CA before LORD CHIEF JUSTICE, MASTER OF THE ROLLS and VICE-CHANCELLOR. 17th November 1999.

1. This is the judgment of the court on five applications for permission to appeal. The applications have been listed and heard together since they raise common questions concerning disqualification of judges on grounds of bias. At the outset we acknowledge with gratitude the help we have received from Mr David Lloyd Jones QC who has made submissions on the law as an amicus.

2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention on Human Rights, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

3. Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called "actual bias" are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

4. There is, however, one situation in which, on proof of the requisite facts, the existence of bias is effectively presumed, and in such cases it gives rise to what has been called automatic disqualification. That is where the judge is shown to have an interest in the outcome of the case which he is to decide or has decided. The principle was briefly and authoritatively stated by Lord Campbell in ***Dimes v. The Proprietors of the Grand Junction Canal*** (1852) 3 HL Cas 759 at 793, when orders and decrees made by and on behalf of the Lord Chancellor were set aside on the ground that he had had at the relevant times a substantial shareholding in the respondent company: "*No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest. Since I have had the honour to be Chief Justice of the Court of Queen's Bench, we have again and again set aside proceedings in inferior tribunals because an individual, who had an interest in a cause, took a part in the decision. And it will have a most salutary influence on these tribunals when it is known that this high Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.*"

5. The rule has been expressed in slightly different terms in different cases. In ***R. v. Rand*** (1866) LR 1 QB 230 at 232, Blackburn J. said: *"There is no doubt that any direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter ..."*

6. ***In R. v. Camborne Justices, ex parte Pearce*** [1955] 1 QB 41 Slade J., giving the judgment of the court, said at page 47: *"It is, of course, clear that any direct pecuniary or proprietary interest in the subject-matter of a proceeding, however small, operates as an automatic disqualification."*

7. The basic rule is not in doubt. Nor is the rationale of the rule: that if a judge has a personal interest in the outcome of an issue which he is to resolve, he is improperly acting as a judge in his own cause; and that such a proceeding would, without more, undermine public confidence in the integrity of the administration of justice (see ***Dimes*** above, in the passage quoted, and ***R. v. Gough*** [1993] AC 646 at 661, per Lord Goff of Chieveley).

8. In the context of automatic disqualification the question is not whether the judge has some link with a party involved in a cause before the judge but whether the outcome of that cause could, realistically, affect the judge's interest. In ***Dimes*** the outcome of the litigation certainly could have had such an effect on the Lord Chancellor's personal position. In ***Clenae Pty. Ltd. & Others v. Australia and New Zealand Banking Group Ltd*** [1999] VSCA 35 (Supreme Court of Victoria) it was held that the outcome of the litigation could not have had such an effect. That will often be the case where the judge holds a relatively small number of shares in a large company and the sums involved in the litigation are not such as could, realistically, affect the value of the judge's shares or the dividend he could expect to receive. The correct approach was in our judgment taken by the majority in the Victoria Court of Appeal in the case cited where, giving the main judgment after reviewing English and Australian authority, Charles JA said (at paragraph 59 of the judgment): *"If there is a separate rule for automatic disqualification for financial interest, unrelated to a reasonable apprehension of bias, in my view the irrebuttable presumption of bias only arises (subject to questions of waiver or necessity) where the judicial officer has a direct pecuniary interest in the outcome of the proceeding."*

9. Winneke P. agreed (at paragraph 3 of the judgment): *"... I agree with Charles JA that authority which binds this Court does not compel us to conclude that it is the mere shareholding by a judicial officer ("judge") in a party which, alone, constitutes the "disqualifying pecuniary interest", but rather it is the potential interest, created by that shareholding, in the subject matter or outcome of the litigation which is the disqualifying factor."*

10. While the older cases speak of disqualification if the judge has an interest in the outcome of the proceedings *"however small"*, there has in more recent authorities been acceptance of a ***de minimis*** exception: ***BTR Industries South Africa (Pty) Ltd v. Metal and Allied Workers' Union*** 1992 (3) SA 673 at 694; ***R. v. Inner West London Coroner, ex parte Dallaglio*** [1994] 4 All E.R. 139 at 162; ***Auckland Casino Ltd. v. Casino Control Authority*** [1995] 1 NZLR 142 at 148. This seems to us a proper exception provided the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his decision one way or the other; but it is important, bearing in mind the rationale of the rule, that any doubt should be resolved in favour of disqualification. In any case where the judge's interest is said to derive from the interest of a spouse, partner or other family member the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself.

11. Until recently the automatic disqualification rule had been widely (if wrongly) thought to apply only in cases where the judge had a pecuniary or proprietary interest in the outcome of the litigation. That is what ***Dimes*** concerned, although the statement of principle quoted above is not in terms so limited. In ***R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2)*** [1999] 2 WLR 272, the House of Lords made plain that the rule extended to a limited class of non-financial interests. At page 283, Lord Browne-Wilkinson said: *"My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties."*

    At page 284, Lord Browne-Wilkinson added: *"It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest."*

12. The other members of the House agreed that the rule should be extended to the extent indicated, and Lord Hutton (at page 293) observed that: *" ... there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation."*

13. In ***R. v. Gough***, above, Lord Woolf suggested (at page 673) that the courts should hesitate long before creating any other special category of automatic disqualification: *"since this will immediately create uncertainty as to what are the parameters of that category and what is the test to be applied in the case of that category."*

14. With that expression of view Lord Goff, it would seem, agreed (at page 664), and it has earned support in the High Court of Australia: see ***Webb v. R.*** (1994) 181 CLR 41 at page 75, per Deane J. In ***Pinochet (No. 2),*** at page 287 Lord Goff did not envisage any wider extension. Since any extension of the automatic disqualification rule would also, inevitably, limit the power of the judge and any reviewing court to take account of the facts and circumstances of a particular case, and would have the potential to cause delay and greatly increased cost in the final disposal of the proceedings, we would regard as undesirable any application of the present rule on automatic disqualification beyond the bounds set by existing authority, unless such extension were plainly required to give effect to the important underlying principles upon which the rule is based.

15. Although disqualification under the rule in ***Dimes*** and ***Pinochet (No 2)*** is properly described as automatic, a party with an irresistible right to object to a judge hearing or continuing to hear a case may, as in other cases to which we refer below, 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.

16. In practice, the most effective guarantee of the fundamental right recognised at the outset of this judgment is afforded not (for reasons already given) by the rules which provide for disqualification on grounds of actual bias, nor by those which provide for automatic disqualification, because automatic disqualification on grounds of personal interest is extremely rare and judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise. The most effective protection of the right

is in practice afforded by a rule which provides for the disqualification of a judge, and the setting aside of a decision, if on examination of all the relevant circumstances the court concludes that there was a real danger (or possibility) of bias. Until 1993 there had been some divergence in the English authorities. Some had expressed the test in terms of a reasonable suspicion or apprehension of bias: see, for example, ***Law v. Chartered Institute of Patent Agents*** [1919] 2 Ch. 276 at 290; ***R. v. Sussex Justices, ex parte McCarthy*** [1924] 1 KB 256 at 259; ***Metropolitan Properties Co. (FGC) Ltd. v. Lannon*** [1969] 1 QB 577 at 599, 602, 606; ***R. v. Liverpool City Justices, ex parte Topping*** [1983] 1 WLR 119 at 123; ***R. v. Mulvihill*** [1990] 1 WLR 438 at 444. This test had found favour in Scotland (***Bradford v. McLeod*** 1986 SLT 244), Australia (***R. v. Watson, ex parte Armstrong*** (1976) 136 CLR 248) and South Africa (***BTR Industries,*** above). Other cases had expressed the test in terms of a real danger or likelihood of bias: ***R. v. Rand*** (1866) LR 1 QB 230 at 233; ***R. v. Sunderland Justices*** [1901] 2 KB 357 at 371; ***R. v. Camborne Justices, ex parte Pearce*** [1955] 1 QB 41 at 51; ***R. v. Barnsley Licensing Justices, ex parte Barnsley and District Licensed Victuallers' Association*** [1960] 2 QB 167 at 186; ***R. v. Spencer*** [1987] AC 128. Whatever the merits of these competing tests, the law was settled in England and Wales by the House of Lords' decision in ***R. v. Gough,*** above. The gist of that decision is to be found in two brief extracts from the leading speech of Lord Goff. The first is at page 668 where he said: *"In my opinion, if, in the circumstances of the case (as ascertained by the court), it appears that there was a real likelihood, in the sense of a real possibility, of bias on the part of a justice or other member of an inferior tribunal, justice requires that the decision should not be allowed to stand. I am by no means persuaded that, in its original form, the real likelihood test required that any more rigorous criterion should be applied. Furthermore the test as so stated gives sufficient effect, in cases of apparent bias, to the principle that justice must manifestly be seen to be done, and it is unnecessary, in my opinion, to have recourse to a test based on mere suspicion, or even reasonable suspicion, for that purpose."*

The second passage is at page 670: *"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention the possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..."*

17. This rule has been applied in a number of English cases and Privy Council appeals. It has not commanded universal approval elsewhere: Scotland (***Doherty v. McGlennan*** 1997 SLT 444), Australia (***Webb v. R.,*** above) and South Africa (***Moch v. Nedtravel (Pty) Ltd.*** 1996 (3) SA 1) have adhered to the reasonable suspicion or reasonable apprehension test, which may be more closely in harmony with the jurisprudence of the European Court of Human Rights (see, for example, ***Piersack v. Belgium*** (1982) 5 EHRR 169; ***De Cubber v. Belgium*** (1984) 7 EHRR 236; ***Hauschildt v. Denmark*** (1989) 12 EHRR 266; ***Langborger v. Sweden*** (1989) 12 EHRR 416). We need not debate whether the substance of the two tests is different, as suggested in ***Webb v. R.,*** above. Nor need we consider whether application of the two tests would necessarily lead to the same outcome in all cases. For whatever the merit of the reasonable suspicion or apprehension test, the test of real danger or possibility has been laid down by the House of Lords and is binding on every subordinate court in England and Wales. This test appears to be reflected in section 24 of the Arbitration Act 1996 (see ***Laker Airways Inc. v. FLS Aerospace Limited*** [1999] 2 Lloyd's Rep. 45). In the overwhelming majority of cases we judge that application of the two tests would anyway lead to the same outcome. Provided that the court, personifying the reasonable man, takes an approach which is based on broad common sense, without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary, reasonably well-informed member of the public, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done.

18. When applying the test of real danger or possibility (as opposed to the test of automatic disqualification under ***Dimes*** and ***Pinochet (No. 2)*** it will very often be appropriate to enquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled. As the Court of Appeal of New Zealand observed in ***Auckland Casino Ltd v. Casino Control Authority*** [1995] 1 NZLR 142 at 148, if the judge were ignorant of the allegedly disqualifying interest: *"there would be no real danger of bias, as no one could suppose that the Judge could be unconsciously affected by that of which he knew nothing".*

19. It is noteworthy that in ***R. v. Gough*** evidence was received from the juror whose impartiality was in issue (pages 651G and 658D), and reliance was placed on that evidence (page 652F); both in the Court of Appeal and the House of Lords it was accepted that if the correct test was the real danger or possibility test the appeal could not succeed, since the allegedly disqualifying association had admittedly not been known to the juror at the time when the verdict had been returned, and therefore there was no possibility that it could have affected her

decision (pages 652D, 660G and 670G). 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 possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the 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.

20. When members of the Bar are appointed to sit judicially, whether full-time or part-time, they may ordinarily be expected to know of any past or continuing professional or personal association which might impair or be thought to impair their judicial impartiality. They will know of their own affairs, and the independent, self-employed status of barristers practising in chambers will relieve them of any responsibility for, and (usually) any detailed knowledge of, the affairs of other members of the same chambers. The position of solicitors is somewhat different, for a solicitor who is a partner in a firm of solicitors is legally responsible for the professional acts of his partners and does as a partner owe a duty to clients of the firm for whom he or she personally may never have acted and of whose affairs he or she personally may know nothing. While it is vital to safeguard the integrity of court proceedings, it is also important to ensure that the rules are not applied in such a way as to inhibit the increasingly valuable contribution which solicitors are making to the discharge of judicial functions. Problems are, we apprehend, very much more likely to arise when a solicitor is sitting in a part-time capacity, and in civil rather than criminal proceedings. But we think that problems can usually be overcome if, before embarking on the trial of any assigned civil case, the solicitor (whether sitting as deputy district judge, assistant recorder, recorder or section 9 judge) conducts a careful conflict search within the firm of which he is a partner. Such a search, however carefully conducted and however sophisticated the firm's internal systems, is unlikely to be omission-proof. While parties for and against whom the firm has acted, and parties closely associated, would (we hope) be identified, the possibility must exist that individuals involved in such parties, and parties more remotely associated, may not be identified. When in the course of a trial properly embarked upon some such association comes to light (as could equally happen with a barrister-judge), the association should be disclosed and addressed, bearing in mind the test laid down in ***R. v. Gough***. The proper resolution of any such problem will, again, depend on the facts of the case.

21. In any case giving rise to automatic disqualification on the authority of ***Dimes*** and ***Pinochet (No. 2),*** the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. In either event it is highly desirable, if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve or the day of the hearing. Parties should not be confronted with a last-minute choice between adjournment and waiver of an otherwise valid objection. If, in any case not giving rise to automatic disqualification and not causing personal embarrassment to the judge, he or she is or becomes aware of any matter which could arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance. We find force in observations of the Constitutional Court of South Africa in ***President of the Republic of South Africa & Others v. South African Rugby Football Union & Others*** 1999 (7) BCLR (CC) 725 at 753, even though these observations were directed to the reasonable suspicion test: *"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."*

22. We also find great persuasive force in three extracts from Australian authority. In ***Re JRL, ex parte CJL*** (1986) 161 CLR 342 at 352, Mason J., sitting in the High Court of Australia, said: *"Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."*

23. In ***Re Ebner*** [1999] FCA 110, the Federal Court asked (in paragraph 37): *"Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by the setting aside of a judgment on the ground that the judge is disqualified for having such an interest?"*

24. In the ***Clenae*** case, above, Callaway JA, at paragraph 89(e) of the judgment, observed: *"As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application ..."*

25. It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (***KFTCIC v. Icori Estero SpA*** (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol. 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see ***Vakauta v. Kelly*** (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, 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. We repeat: every application must be decided on the facts and circumstances of the individual case. 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.

26. We do not consider that waiver, in this context, raises special problems (**Shrager v. Basil Dighton Ltd.** [1924] 1 KB 274 at 293; ***R. v. Essex Justices, ex parte Perkins*** [1927] 2 KB 475 at 489; ***Pinochet (No. 2),*** at 285; ***Auckland Casino,*** above, at 150, 151; ***Vakauta v. Kelly,*** above, at 572, 577). If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so. What disclosure is appropriate depends in large measure on the stage that the matter has reached. If, before a hearing has begun, the judge is alerted to some matter which might, depending on the full facts, throw doubt on his fitness to sit, the judge should in our view enquire into the full facts, so far as they are ascertainable, in order to make disclosure in the light of them. But if a judge has embarked on a hearing in ignorance of a matter which emerges during the hearing, it is in our view enough if the judge discloses what he then knows. He has no obligation to disclose what he does not know. Nor is he bound to fill any gaps in his knowledge which, if filled, might provide stronger grounds for objection to his hearing or continuing to hear the case. If, of course, he does make further enquiry and learn additional facts not known to him before, then he must make disclosure of those facts also. It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should.

**Locabail (UK) Ltd v Bayfield Properties Ltd and another.**

**Locabail (UK) Ltd and another v Waldorf Investment Corporation and others**

**The Background**

27. Mr Lawrence Collins QC is a solicitor and a senior partner in Herbert Smith. Since 1995 he has been head of Herbert Smith's Litigation and Arbitration Department. Herbert Smith is a firm of some 145 partners. Mr Collins became Queen's Counsel in 1997 and in the same year was appointed by the Lord Chancellor under section 9(4) of the Supreme Court Act 1981 to sit as a deputy High Court Judge in the Chancery Division. He has sat on a number of occasions in that capacity.

28. In October and November 1998 Mr Collins, sitting as a deputy High Court Judge, heard two cases in each of which the plaintiff was Locabail (UK) Ltd and in each of which Locabail was attempting to enforce charges securing repayment of advances made to Mr Emmanuel, Mrs Emmanuel's husband, or to companies controlled by

him. In one case, the security consisted of Hans House in Knightsbridge. Hans House was owned by Waldorf Investment Corporation (`Waldorf'), a Liberian company controlled by Mr Emmanuel. In the other case the security consisted of Hawks Hill, a country estate in Chobham, Surrey. Hawks Hill had been owned by Aurora Enterprises S.A., a Panamanian company also controlled by Mr Emmanuel, but in 1995, by agreement between Locabail and Mr Emmanuel (or his companies), was transferred to Bayfield Properties Ltd (`Bayfield'), an Isle of Man company controlled by Mr Emmanuel. Locabail's charge over Hawks Hill was replaced by a charge in favour of Allied Trust Bank to secure funds advanced by Allied Trust Bank to Bayfield for the purchase of Hawks Hill from Aurora.

29. Allied Trust Bank commenced mortgage proceedings for possession of Hawks Hill and obtained a possession order on 18 June 1996. A few days later Locabail took an assignment of the Allied Trust Bank charge and was substituted as plaintiff.

30. Mrs Emmanuel claimed to be the beneficial owner of Hawks Hill. Her claim was based on representations alleged to have been made to her by Mr Emmanuel prior to their marriage and on the expenditure by her of money in reliance on the representations. In January 1997 she became a defendant in the Bayfield action and applied to have the possession order set aside.

31. Hans House had been the matrimonial home of Mr and Mrs Emmanuel. It had been charged to Locabail. In April 1998 Locabail commenced mortgage proceedings for possession of Hans House. The defendants were Waldorf and Mr and Mrs Emmanuel. Summary judgment under Order 14 was obtained by Locabail in August 1998. Waldorf and Mr Emmanuel consented to the order. Mrs Emmanuel did not. She contended that Mr Emmanuel had assured her that she had a one half share in Hans House, that in reliance on that assurance she had expended money on the property and that in consequence she had an equitable interest binding on Locabail. She had, however, signed a letter of consent to the charge and Locabail had been provided with a certificate from her solicitor stating that he had advised her separately and that she appeared to have given her consent voluntarily. So summary judgment for possession was given. After the order had been made Mrs Emmanuel changed her solicitors, gave notice of appeal and filed evidence in support of a contention that her consent had been given as a result of undue influence.

32. The trial of the Hawks Hill action, in which Mrs Emmanuel was applying for the order for possession of Hawks Hill to be set aside, began on 19 October 1998. The trial lasted 16 days. The deputy judge reserved his judgment. Later, in November 1998, he heard Mrs Emmanuel's appeal against the Order 14 judgment in the Hans House action. He reserved his judgment. Both judgments were given together on 9 March 1999. They were adverse to Mrs Emmanuel. The deputy judge did not accept, either in relation to Hawks Hill or in relation to Hans House, that Mrs Emmanuel was entitled to the equitable interests she had claimed. It is not necessary for the purposes of this judgment to describe why it was that he came to those conclusions.

33. On 29 March 1999, before the orders made on 9 March had been drawn up, Mrs Emmanuel made an application to the deputy judge asking him to disqualify himself from further dealing with the two cases and to direct a re-hearing before another judge. Mrs Emmanuel's application was based upon the fact that Herbert Smith had been, and probably still was, acting for a Russian company, Sudoexport, which had claims against Mr Emmanuel and against a company, Howard Holdings Inc., controlled by Mr Emmanuel. Sudoexport had obtained a bankruptcy order against Mr Emmanuel and a winding-up order against Howard Holdings Inc. Herbert Smith were acting for the liquidator of Howard Holdings Inc, as well as for Sudoexport. It seems that the company had substantial claims against Mr Emmanuel. For reasons which we will expand upon later, Mrs Emmanuel contended that the deputy judge, being a partner in Herbert Smith, was not a proper person to have been the judge in the cases in which Locabail was seeking to enforce the securities obtained from Mr Emmanuel's companies. It was said that a reasonable person, knowing the circumstances, might reasonably feel doubts as to the ability of the deputy judge to be impartial and unbiased. The deputy judge gave judgment on the same day, 29 March, dismissing the application.

34. Mrs Emmanuel has applied for permission to appeal against the judgments given on 9 March and also against the deputy judge's dismissal of her application on 29 March. She has filed, with her application for permission to appeal, a draft notice of appeal setting out the proposed grounds of appeal and a supplemental document giving details of the respects in which it is contended that the deputy judge's findings of fact and handling of evidence were unsatisfactory. The hearing before us, however, has been confined to a consideration of Mrs Emmanuel's bias point. If she succeeds on that point, she is entitled to a new hearing before another judge of the Hawks Hill application and the Hans House appeal. If she fails on that point she is still able to prosecute her application for permission to appeal on the other grounds set out in her draft notice of appeal.

35. Mrs Emmanuel's bias case is based on the solicitor/client relationship between Herbert Smith and Sudoexport and between Herbert Smith and the liquidator of Howard Holdings Inc. These matters came to light in the course of the hearing of the Hawks Hill case. The manner in which that happened appears from the deputy judge's 29 March judgment:

*"It is not suggested that I knew of these matters prior to the commencement of the trial. On Day 7 of the trial in the Hawks Hill action [Tuesday 27 October 1998] Mrs Emmanuel produced further discovery of the file in the possession of the solicitors who had acted for her in her divorce proceedings against Mr Emmanuel. Since her advisers in the Hawks Hill action had not previously seen the file, and since it inevitably contained privileged material, I did not sit for a substantial part of that day so that the matrimonial file could be examined by Mrs Emmanuel's advisers and*

*privileged material removed. The advisers to [Locabail] and I were provided with the remainder of the file towards the end of that day.*

*The first document in the file was a fax sent in June 1996 from Mr Peter Taroulareas, the first husband of Mrs Emmanuel, to her solicitors, attaching a press cutting from August 1995 about a bankruptcy order obtained against Mr Emmanuel by Sudoexport".*

The press cutting to which the deputy judge referred said, under the headline *"Greek shipowner in bankruptcy puzzle",* that: *"Herbert Smith - the top British solicitors working for Russian trading group Sudoexport - confirmed ... that it had won a bankruptcy order against Emmanuel".*

37. The article referred to Mr Emmanuel's purchase from Sudoexport of a ship for US$20 million and went on "... The ship-owning company was alleged to have collapsed owing the Russians US$10 million ... . Sudoexport applied for the company to be wound up in London. The petition was opposed but Emmanuel was asked to pay Sudoexport's legal costs of GBP 20,000. Emmanuel is alleged to have not done so and Herbert Smith, acting for the Russians, started proceedings for personal bankruptcy".

38. The ship-owning company referred to in the article was Howard Holdings Inc, but it may be Mrs Emmanuel did not know that until the deputy judge gave his 29 March judgment.

39. The deputy judge, having come across the press cutting during the course of his perusal of the matrimonial file in the evening of 27 October 1998, made an immediate disclosure on the morning of 28 October. We have been supplied with a transcript of what he said:

"Judge Collins: Mr Mann and Miss Williamson, I had a quick flick through Bundle T last night and I discovered on the second page for the first time that the firm of which I am a partner seems to have had something to do with attempting to get a bankruptcy order against Mr Emmanuel. It is the first time I have heard of it, and I had nothing whatever to do with it."

40. Neither Mr Mann QC for Locabail nor Miss Williamson QC for Mrs Emmanuel made any response to the disclosure made by the deputy judge. Neither asked for time to consider the position more fully. Neither asked for any additional information about the matters the deputy judge had referred to. Each side, of course, had its own copy of the press-cutting in Bundle T. Both sides were content for the hearing to continue. It did continue for a further eight days after which, as we have said, judgment was reserved and eventually given on 9 March 1999.

**The Issues**

41. The arguments put forward in support of the contention that the deputy judge should have acceded to the 29 March application were essentially the same below as those advanced before us. Three points are made by Miss Williamson:-

42. She submits that there was a conflict of interest between Mrs Emmanuel and Herbert Smith's clients, Sudoexport and/or the liquidator of Howard Holdings Inc. The conflict of interest is constructed as follows: Sudoexport has money claims against Mr Emmanuel. So does Howard Holdings Inc. in liquidation. Locabail is one of Mr Emmanuel's creditors. If Mrs Emmanuel's claims to equitable interests in the two properties were to succeed, there would be a reduction in the value to Locabail of its security and an increase in the unsecured debt owing by Mr Emmanuel to Locabail. This would be detrimental to the ability of Sudoexport and the liquidator of Howard Holdings Inc. to obtain payment of the sums owing to them by Mr Emmanuel. The deputy judge explained the point in his judgment: "... if [Mrs Emmanuel] failed, [Locabail] would be removed as a creditor in competition with Sudoexport". There is, therefore, Miss Williamson submitted, a conflict of interest between Mrs Emmanuel and Herbert Smith's clients.

Miss Williamson's second point was that the conflict of interest between Mrs Emmanuel and Herbert Smith's clients would have disqualified Herbert Smith from acting as Mrs Emmanuel's solicitor. She relied on paragraph 15.01 of the Guide to the Professional Conduct of Solicitors (7th Edition 1996) published by the Law Society: Paragraph 15.01 provides: *"A solicitor or firm of solicitors should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients".*

44. Miss Williamson's submission was that if a conflict of interest prevented a solicitor from accepting instructions to act for someone, the conflict would be sufficient to disqualify the solicitor from sitting as a judge on a case in which that person was a party.

45. Miss Williamson's third point was based on the likelihood that, in the proceedings in which Herbert Smith had acted for Sudoexport and for Howard Holdings Inc. (in liquidation) against Mr Emmanuel, allegations of a discreditable nature had been made against Mr Emmanuel. This, submitted Miss Williamson, gives rise to a risk that Mrs Emmanuel, and her witnesses in the Locabail litigation who were associates of Mr Emmanuel, may in the eyes of the deputy judge have become tarnished by their association with Mr Emmanuel.

46. These were the three main points relied on by Miss Williamson in support of her submission that there was a real danger that the deputy judge might, in hearing the Hawks Hill application and the Hans House appeal, have been biased against Mrs Emmanuel.

47. There was an additional issue. When, on Day 8 of the hearing, the deputy judge made the disclosure recorded in the transcript, Mrs Emmanuel could then have made an objection to the deputy judge continuing to hear the case. Or she could have asked for time to consider the position. She did neither, but allowed the hearing to continue to

a conclusion. She could, after the Hawks Hill hearing had come to an end, have objected to the deputy judge hearing the Hans House appeal. She did not do so, and, without objection, he heard the appeal. Thereafter, during the three and half month delay before the reserved judgment was delivered, no bias objection was made. An inference that might be drawn is that Mrs Emmanuel wanted to await the result of the two hearings, and only made her bias objection when she knew she had lost. So the question arises whether she must be taken to have waived any bias objection.

48. As to this, Mrs Williamson's response was to submit, first, that the disclosure made by the deputy judge was not complete disclosure, second, that a waiver could only be effective when made by a person with full knowledge of the relevant facts and, third, that in view of Mrs Emmanuel's incomplete knowledge of the circumstances of Herbert Smith's involvement in the litigation against her husband, she was never put to her election as to what she should do and waiver could not be raised against her.

49. The "waiver" issue is one which, logically, falls to be considered after the bias issues have been considered.

**The bias issues**

50. This is not a case in which actual bias on the part of the deputy judge is alleged. Is it a case in which the judge has a sufficient pecuniary or propriety interest in the outcome of the trial so as to attract the automatic disqualification principle expressed in ***Dimes?*** If it is, then the deputy judge is automatically disqualified. If it is not, then it is a case to which the principles expressed in ***R -v- Gough*** must be applied. It was suggested by Miss Williamson that this was a case to which ***Dimes*** applied. Her argument went like this. The deputy judge is a partner in Herbert Smith. Herbert Smith was acting for Sudoexport and Howard Holdings Inc in litigation against Mr Emmanuel. Success in achieving the maximum possible recovery from Mr Emmanuel would enhance the goodwill of Herbert Smith and thereby tend to increase its profits. The deputy judge would share in the firm's profits. Miss Williamson suggested, also, the possibility that Herbert Smith might be acting under a conditional fee agreement with fees dependent on the level of recoveries extracted from Mr Emmanuel. But in order to attract the Dimes consequence of automatic disqualification something more must, in our judgment, be present than the tenuous connection between the firm's success in an individual case on the one hand and the firm's goodwill and the level of profits on the other. And if the pecuniary or proprietary interest has to depend upon the existence of a conditional fee agreement of the unusual character suggested by Miss Williamson, there must be at least some evidence to suggest the existence of such an agreement. Here there is none. Miss Williamson's suggestion is wholly speculative and hypothetical. In our judgment this is not a case to which the ***Dimes*** principle of automatic disqualification applies. The ***R -v- Gough*** test must be applied and the court must ask itself whether *"... in the circumstances of the case ... it appears that there was a real likelihood, in the sense of a real possibility, of bias ..."* on the part of the deputy judge (Lord Goff at p. 668).

51. In answering this question, the court must take into account the actual facts as disclosed by the evidence and, in particular, what it was that the judge knew at the time the case was being heard. In ***R -v- Gough*** evidence was received from a juror as to whether she recognised the name "Gough" as being the name of the neighbour whom she knew as "Steve". She said she did not. She said she had had no idea that her next door neighbour, "Steve", was the brother of the accused. This absence of knowledge of the connection between "Steve" and the accused formed part of the basis on which the House of Lords (and the Court of Appeal) assessed whether there was any real danger of bias.

52. In the present case, the deputy judge told the parties, when he made the disclosure on 28 October 1998, that he knew no more of the litigation in which Herbert Smith were acting than was disclosed by the article. No-one then or since has suggested that that was not true. In his 29 March 1999 judgment the deputy judge referred to remarks made by Lord Denning in ***Metropolitan Properties Co Ltd -v- Lannon*** [1969] 1QB 577, to the effect that a barrister or solicitor should not sit as a judge on a case to which one of his clients was a party, nor on a case where he was already acting against one of the parties, and continued: *"It is for that reason that I, and no doubt others who sit in a part time capacity, take steps to discover whether that is so. I should add that in the Hawks Hill action Bayfield Properties Ltd (by then controlled by the mortgagees of its shares) consented to the possession order and took no further part in the proceedings; and that in the Hans House action Waldorf Investment Corporation and Mr Emmanuel were not parties to the appeal: they did not appear in the action, and consented in writing to the possession order".*

53. It is clearly to be inferred from this passage that the deputy judge, before he heard the Hawks Hill application and the Hans House appeal, had a conflict search carried out within Herbert Smith in order to make sure that his firm was not acting for or against Locabail or for or against Mrs Emmanuel. He did not, it must also be inferred, make a conflict search to ascertain whether or not his firm was acting for or against Mr Emmanuel.

54. In his 29 March judgment the deputy judge identified an important question: *"No doubt there may be cases in the future where, notwithstanding conflict searches, the fact that a large firm is acting for or against a party, or an entity connected with a party, will not be known to a deputy judge, and might not emerge until after judgment has been given. The question might then arise as to whether that would in itself require the judgment of a judge who did not know of the connection to be set aside".*

55. This is a question that we have put to ourselves. In our view, once the hypothesis that the judge *"did not know of the connection"* is accepted, the answer, unless the case is one to which ***Dimes*** applies, becomes obvious. How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of

the facts that, in argument, are relied on as giving rise to the conflict of interest? In pressing her case on this point Miss Williamson argued that it was incumbent upon the deputy judge, who had acquired from the press cutting limited knowledge of a connection between his firm and Mr Emmanuel, to make inquiries in order to discover and then to disclose to the parties the full circumstances of the connection. Unless this were done, she submitted, the real danger of bias test would be satisfied. We do not accept this. Miss Williamson, in our view, is confusing the ***Dimes*** approach with the ***Gough*** approach. If ***Dimes*** applies, i.e. if the judge has a sufficiently significant pecuniary or proprietary interest in the outcome of the trial, the knowledge or absence of knowledge of the judge is, in principle, irrelevant. If a judge with limited knowledge of some indirect connection between himself and the case does not make any further inquiries, there may be some risk, an outside chance, that inquiries, if made, would reveal some disqualifying pecuniary or proprietary interest. If there is in fact such an interest, the judge's lack of knowledge of it or forgetfulness about it will not enable the ***Dimes*** principle of automatic disqualification to be avoided. But if there is no such interest, and there is none in the present case, ***the R -v- Gough*** test must be applied and, for that purpose, all that is necessary is to ask whether, in the light of the judge's actual knowledge at the time of the hearing and of any other relevant facts established by the evidence, the real danger of bias test has been satisfied.

56. The matters relied on by Miss Williamson as demonstrating the requisite real danger must be considered cumulatively. There are three matters relied on. Each has been previously referred to in this judgment.

57. First, there is the point that Herbert Smith's clients, Sudoexport and Howard Holding Inc. in liquidation, had an interest in the failure of Mrs Emmanuel's claims to beneficial interests in Hawks Hill and Hans House. The success of these claims would reduce the assets to which Locabail could look in order to obtain payment of its secured debts. The balance remaining owing to Locabail would increase the amount of the debts which would rank for dividend in Mr Emmanuel's bankruptcy and reduce the amount of any dividend that creditors might receive. Hence the conflict. The point, when explained by Miss Williamson, was easy enough to follow. It was not one, however, which would immediately occur to even an informed reader of the press cutting disclosed on 28 October. It plainly did not occur to the deputy judge, nor did it occur to Mrs Emmanuel or her lawyers. It did not occur to anyone at the time the disclosure was made that Sudoexport might have an interest in the failure of Mrs Emmanuel's claims. All the facts on which the alleged conflict of interest depended were known at the time. The press cutting disclosed that Herbert Smith was acting for Sudoexport, that Sudoexport had many claims against Mr Emmanuel and that Sudoexport had obtained a bankruptcy order against Mr Emmanuel. Mr Emmanuel's connection with Hawks Hill and Hans House was, of course, known to everyone. So was his potential indebtedness to Locabail. So was the fact that the deputy judge was a Herbert Smith partner. But the alleged conflict of interest occurred to no-one. Why should it have occurred to the reasonable onlooker?

58. Miss Williamson placed reliance on the Law Society's conflict rules. These, it was argued, would have disqualified the deputy judge - or Herbert Smith as a firm - from acting for Mrs Emmanuel or for Locabail in the Hawks Hill or Hans House litigation. We think that is probably correct. We see the force of Miss Williamson's submission that, if a conflict prevents a solicitor from acting for a party to litigation, the conflict must surely also disqualify the solicitor from sitting as a deputy judge in that litigation. But the submission is, in our opinion, too inflexible. Everything depends on the circumstances. If a serious conflict of interest becomes apparent well before the hearing is due to commence, it seems plain to us that the judge should not sit on the case. This is so whether the judge is a full time judge or a solicitor deputy or a barrister deputy. On the other hand, if a conflict does not become apparent until very shortly before the hearing or during the hearing, the position may be different. The course the judge, or deputy judge, should take will depend on all the circumstances. Inflexible rules are best avoided. Plainly the judge should not sit, no matter what inconvenience to the parties may result, if he doubts his ability to be impartial. But, short of that, a number of variable factors will need to be taken into account. What is the nature of the conflict of interest? Are the parties willing for the judge to hear the case? Do they positively want him to hear the case rather than have to suffer an adjournment? Is another judge available to take on the case? If the case has already started, how long has it been going on and how much is left? What will be the expense consequences for the parties if the judge withdraws? How will it appear to the reasonable onlooker if the judge does not withdraw?

59. Of these questions perhaps only the first and the last are directly relevant to the Gough test. But it must be remembered that in Gough the arguably damaging relationship between the juror and the accused's brother only came to light after the trial was over. In a case in which before or during the trial the facts relating to the alleged bias have been disclosed to the parties, it seems to us right that attention should be paid to the wishes of the parties. They are the principals. If they are content that the trial should proceed the judge should, in our view, except where he doubts his ability to be impartial, be very slow to abort the trial. If one party wants the trial to continue and the other wants it aborted, the judge must decide what to do, weighing all the factors and asking the questions to which we have referred. It follows that we do not accept that the discovery of a conflict of interest which, under the Law Society's conflict rules, would disqualify a solicitor from acting for one or other of the parties to a case necessarily bars the solicitor from hearing the case as a deputy judge or requires a hearing already started to be aborted or a judgment given on the case to be set aside. Everything depends on the circumstances of the particular case.

60. The second point relied on by Miss Williamson is based upon the deputy judge's interest in fees earned by Herbert Smith. The point has already been discussed in this judgment. It is as tenuous and insubstantial for the

purposes of the ***Gough*** test as it is for the purpose of establishing that the deputy judge had a sufficient pecuniary or proprietary interest in the outcome of the litigation to attract automatic disqualification.

61. Miss Williamson's third point was based upon the belief that, in the Sudoexport litigation against Mr Emmanuel and the litigation against him brought by the Howard Holdings Inc. liquidator, discreditable allegations about him were likely to have been made, and upon a consequent fear that these allegations might tarnish Mrs Emmanuel and her witnesses in the eyes of the deputy judge. This point has, in our judgment, no merit at all. First, Mrs Emmanuel, who is estranged from her husband, has in hearings before the deputy judge herself made discreditable allegations about him. Second, as the deputy judge rightly pointed out in his 29 March judgment, it is the duty of a judge to put out of mind irrelevant or immaterial matters, particularly those of a prejudicial character. Knowledge by a judge of such matters goes nowhere towards establishing a real danger of bias.

62. In considering the cumulative weight of these matters, there are one or two other submissions made by Miss Williamson that should be mentioned.

63. She submitted that the deputy judge's statement on 28 October that he knew no more of the Sudoexport matters than was contained in the press cutting should not be entertained. His state of knowledge, she submitted, was irrelevant. This submission is contrary to authority. In ***R -v- Gough*** an affidavit from the juror as to the juror's state of knowledge was accepted.

64. Mr Mann QC, counsel for Locabail, submitted that there was no absolute rule as to whether or not the court should accept a statement from the judge as to his or her state of knowledge of facts relevant to a bias allegation. He submitted that although the court could not investigate the judge's motives, and so could not accept a statement from the judge that he was not biased, the court could accept, and if necessary test by reference to the facts of the case, statements by the judge as to what he knew or did not know at the relevant time. We think this is right and in accordance with authority. If the judge's statement about his knowledge is, objectively viewed, cogent, then that is the basis on which the reasonable onlooker, or the court personifying the reasonable onlooker, will ask whether there was any real danger of bias. If the judge's statement is, objectively viewed, an improbable one, then that is how the reasonable onlooker will approach it.

65. Miss Williamson challenged the cogency of the deputy judge's statement that he knew nothing more about the Sudoexport litigation than was contained in the press cutting. She submitted that, in the circumstances, "the mere fact that the firm is dealing with the matter which is a conflicting matter must give rise to an expectation that the [solicitor judge] will know at least something about it". We regard this proposition, when applied to a firm like Herbert Smith with around 145 partners and over 300 assistant solicitors, as wholly unreal. We do not think there was any such expectation.

66. We regard the deputy judge's statement that he had not known of the matters disclosed in the press cutting until he read it as eminently believable. There is nothing that casts doubt on the statement. Moreover no doubt as to the accuracy of the statement was raised by Mrs Emmanuel or her lawyers either at the time or at any time until after judgment had been given against her.

67. In our judgment the reasonable onlooker, and the court personifying the reasonable onlooker, would accept the deputy judge's statement about his knowledge and, on that basis, would find no difficulty in concluding that there was no real danger that the judge had been biased.

**Waiver**

68. In our judgment, Mrs Emmanuel and her lawyers had to decide on 28 October what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another judge. They could have told the judge they had no objection to him continuing with the hearing. In the event they did nothing. In doing nothing they were treating the disclosure as being of no importance. The hearing then continued for a further 7 days, judgment was reserved, the Hans House appeal was heard, judgment was reserved, and judgment in both cases was given three and half months later. During all this period Mrs Emmanuel and her lawyers did nothing about the disclosure that had been made on 28 October. They only sprang into action and began complaining about bias after learning from the deputy judge's judgment that Mrs Emmanuel had lost.

69. Mrs Emmanuel's application for permission to appeal and draft notice of appeal raise a large number of objections to the 9 March judgment expressed over several pages. We are concerned with none of these objections. They may or may not be well founded. The deputy judge may or may not have been unfair to Mrs Emmanuel in the way in which he dealt with her evidence and that of her witnesses. These are matters which must be raised with another court on another occasion. We are concerned only with the complaint based upon an appearance of bias allegedly produced by Herbert Smith's involvement in the litigation against Mr Emmanuel. This involvement was, in its essentials, disclosed on 28 October. It was not open to Mrs Emmanuel to wait and see how her claims in the Locabail litigation turned out before pursuing her complaint of bias. Miss Williamson protests that on 28 October not enough was disclosed to put Mrs Emmanuel to her election. We disagree. The essentials of the conflict of interest case that is now relied on were to be found in the press cutting. Mrs Emmanuel wanted to have the best of both worlds. The law will not allow her to do so.

70. We agree with the reasons given by the deputy judge in his 29 March 1999 judgment for dismissing Mrs Emmanuel's bias application. We refuse permission to appeal from that judgment.

**Error! Reference source not found. Timmins v Gormley**

71. This case has caused us particular concern. The defendant, Timothy Gormley, seeks permission to appeal against the judgment of Mr Recorder Braithwaite QC given on 3 June 1999. At the Liverpool County Court the recorder awarded the claimant, Margaret Timmins, £227,123.

72. Mr Robert Jay QC who represents the defendant made his submissions with admirable moderation and precision. In addition to relying on a number of other grounds of appeal, the defendant contends that the judgment of the recorder should be set aside for apparent bias, that is, a real danger of bias on the part of the recorder. In support of his allegation of bias Mr Jay relies on certain articles written by the recorder which he submits indicate that there is a real danger that the recorder at the time of the trial was or could have been influenced by an unconscious but settled prejudice against the insurers of the defendant who are the real defendants in this case. Mr Jay also submits that the findings which the judge made were so favourable to the claimant that they provide support for this allegation of bias.

73. The action arose out of a traffic accident on 14 October 1994. The claimant commenced proceedings on 1 November 1995. She claimed damages for her injuries. These include injury to her cervical and thoracic spine. She also claimed special damages, which included continuing loss of earnings. She initially limited her claim to £25,000. Promptly on 20 November 1995 a defence was filed. The defence admitted negligence but not the damages. On 22 November 1995 the claimant obtained judgment for damages to be assessed. The defendant was guilty of no delay. However, it was not until 19 March 1999 that the claimant filed her final schedule of special damage. By that time the sum specified had grown to £199,413, including past loss of earnings amounting to £32,120 and future loss of earnings amounting to £133,750. The future loss of earnings was calculated on the basis that the claimant would never work again. A counter-schedule was filed on behalf of the defendant. This accepted the arithmetical calculation of the claim but put in issue the claimant's alleged inability to work.

74. In general it would not be unfair to say that the recorder determined almost every issue in favour of Mrs Timmins. He found that before the accident she was a happy and fulfilled person. There were indications in the medical evidence that she was not a reliable historian. The recorder indicated in his judgment that he had *"a suspicion"* that part of the reason for this was that *"doctors sometimes do not have the time to listen and to understand what is troubling somebody"*. He thought that on all matters relevant to his judgment Mrs Timmins was in fact actually telling him the truth. The recorder considered that the defendant's doctor was "slightly dismissive" of the claimant's difficulties. He preferred the claimant's medical evidence to that of the defendant. He concluded that although the defendant relied on a video which the defence had arranged to be taken, it did not support his case but, on the contrary, showed the claimant was severely handicapped by her on-going problems. The accident had left her "crippled" in a "holistic sense". It had spoilt her life. The recorder indicated, in case there was an appeal, that the transcript would not be able to convey the flavour of the manner in which the claimant gave evidence.

75. In addition to his practice in personal injury cases, primarily but not exclusively on behalf of claimants who are seeking damages for personal injuries, Mr Braithwaite is a relatively prolific writer in the area in which he practises. He is a consultant editor of the well known and respected textbook Kemp and Kemp. Mr Braithwaite in a letter to the court points out that it is a fundamental part of the policy of that book that it should not favour either claimants or defendants. He has written extensively on personal injury topics in almost all the publications devoted to that subject. He has also lectured, appeared on television and acted abroad as an expert on English personal injury law.

76. The flavour of the four articles relied on as suggesting bias can only be properly assessed by reading them as a whole. However, that in "The Lawyer" of 21 June 1999, which is after the trial, is probably the most revealing. It examines the Access to Justice reforms in the context of personal injury and clinical negligence claims. It suggests that the reforms are unrealistic in their expectations of defendants. It is not credible that they "would recognise that it was their responsibility to give the claimant real quality of life, whatever the cost. And they would refrain from attacking a claimant's credibility without good cause... If someone's life had been ruined they would do their utmost to deliver fair and adequate compensation within a reasonable time frame." The Access to Justice approach, Mr Braithwaite considered, was likely "to remain a dream". It was inconsistent with the adversarial system in which lawyers had spent their lives. "The chances of them changing behaviour overnight at this stage are as unlikely as that of global insurers willingly [opening] their coffers to pay paralysed and brain damaged accident victims the sums to which they are justly entitled." The article suggests that "delaying tactics" are often premeditated, in the hope that the case will just go away; that when an offer is eventually made it is intended that the victim will accept a smaller sum than is deserved, in order to put an end to the ongoing stress of the litigation process. "Denying liability in cases where it is clear that liability should not be questioned – for example where drivers have already been convicted of dangerous or drunk driving – is common." Mr Braithwaite adds that it is only with the assistance of determined lawyers that claimants are likely to obtain a just settlement. He also makes adverse comments on experts who specialise "in personal injury as 'defendant' experts." The article does however end with an acknowledgement that to a limited extent lawyers of good quality and insurers who are decent and humane are coming together to resolve disputes without the intervention of the courts and the reforms may be a catalyst which will accelerate this trend.

77. The next article upon which Mr Jay relies is an article in a special issue of Quantum (Double issue 4 and 5, 4 September 1998) devoted to the decision of the House of Lords in ***Wells v Wells*** [1999] 1 AC 345. That decision

resulted in successful personal injury claimants receiving substantially increased damages for future long term care and long term loss of earnings. The article contained a contribution from the recorder and a contribution from a solicitor who was expressing "the defendants' view". The recorder considered the decision a "wonderful victory" for claimants generally and for Mr Kemp QC who had been arguing for the change reflected in the decision of the House of Lords for many years.

78. Neither of the articles to which we have referred so far are couched in language which can be criticised as being inappropriate. They do make clear that the recorder is very sympathetic to the position of claimants who are pursuing claims for personal injuries. The earlier article in addition indicates that the recorder strongly disapproves of insurers who in his eyes adopt unacceptable practices. However it cannot be said it is inappropriate for a judge to hold firm views as to insurers who adopt tactics of this nature. After all, the Civil Procedure Reforms were in part designed to prevent practices of the sort of which the recorder complains occurring in the future. The recorder has reservations as to whether the reforms will bring about the change of culture which is necessary. He is entitled to have reservations. While it does lack balance, the article does not exhibit such a lack of proportion that it can be regarded as showing a blinkered approach. As to the Wells v Wells article, it could be said that the decision was rectifying a previous state of affairs which was not fair to claimants and the recorder was entitled to welcome the decision.

79. The next article relied upon by Mr Jay was also in Quantum (Issue 3, 10 August 1998). It contains a description of a case which the recorder had recently successfully conducted on behalf of a claimant. It is highly critical of the conduct of the defendant's insurers in that case. It refers to them in trenchant terms as not doing anything to assist the claimant in her plight. The article describes the defendant's "team" as apparently lacking compassion and perception and their conduct as reminding him "just how badly these cases can be managed". The final article appeared in the Personal and Medical Injuries Law Letter (Vol.15, No.7, July 1999). This time the article is a report on a case in which the recorder was not personally involved. The case concerned a claim by a tetraplegic. It suggests that the defence team had targeted the case "intending to create a precedent to discourage plaintiffs generally, and apparently set out to attack both the plaintiff and his experts" when the particular plaintiff had an excellent record. The recorder indicates that the case has lessons for plaintiffs' lawyers: "First, we should not allow ourselves to be deterred by intimidatory tactics by defendants. Second, if a plaintiff's claim is carefully researched and properly presented it ought to succeed". It is not possible for us to say whether the recorder's criticisms are or are not justified. However, we note that the plaintiff was successful in obtaining judgment for a very substantial sum. It was a much larger sum than the defendant's insurers were prepared to pay.

80. When considering the weight which should be attached to these articles, it is necessary to bear in mind that they are only a small selection of the recorder's extensive writing on the subject of personal injuries. They have been perfectly properly selected because it is thought they support the defendant's contention that the recorder is a committed advocate of the cause of claimants generally.

81. Mr Jay makes no specific complaints about the manner in which the case was conducted by the recorder.

82. In relation to the conduct of the trial, Mr Edis QC, on behalf of the claimant, has the advantage that the recorder very properly gave full disclosure of information which might have resulted in the defendant asking for the case to be tried by another judge. He did not choose to do so. The recorder disclosed that he was a member of the Association of Personal Injury Lawyers (APIL). He also disclosed that he was aware that there had been a payment into court and the amount of that payment, and finally that he had previously cross-examined the defendant's expert in a manner which had caused offence to that expert. The defendant was only informed of these matters shortly before the hearing when the case was transferred to the recorder. This disclosure by the recorder is properly relied on as showing that he was aware of his responsibilities to the defendant. If objection had been taken the case would probably have had to be adjourned. But the defendant was not then aware of the articles now said to show a real danger of bias, and cannot be said to have waived any objection to which they may give rise.

83. Mr Jay disclaims any reliance on the fact that the recorder is a member of APIL, an organisation which normally represents claimants rather than defendants.

84. Although the judgment of the recorder was from the claimant's point of view in very favourable terms, having heard Mr Edis's submissions we do not consider that the judgment in itself provides any direct support of the allegation of apparent bias. The findings the recorder made are not so surprising that they support the allegation.

85. The defendant's case on bias therefore turns on the statements that the recorder made in the articles to which we have referred. It is not inappropriate for a judge to write in publications of the class to which the recorder contributed. The publications are of value to the profession and for a lawyer of the recorder's experience to contribute to those publications can further rather than hinder the administration of justice. There is a long established tradition that the writing of books and articles or the editing of legal textbooks is not incompatible with holding judicial office and the discharge of judicial functions. There is nothing improper in the recorder being engaged in his writing activities. It is the tone of the recorder's opinions and the trenchancy with which they were expressed which is challenged here. Anyone writing in an area in which he sits judicially has to exercise considerable care not to express himself in terms which indicate that he has preconceived views which are so firmly held that it may not be possible for him to try a case with an open mind. This is the position notwithstanding

the fact that, as Mr Edis submits, there can be very real advantages in having a judge adjudicate in the area of law in which he specialises. But if this is to happen it must be recognised that his opinions as to particular features of the subject will become known. The specialist judge must therefore be circumspect in the language he uses and the tone in which he expresses himself. It is always inappropriate for a judge to use intemperate language about subjects on which he has adjudicated or will have to adjudicate.

86. Assistance in this situation is provided by the decision of the High Court of Australia in the case of ***Vakauta v Kelly*** (1989) 167 CLR 568. In that case, in the course of a trial for personal injuries, the judge had made intemperate remarks about the medical evidence. The majority of the court came to the conclusion that the remarks would have excited in the minds of the parties a reasonable apprehension that the judge would not bring an unprejudiced mind to the resolution of the matter before him. In the judgment of the majority (Brennan, Deane and Gaudron JJ) it was stated:

*"It is inevitable that a judge who sits regularly to hear claims for damages for personal injury will form views about the reliability and impartiality of some medical experts who are frequently witnesses in his or her court. In some cases and notwithstanding the professional detachment of an experienced judge, it will be all but impossible to put such preconceived views entirely to one side in weighing the evidence of a particular medical expert. That does not, however mean that the judge is disqualified from hearing the particular action or any other action involving that medical expert as a witness. The requirement of the reality and the appearance of impartial justice in the administration of the law by the courts is one which must be observed in the real world of actual litigation. That requirement will not be infringed merely because a judge carries with him or her the knowledge that some medical witnesses who are regularly called to give evidence on behalf of particular classes of plaintiffs (eg members of a particular trade union), are likely to be less sceptical of a plaintiff's claims and less optimistic in their prognosis of the extent of future recovery than are other medical witnesses who are regularly called to give evidence on behalf of particular classes of defendants (eg those whose liability is covered by a particular insurer). If it were so infringed, the administration of justice in personal injury cases would be all but impossible.*

*On the other hand, there is an ill defined line beyond which the expression by a trial judge of preconceived views about the reliability of particular medical witnesses could threaten the appearance of impartial justice".* (pp.570/571)

87. Those remarks were made in the context of a case in which comments were made during a trial. Here we are concerned with comments made in articles written in close proximity to the trial. The issue is however the same.

88. Did the recorder cross the "ill defined" line to which that judgment refers? We have already given an indication of the nature of the articles. The only other factor to which it is necessary to draw attention is that in this particular case the insurers had not behaved in the irresponsible manner of which the recorder so vehemently complained. They had admitted liability promptly. They had made a payment into court and had only contested issues which it was reasonable for them to contest on the evidence which was available to them. The recorder had recognised that some insurers do behave responsibly. The comments which he made about the conduct of insurers would have been more justified in the past than they are today. Today, many insurers and their legal advisers, particularly those legal advisers who are members of FOIL (the Forum of Insurance Lawyers, the counterpart for defendants' representatives of APIL, which has made a significant contribution to the recent reforms) conduct litigation in accordance with the "Overriding Objectives" set out in Part I of the CPR.

89. We have found this a difficult and anxious application to resolve. There is no suggestion of actual bias on the part of the recorder. Nor, quite rightly, is any imputation made as to his good faith. His voluntary disclosure of the matters already referred to show that he was conscious of his judicial duty. The views he expressed in the articles relied on are no doubt shared by other experienced commentators. We have, however, to ask, taking a broad common sense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leant in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we. We accordingly grant permission to appeal on this ground, allow the defendant's appeal and order a re-trial. We should not be thought to hold any view at all on the likely or proper outcome of any re-trial.

**Williams v Inspector of Taxes and Others**

90. Mrs Williams, who appears in person but with the assistance of a McKenzie Friend, seeks permission to appeal from the decision of the Employment Appeal Tribunal of 20 November 1998 dismissing her appeal from a decision of an industrial tribunal.

91. The background to the appeal is that on 17 January 1996 Mrs Williams made a complaint of sexual harassment and race discrimination by various individuals at the tax office of the Inland Revenue at which she worked in Croydon. On 17 April 1996 she made a further complaint that two individuals together with the Board of Inland Revenue had committed an act of race discrimination against her by failing properly to investigate a grievance she had and by submitting a report which was not consistent with her grievance. By a decision of 7 May 1996, Mr Booth, the chairman of the industrial tribunal, sitting alone, held that it was not just and equitable to allow Mrs Williams' application of 17 January 1996, which related to events in 1991 and 1992, to proceed. However, in relation to her second application, he decided that there should be a preliminary hearing into the question (raised by the Inland Revenue) whether Mrs Williams had failed to co-operate in an inquiry into her allegations of sexual

harassment to such an extent that she had brought the dismissal of her complaints upon herself, with the consequence that her complaints lacked any prospect of success and were therefore scandalous, frivolous or vexatious.

92. On 24 June 1996, an industrial tribunal chaired by Mr Booth sitting with two other members, unanimously decided that the application should proceed.

93. However, the same industrial tribunal on 19 November 1996 unanimously decided to dismiss her application. The tribunal came to the conclusion that Mrs Williams had not discharged the onus which was upon her, that her complaints had been thoroughly and impartially and fairly investigated internally and that there was no evidence from which the tribunal could draw an inference of race discrimination.

94. Mrs Williams had been employed by the Inland Revenue at the tax office from 1985 until she took 9 months' maternity leave in March 1994. It was this period to which her complaint related. Mr Booth had also worked for the Inland Revenue from 1958 to 1961 in a junior position. In her submissions to us, Mrs Williams emphasised that it was because of the knowledge of the workings of the Revenue which Mr Booth displayed at the hearings, that she and the McKenzie Friend challenged the chairman as to whether he had been employed by the Revenue. Mr Booth then said that he had worked for the Inland Revenue from 1958 to 1961 in a junior position. Mr Booth says he invited any response from Mrs Williams but none was forthcoming.

95. Having heard Mrs Williams' submissions which she put forward very clearly and courteously, we did not consider it necessary to call on the Respondent to address us. It was for this reason that we did not invite submissions from Mrs Williams in reply.

96. We entirely agree with the conclusion of the Employment Appeal Tribunal that no right thinking person knowing of the connection of Mr Booth with the Inland Revenue would feel that there was any danger of bias in this case. The suggestion that there might be was fanciful. In coming to that conclusion we take into account the fact that one of the points made by Mrs Williams in her grounds of appeal is that there was also a risk of prejudice resulting from the chairman projecting on to her case his displeasure with her "counsel" (the person who was assisting her at the hearing). It is fanciful to suggest that the chairman's employment by the Revenue over 30 years ago could have affected his view. The chairman made jocular remarks that her representative "had come to bash the Revenue" and that "my colleagues and I would always be happy to hear cases involving the Revenue" but these remarks do not suggest bias as Mrs Williams contends, and she made no such suggestion at the time. The earlier decisions were substantially in Mrs Williams' favour and the decision of the 19 November 1996 was unanimous.

97. In Mrs Williams's case, having considered all her grounds of appeal, we do not consider it right to grant her permission to appeal.

**R v Bristol Betting & Gaming Licensing Committee ex parte O'Callaghan**

98. Mr O'Callaghan contends that on 10 September 1996 he placed two £25 "correct score accumulator" bets at a betting shop operated by Coral Racing Limited ("Corals") in Cardiff. He expected, as a result of one of those bets, to be paid £259,200. However Corals declared that bet to be void because it had not been photographed. Since that time Mr O'Callaghan has been conducting a campaign which is no doubt designed to place pressure on Corals to meet what Mr O'Callaghan regards as their obligation.

99. On 22 May 1997 a hearing was due to take place before the Bristol Betting & Licensing Committee into the renewal of bookmakers' permits. Mr O'Callaghan says that on the previous day his wife wrote to the court asking for an adjournment because he was unfit to attend for medical reasons. A medical certificate was enclosed. Despite a further letter the adjournment was refused and Corals were granted their renewed permit. An award of costs of £5,000 was made against Mr O'Callaghan.

100. He initially tried to appeal to the crown court but having been informed that he had no right to appeal he made an application for judicial review. Leave was granted on 2 December 1997 to apply for judicial review by Tucker J. The application should have been entered and served on the respondents, namely the Bristol Betting & Gaming Licensing Committee and Corals, within 14 days (O.53 r.5(5)), that is, by 16 December 1997. This did not happen, and it was not until 9 February 1999 that Miss Jackson QC appeared on behalf of Mr O'Callaghan before Dyson J seeking to extend the period of 14 days. The reasons for the delay were connected with difficulties that Mr O'Callaghan was having in obtaining legal aid. There were further difficulties with the solicitors whom he initially instructed and subsequently he instructed another firm, his present solicitors, who still have the conduct of the case.

101. On 16 July 1998, prior to the hearing before Dyson J, the Bristol Betting & Gaming Licensing Committee had extended Corals' permits for three years. This was notwithstanding Mr O'Callaghan's further application for an adjournment pending the outcome of an application for judicial review.

102. The fact that the permit had been extended meant, as Dyson J pointed out in his judgment, that the reality of the judicial review proceedings was a dispute as to the lawfulness of the decision to order Mr O'Callaghan to pay £5,000. Having expressed sympathy for Mr O'Callaghan's personal position, Dyson J decided that because of the modest sum of money which was then involved, it would not be right to grant an extension of time. He therefore refused the application and it is from that decision that Mr O'Callaghan wishes to appeal.

103. On 28 March 1999, The Sunday Times published an article which stated that Dyson J was a director of Dyson Properties Limited, a company which owned rented properties in Yorkshire, Greater Manchester and Cheshire and

that the tenants of the company included Corals. Mr O'Callaghan, in an affidavit, says that he subsequently learnt that Corals and its associated companies are tenants of a number of properties owned by Dyson Properties Limited and Gown & Mantle Limited of which Dyson J is also a director.

104. It is now contended on behalf of Mr O'Callaghan that if Dyson J had disclosed his connection with Corals, he would have objected to his hearing the application. It is said that either Dyson J was disqualified from hearing the application because it is a "***Dimes*** situation" or that it is a situation where there was a real danger of bias on the part of Dyson J.

105. In accordance with the normal procedure adopted by the Court of Appeal when allegations are made against a judge, Dyson J was informed of what was being relied on by Mr O'Callaghan. By letter to this court of 28 June 1999 he confirmed that he had been a non-executive director of Dyson Properties Limited since the late 1980's; that it is a family property investment company, which was formed by his parents many years ago; that it holds commercial properties in the North of England; that, apart from himself, the current directors are his mother and brother; that all shares are held by members of the family (which include the judge); that he is not involved in the management of the company; that his role is limited to giving occasional advice to his brother; and that Gown and Mantle Limited is a wholly owned subsidiary of Dyson Properties Limited. (This last statement may not be entirely accurate, because it appears that the judge may also hold shares in this company). The judge adds that until he read the article in The Sunday Times he "was not aware that Corals was one of the company's tenants" and that the rent payable by Corals for the only shop of which it is a tenant of the company represents slightly more than 4% of the total rent currently receivable by the company.

106. The Lord Chancellor gives guidance to judges on their appointment. At the time of Dyson J's appointment, the guidance provided that no judge should hold a *commercial directorship*. But the guide added that:

*"There is, however, normally no objection to a Judge holding shares in commercial companies, or taking part in the management of a family estate or farming his own land. Equally, there are some forms of non-commercial directorships which a Judge may hold without objection."*

107. The current guide of October 1998, is in similar terms.

108. It cannot be said that this is a case where the strict principle of automatic disqualification laid down in ***Dimes*** and ***ex parte Pinochet (No.2)*** applies. Miss Jackson submitted that if the judicial review proceedings had continued they could have had a significant effect upon Corals and in consequence adversely affected that company's ability to meet its obligations to the Dyson family companies. We do not agree. The judicial review proceedings by the time they came before Dyson J were only concerned with the issue of £5,000 costs. It would be absurd to suggest that recovery or non-recovery of this sum could affect Corals' ability to pay the rent of its shop in Leeds. It was suggested that the court in the judicial review proceedings could grant Mr O'Callaghan a declaration which would be helpful in his dispute with Corals. However, we cannot see any basis for such a declaration. Once Corals' betting permits had been renewed, the judicial review proceedings could only have relevance with regard to costs. It cannot be said that the judge had anything more than a nominal and indirect interest because of his directorship and shares in the company. Such an interest does not establish a bar to the judge sitting.

109. If (as we hold) Mr O'Callaghan cannot succeed under the strict rule of automatic disqualification, he certainly cannot succeed under the real danger rule. There is absolutely no reason to doubt or question the judge's statement that he was unaware that Corals were a tenant of his family company. His role was non-executive and there is no reason why he should know of the tenancy. Even if the judge did know, there could not be any real danger of bias. The interest was so minimal, that no reasonable and fair minded person sitting in court and knowing the relevant facts would have considered there was a real as opposed to fanciful danger of a fair trial not being possible. The order which the judge made, having regard to the gross delay and the limited issue raised by the application, was well within his discretion, which in our view he exercised correctly.

110. We would dismiss the application for permission to appeal.

1. Mr Anthony Mann QC and Mr James Barker (instructed by Messrs More Fisher Brown, London E1 6DA, for the Plaintiff)
   Ms Hazel Williamson QC (instructed by Messrs Stephenson Harwood, London EC4M 8SH, for the Second Defendant)
2. Mr Anthony Mann QC and Mr James Barker (instructed by Messrs More Fisher Brown, London E1 6DA, for the Plaintiffs)
   Ms Hazel Williamson QC (instructed by Messrs Stephenson Harwood, London EC4M 8SH, for the Third Defendant)
3. Mr Andrew Edis QC and Mr Ivan Woolfenden (instructed by Messrs Bartlett & Son, Liverpool L2 9QN for the Claimant)
   Mr Robert Jay QC (instructed by Messrs Morgan Cole, Cardiff CF10 3DP for the Defendant
4. Mrs Williams appeared in Person
   Miss Tess Gill (instructed by the Solicitor for the Inland Revenue, London WC2 2SG)
5. Miss Judith Jackson QC (instructed by Messrs Dolmans, Cardiff CF10 3DS for the Applicant)
   Mr William Norris QC and Miss Lucy Moorman (instructed by Messrs Richards Butler, London EC3A 7EE for the interested party)
   Mr David Lloyd Jones QC (instructed by the Treasury Solicitor, London, as Amicus Curiae)