarity with the details of the Beddoe application. He said that he had scant knowledge of the case.

19. I am bound to say that to my mind it was not appropriate for the judge to cross-examine Mr Twigden rather as if he, the judge, was fighting his own case. The authorities to which I have referred lead to the conclusion that at most a judge should make a short statement of the position on the record. It was in my judgment wholly inappropriate for the judge to cross-examine Mr Twigden.

20. There followed submissions by Mr Crampin. He put the application thus: *"Your Lordship having heard the evidence, I renew my application to you to recuse yourself on the basis that there is a real risk or possibility that your Lordship will not be able to bring to bear, on the determination of the matters in dispute in this case, an open mind and objectivity which is required in the discharge of high judicial office. The reasons that I make that submission to your Lordship are apparent from the terms of the e-mails which were exchanged between you and Mr Twigden and which indicated, or would indicate, to a fair-minded person reading those e-mails, that your Lordship, having made an unsuccessful job application --"*

The judge interrupted. He said: *"I made no job application. They invited me. That's your first point failing. There is plainly a big difference, Mr Crampin."*

21. There then followed these exchanges:

"MR CRAMPIN: *Having had an unsuccessful discussion or negotiation with Addleshaws, your lordship expressed yourself in strong – intemperate, almost -- anguish.*

"MR JUSTICE PETER SMITH: *Nonsense. I don't know what part of the country you come from, Mr Crampin, but it's about time you grew up. If you think that's intemperate, then you are on another planet from me. If you thought it was intemperate, then you should have seen the correspondence which didn't trouble Mr Twigden.*

"MR CRAMPIN: *I'm endeavouring to make a submission, not to engage with your Lordship in badinage of that kind. The question that a fair-minded person –*

"MR JUSTICE PETER SMITH: *I'm challenging you, Mr Crampin, on your analysis, when you suggest that my correspondence was intemperate. I don't accept that.*

"MR CRAMPIN: *Well, it's a submission, my Lord –*

"MR JUSTICE PETER SMITH: *Well, I have rejected it. I've just told you.*

"MR CRAMPIN: *Your Lordship will no doubt make it part of your judgment in due course. It's a submission I'm making to your Lordship that a fair-minded, reasonable onlooker, reading that correspondence, would come to the view that your Lordship bore a degree of animosity and hostility, even, towards Addleshaws as a result of the way that you thought you had been treated by them. That is what the e-mails disclose.*

"MR JUSTICE PETER SMITH: *I don't agree the e-mails disclose that at all. The e-mails simply disclose that, and Mr Twigden has confirmed it today, that the reasons they gave were not the same reasons when they introduced me, and that I was therefore unimpressed by their change of attitude, which bore no relation to our discussions. But I'm sorry, Mr Crampin, life goes on, I'm afraid. I accept that. I am somewhat surprised that your solicitors are unable to accept that, despite the fact that they were willing to take me into the firm, despite the fact that I had accused a*

partner on the management firm of negligence, in correspondence which went far beyond that. It was a point which was so trivial, in Mr Twigden's mind, not only did he forget it when he prepared his confidential statement, but he also forgot that he said he would ensure that he would put no objection if that person objected.

"MR CRAMPIN: *Well, this is one of the more unusual exchanges that I've taken place –*

"MR JUSTICE PETER SMITH: *This whole procedure is unusual, but we can't avoid that, because effectively I am being asked to recuse myself, and I'm the person who can deal with it.*

"MR CRAMPIN: *Your Lordship is in the process of, while listening to my submissions, giving evidence.*

"MR JUSTICE PETER SMITH: *I'm not giving evidence; I'm reminding you of what Mr Twigden said. I'm not going to decide this case on anything other than the answers Mr Twigden gave, and Mr Twigden confirmed that I did indeed raise those matters, and that they were not sufficient to lead him to believe I couldn't join the firm and that, if anybody objected, he would ensure they would be overruled. That is what his evidence was.*

Now given that, and given the seriousness of those matters, it is extraordinary to believe, is it not, that Addleshaws are actually fearful on the basis of these e-mails?

"MR CRAMPIN: *I do not think the test is what Addleshaws think --*

"MR JUSTICE PETER SMITH: *Of course it is.*

"MR CRAMPIN: *-- it is what a fair-minded person can think."*

22. Pausing there, I am bound to say that those exchanges seem to me to be somewhat extraordinary. In my judgment, Mr Crampin was entirely justified in saying that the judge was in the process of giving evidence. The judge's approach was quite wrong. It is one thing to test counsel's submissions as a judge. It is quite another for a judge to give evidence of fact.

23. There then followed another exchange which in my judgment demonstrated an animosity toward AG. Immediately after the last exchange, the transcript continues:

"MR JUSTICE PETER SMITH: *A fair-minded person would think that Addleshaws could not possibly be concerned about those e-mails when they were so unconcerned about somebody who made allegations of negligence against them, and somebody who criticised them in the way in which they conducted the case, didn't stop them contemplating him even becoming a partner in the firm. That shows there's no genuine belief.*

Mr CRAMPIN: *In my respectful submission, there's all the difference in the world between discussions that were taking place between you and Addleshaws at the time that your future employment was under consideration, and the position you're in now, meaning that your Lordship has adjudicated on the matter …*

"MR JUSTICE PETER SMITH: *So it's all right to have, as a partner ,somebody who does this, but it's not alright for that person to be a judge? That's just unreal, Mr Crampin. It just shows the lack of genuineness in this evidence."*

Pausing there, in that passage the judge was saying that the evidence of Mr Twigden was not genuine or, put another way, not true. No such allegations had been put to Mr Twigden and I see no warrant for them at all. This again seems to me to be evidence of that animosity towards Mr Twigden and AG.

24. Finally, I should I think refer to this part of the transcript, if only in fairness to Mr Crampin. Immediately after the last extract the transcript continues:

"MR CRAMPIN: *I don't think your Lordship is actually going to pay attention to anything further I say on this subject. Your conduct of the matter in the court today is remarkable. My submission to your Lordship …*

"MR JUSTICE PETER SMITH: *I'm not going to comment on that, Mr Crampin. It does not dignify a comment*

"MR CRAMPIN: *I'm making the submission that I am.*

"MR JUSTICE PETER SMITH: *If you're going to say that, you'd better say it with specificity, or you'd better withdraw it, or there might be professional consequences.*

"MR CRAMPIN: *Your Lordship can take whatever course you'd like to take.*

"MR JUSTICE PETER SMITH: *No, if are going to say my conduct in court is quite remarkable, you have to say why. In which way do you think my conduct has been remarkable?*

"MR CRAMPIN: *It is a remarkable proposition that a judge should cross-examine a witness in the basis of what is in the judge's head, which no-one else has seen.*

"MR JUSTICE PETER SMITH: *Forgive me, Mr Crampin, that's because of the nature of the application because it appertains to particular facts. I have already said to you that I will decide this issue not on things that were in my head, but solely on the evidence that Mr Twigden has given, and he accepted all of my points. So it's his evidence which decides it, and nothing else. Do you have any other, better criticisms of my conduct?*

"MR CRAMPIN: *My Lord, I have made the submissions I wish to make.*

"MR JUSTICE PETER SMITH: *I'm sorry, Mr Crampin, I'm not going to allow you to pass over a gratuitous comment saying my conduct is remarkable, any more than anybody else would, without requiring you to be specific.*

"MR CRAMPIN: *Well, I've indicated why your comment is --*

"MR JUSTICE PETER SMITH: *Well, that's the one, is it?*

"MR CRAMPIN: *Hmm?*

"MR JUSTICE PETER SMITH: *That's the one thing? Because that would have made the application inevitable, because it would mean that the defendants, who have no knowledge of this, can't say anything, and I can't say anything, and therefore you ensure an absolute certainty to your application.*

"MR CRAMPIN: *No, my lord. The question is, viewing those e-mails, whether, as I say, a fair-minded observer would conclude that --*

"MR JUSTICE PETER SMITH: *You've already said that.*

"MR CRAMPIN: *Yes, I have.*

"MR JUSTICE PETER SMITH: *Well, you don't get better by repeating your submissions. I have that, and I'm aware of the authorities. Do you have anything more to say?*

"MR CRAMPIN: *No, my Lord.*

"MR JUSTICE PETER SMITH: *Thank you."*

25. The judge's contribution to these exchanges seems to me to be intemperate. In short, the cross-examination of Mr Twigden and the approach adopted by the judge in the course of Mr Crampin's submissions provides strong support for Mr Flint's submissions that the fair-minded and informed observer having considered the facts would conclude that there was a real possibility that the judge was biased against AG and its partners, one of whom is the first claimant in the application. When this evidence is put together with the content and tone of the emails sent by the judge that I quoted earlier, I am quite satisfied that this is a case in which the judge should have recused himself. This is not to my mind a case which is close to the borderline but a case in which there is no doubt that the test laid down in the authorities is satisfied. I should add by way of postscript that to my mind Mr Crampin behaved entirely appropriately throughout.

The judgment

26. Mr Flint relies upon a number of elements in the judge's judgment. First, he submits that the judge erred in paragraph 9 in saying that the shortness of time since the email exchanges is irrelevant. He notes Mr Crampin's acceptance that he was not saying that the judge should never hear an AG case, and the judge said this in paragraph 9: *"Nevertheless I do not see how once he [ie Mr Crampin] makes that concession he can support any claim that I should recuse myself. Equally the suggestion that shortness of time is a relevant factor is in my view nonsensical. Either there is a perception that a fair-minded and informed observer with the knowledge of all the relevant circumstances would believe that there would be apparent bias or not I do not see how the passage of time has any impact whatsoever on that perception."*

    I would accept Mr Flint's submission that that conclusion was wrong in principle as the authorities to which I referred earlier demonstrate. The exchange of emails was only just over a month ago and the reaction of the judge in argument was only last Friday.

27. Secondly, Mr Flint submits that the judge was wrong to reject, as he did in paragraph 24, the concern that Mr Howell's conduct was being impugned. Again I would accept that submission. As I indicated earlier, while it is true that Mr Howell's honesty was not being impugned, his conduct was, and the judge was wrong to hold that the potential costs order was, as he put it, nothing more than a costs order that might be made against any party to litigation if an application is unsuccessful. The usual order in an application of this kind is not that trustees pay the costs personally, yet that is the order sought here.

28. Thirdly, I would accept Mr Flint's submissions that in the judgment the judge again impugned the good faith of Mr Twigden. He said at paragraph 25: *"I do not believe that given the matters which were omitted Mr Twigden could have seriously believed that I might not be able to deal with the issues fairly objectively. At the end of the day in any event Mr Howell is a professional trustee one of three and I do not see how anyone looking at it objectively could possibly think given the concession that there can be no objection to me hearing cases where Addleshaw Goddard are involved that there are any genuine grounds for the present application."*

    He added at paragraph 28: *"As set out above Mr Twigden's evidence was seriously deficient. When the totality of his evidence is evaluated there is no room for doubt. There cannot on his evidence be any possible belief that it shows there is any reasonable objective perception of possible bias and Addleshaw Goddard could not have believed that given the extra material which Mr Twigden acknowledged in response to my questions."*

    That is an echo of the point made by the judge in the course of Mr Crampin's submissions, to which I have already referred and held to be unsatisfactory.

29. Finally, and less importantly, the judge said that he would recuse himself if the defendants raised any objection. It is difficult to see how that approach can be justified given the nature of the test.

Conclusion

30. It may well be that the judge became somewhat carried away in the heat of the argument. But for the reasons I have given, I would hold that his attitude throughout, from the emails at the end of May, during the hearing on Friday and in his judgment show that the test for apparent bias is satisfied. As the reviewing court, this court is in a position to form its own view. I have concluded that in all the circumstances, a fair-minded and informed observer

would conclude that the judge was biased against AG and its partners, including Mr Howell. It was for that reason that I concluded on Monday that the appeal should be allowed.

Sir Igor Judge:

31. The Master of the Rolls has summarised the essential facts and the relevant principles. Without repeating them, I shall add a short judgment of my own simply to add emphasis to my entire agreement with his judgment.

32. There is no disguising the regrettable features of this case. The application to Peter Smith J to recuse himself was entirely justified and, notwithstanding the inevitable delicacy of the position in which he found himself, leading counsel responsibly handled the case throughout in accordance with his professional obligations both to his client and to the court. The exchange of still very recent emails demonstrates that the judge was extremely displeased that the negotiations about his possible future with the firm of solicitors Addleshaw Goddard had broken down. His irritation is obvious. It did not arise from previous professional encounters with the solicitors or their conduct of earlier or indeed the current litigation when different considerations would apply. It arose exclusively and directly from the judge's personal affairs and his private but recently unsuccessful dealings with Addleshaw Goddard. The solicitors were not simply solicitors on the record. Mr Howell, a partner in the firm of Addleshaw Goddard, was a party to what I may loosely describe trustee proceedings, and this contentious litigation carried with it at least the potential for serious adverse personal consequences for him.

33. It is the conduct of the hearing which underlines that the judge had become too personally involved in the decision he was being asked to make to guarantee the necessary judicial objectivity which would be required in the trustee proceedings. I identify three particular features. First, the witness who supported the application was in effect cross-examined by the judge in something of the style of an advocate instructed to oppose the application. Second, the submission by counsel for the applicant that the judge had given evidence was in the circumstances unsurprising, and the concerns he expressed on this topic were validly made. Finally, the judge impugned the good faith of the application, a conclusion repeated in the strongest terms in his judgment when there is no shred of evidence to suggest some ulterior or improper motive behind the application.

34. In these circumstances it is unfortunate to have to record that, in my judgment, the conduct of the hearing itself demonstrated not only that the application to the judge to recuse himself was rightly made, but that it should have been granted.

Lord Justice Buxton:

35. I agree with both judgments and there is nothing I need to add.

Order: Appeal allowed.

MR C FLINT QC and MR T WEISSELBERG (instructed by Messrs Addleshaw Goddard) for the Appellant.
MR N LE POIDEVIN (instructed by Taylor Wessing) for the First Defendant
MR A STEINFELD QC, and MR J STEPHENS (instructed by Messrs DLA Piper UK LLP, for the Respondent.