Neutral Citation Number: [2021] EWHC 949 (Ch)

Case Nos: E00YE350, F00YE085, BL-2019-BRS-000028

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 19 April 2021

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

- -

BETWEEN:

AXNOLLER EVENTS LIMITED

Claimant

and

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE

Defendants

AND BETWEEN:

(1) NIHAL MOHAMMED KAMAL BRAKE
(2) ANDREW YOUNG BRAKE
(3) TOM CONYERS D'ARCY

Claimants

and

THE CHEDINGTON COURT ESTATE LIMITED

Defendant

AND BETWEEN:

(1) MRS NIHAL MOHAMMED KAMAL BRAKE
(2) MR ANDREW YOUNG BRAKE

Claimants

and

(1) DR GEOFFREY WILLIAM GUY

(2) THE CHEDINGTON COURT ESTATE LIMITED
(3) AXNOLLER EVENTS LIMITED

Defendants

HEATHER ROGERS, QC (instructed by **Ashfords LLP**) for the Claimants in Claim No BL-2019-000028

MRS NIHAL BRAKE on behalf of herself and Mr Andrew Brake in Claim No E00YE350, and herself, Mr Andrew Brake and Mr Tom D'Arcy in Claim No F00YE085

ANDREW SUTCLIFFE QC and **WILLIAM DAY** (instructed by **Stewarts LLP)** for the Defendants in Claim No BL-2019-000028 and the Defendant in Claim No F00YE085, and **EDWIN JOHNSON QC** and **NIRAJ MODHA** (instructed by **Stewarts LLP)** for the Claimant in Claim No E00YE350

Hearing date: 13 April 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII on the date shown at 6 pm.

HHJ Paul Matthews :

Introduction

1. The following are the reasons for my several decisions, given after argument at a hearing on 13 April 2021, in these three separate claims, albeit between the same or related parties. In relation to claim BL-2019-BRS-000028 (the "documents claim"), the hearing was a continuation of the original hearing on consequential matters following the hand-down of my judgments in both the "preliminary issue" (see [2021] EWHC 670 (Ch)) and the "non-iniquity trial" (see [2021] EWHC 671 (Ch)) in that claim. In relation to claims E00YE350 (the "possession claim") and F00YE085 (the "eviction claim") the hearing was a continuation of the pre-trial reviews for the trials of those claims, which were respectively listed for trial from 26 April and 10 May 2021 respectively.

2. For reasons that I will explain, the first "instalment" of the hearing of each of these matters was in fact held before Marcus Smith J on 31 March 2021. On that occasion Marcus Smith J heard and refused an application for that hearing to be adjourned: see [2021] EWHC 828 (Ch). He then proceeded to deal with some aspects of, and give some directions in relation to, all three claims (finalised after considering written submissions from the parties), but then adjourned the rest to me, and that is what I dealt with on 13 April 2021.

3. In the documents claim, I had held, in the preliminary issue judgment, that the so-called "iniquity defence" was available to the defendants in relation to the claim. I also held, in the non-iniquity trial judgment, that the claim itself failed, without the need to try the "iniquity defence". An unusual feature of this case was that, in the interval between circulating my two draft judgments (at the same time) to the parties and the formal handing down of those judgments, the claimants' counsel withdrew from the case. No explanation was given for this withdrawal, except certain comments made in a letter from the claimants' solicitors to the court dated 29 March 2021.

4. This said (so far as relevant):

> "This morning, we have received confirmation that counsel who have been instructed on behalf of our clients (referred to for ease as 'the Brakes') have found it necessary to withdraw from these matters. We do not intend to waive privilege in respect of any communication or advice which would otherwise be privileged. We inform you that:
>
> > 1. Ms Brown, having consulted with the Bar Council and senior colleagues, has concluded that it is her duty to withdraw. This is as a result of the Judge's conduct of the trial and the contents of the Judgment, [2021] EWHC 671 (Ch) ('the Judgment'), which have made it impossible for Ms Brown to appear before the Judge again.
> >
> > 2. Mr Davies, QC, having considered his position with the benefit of advice from the Bar Council and senior colleagues, has concluded that there

> is a real possibility that he would be unable to fulfil his overriding duty of independence to the court, if he were to continue to represent the Brakes. Accordingly, he has withdrawn as counsel for the Brakes in relation to those matters for which he is instructed. Mr Davies, QC, having reviewed the Judgment in detail, in light of the proceedings at pre-trial hearings and at the trial, has concluded that the Brakes (in particular, Mrs Brake) are unlikely to receive a fair trial in the ongoing proceedings if presided over by the Judge. This includes the proceedings [the Eviction Proceedings], in which Mr Davies, QC was instructed and in relation to which he remains of the view that the Brakes' case has strong legal merits.
>
> In conveying the position to us counsel have indicated the usual reasons for withdrawal such as personal conflict or funding do not apply."

5. It will be seen that this letter makes generalised allegations concerning my conduct of the trial and the contents of my judgment, though without giving any particulars. It also says that it was the opinion of Mr Davies QC that the Brakes were unlikely to receive a fair trial if presided over by me. It was for this reason that, after discussion with Marcus Smith J, the supervising judge for this circuit, it was agreed that he would deal initially with the hearing of consequential matters following the judgments given on the documents claim, at the same time as the pre-trial reviews in the forthcoming trials of the two claims. As I have said, he did this on 31 March 2021, after which he passed the baton back to me.

6. At the hearing before me on 13 April 2021 there were a number of matters which were considered, and in relation to each of which I made and announced a decision. These were: (1) an application for permission by the Brakes to appeal in the documents claim (but limited to the non-iniquity trial), (2) various submissions on costs in the documents claim, (3) the question whether there should be directions given in relation to potential contempt proceedings against the Brakes, (4) the question whether I should deal at this hearing with an application foreshadowed to be made by the Brakes, but not yet made, for an adjournment of the two further trials, (5) an application by the Brakes for me to recuse myself in relation to the possession claim and the eviction claim, and (6) the question whether, in the event that I decided that one or other of the possession claim and the eviction claim should be adjourned, which one of the two it should be. In addition, I also gave directions for certain matters to be dealt with on paper. Here I set out the reasons for each of these decisions.

Permission to appeal

7. I deal first with the application for permission to appeal from my decision in the non-iniquity trial, there being no application in relation to the preliminary issue judgment. The legal test is not in any doubt. Under the Civil Procedure Rules, rule 52.6, the court (whether the lower or the appellate) may not grant permission for a first appeal unless *either* there is a real prospect of a successful appeal *or* there is some other compelling reason why an appeal should be heard. The phrase 'real prospect' does not require a *probability* of success, but merely means that the prospect of success is 'not unreal': *Tanfern v Cameron-MacDonald* [2001] 1 WLR 1311, [21], CA. If the application passes that threshold test, however, the court is not *obliged* to give

permission to appeal; instead it has a *discretion* to exercise. My decision announced at the end of the argument was to refuse permission to appeal.

8. The Brakes had submitted draft grounds of appeal running to 13 pages, supplemented by paragraphs in the skeleton argument helpfully provided by Heather Rogers QC, as amplified by her in oral argument. Andrew Sutcliffe QC made written and oral submissions for the defendants. There were 4 grounds of appeal, which I have read in detail but summarise as follows:

1. My decision that the claimants "had no reasonable expectation of privacy in relation to any of the emails on the enquiries account was wrong in law and/or untenable on the facts". Reliance was placed on the 5511 emails which the defendants agreed should be destroyed. Essentially, my decision was against the weight of the evidence, and also started in the wrong place. My approach to article 8 of the European Convention on Human Rights was wrong and my reliance on *Simpkin* was also misplaced. I treated the defendants' ownership of the domain and email account as a decisive factor against the claimants.

2. I adopted an approach to the determination of whether the claimants had a reasonable expectation of privacy on a basis that was wrong in principle and on the facts. I should have approached the question of reasonable expectation of privacy by reference to the categories of emails in the agreed list of issues. All emails which were not AEL business emails were personal emails in which the claimants had a reasonable expectation of privacy. My decision on reasonable expectation of privacy was internally inconsistent and illogical, and failed to take into account relevant evidence.

3. Similarly, my conclusions that the claimants' personal/private emails on the enquiries account lacked the necessary quality of confidence and/or that the defendants owed no duty of confidence in relation to them were wrong.

4. My conclusions on the access that the defendants had, and permitted others to have, to the claimants' emails in the enquiries account and my conclusion as to the appropriate amount of damages were unwarranted and wrong.

9. On the other side, the defendants said that ground 1 was simply an attempt to re-argue the trial rather than to identify properly appealable points, and to "cherry-pick" points from the judgment. Ground 2 appeared to be insufficiently different from ground 1, and another attempt to reargue the trial. But the question relating to misuse of information demonstrated a fundamental lack of understanding of the procedural history and the issues for trial. Ground 3 repeated the same arguments, but in relation to breach of confidence. Ground 4 added nothing to the earlier grounds, except for subparagraph (d), which was wrong.

10. My reasons for refusing permission to appeal were in summary as follows. First, the problem for the claimants was that I had made findings of fact on the evidence, including that the defendants did not accept that the emails in the enquiries account were private to the claimants, and that, although some of the emails concerned were of a personal nature, the claimants did *not* enjoy a reasonable expectation of privacy in those emails. A finding of fact is a matter for the appreciation of the trial judge in taking account of all the evidence tendered. An appellate court will not interfere

unless it is satisfied that the finding of the court below was plainly wrong: *McGraddie v McGraddie* [2013] 1 WLR 2477, SC. It makes no difference whether the evidence tendered was oral or written, or whether it involved an element of evaluation or appreciation: *R(Z) v Hackney LBC* [2020] 1 WLR 4327, [56], SC. Where there is evidence before the court entitling the judge to conclude as found, it is irrelevant whether another judge (including one in the appellate court) would reach the same conclusion. There was evidence in this case entitling me to reach the conclusion that I did, and there was no real prospect of success on this basis.

11. As for the issue of ownership of the domain and accounts, this was one of the agreed list of issues for trial. But I certainly did not treat "the defendants' ownership of the domain and email account as a decisive factor against the claimants". At [191] of my judgment I said "This [*ie* ownership] cannot of course be the end point of the expectation debate … [I]t is part of the context in which the question [of expectation] arises…".

12. As to ground 2, the claimants' problem is that at trial they did not take me through the individual documents, or even the categories of documents in the enquiries account, to demonstrate that the claimants had a reasonable expectation of privacy in relation to them. They had the burden of proof, and did not discharge it. Moreover, the questions of misuse and quantum of loss were for me to decide, on the basis that I was considering *all* the issues in the case *except* that of alleged 'iniquity'. Paragraph 2 of my order of 31 July 2020, sealed on 4 August said:

> "All issues in this claim other than the Iniquity Defence be listed for trial ("the Non-Iniquity Trial") before HHJ Paul Matthews on the first available date after 4 October 2020 …".

The iniquity defence obviously was to be dealt with at a second hearing if necessary, but the questions of misuse and quantum of damages were not part of that.

13. Ground 3 once more depends on an evaluation of the evidence as to whether the documents have the necessary quality of confidence, and have been imparted in circumstances importing an obligation of confidence. So the claimants have the same problem as in relation to ground 1. There was no real prospect of success.

14. Ground 4 deals with misuse of information and the quantum of damages. It cannot arise unless at least one of the previous grounds has been established. In addition, the suggestion that the recipient of information cannot share it with his lawyers and other advisers in order to be advised *unless* he can establish 'iniquity' (which therefore means that it was not to be decided at this stage) is in my judgment unarguable. Finally, the question of the quantum of damages took account of the relevant authorities. The assessment was a matter for me in the light of those authorities. There was no real prospect of success. I could see no other compelling reason for an appeal. I therefore refused permission.

Costs

15. There were several aspects of my judgments in the documents claim that gave rise to submissions on costs. These were (i) the incidence of costs, (ii) the basis of assessment of costs, (iii) whether there should be a further interim payment, (iv) the

costs reserved by Mr Jarvis QC in December 2019, and (v) whether there should be a stay on the order for a payment of costs on account. I will deal with each of these in turn.

The incidence of costs

16. On 31 March 2021 Marcus Smith J ordered that the claimants pay the defendants' costs, subject to any application by the claimants to vary the incidence of those costs. The claimants argued in written costs submissions that the defendants' costs should be twice discounted. First, they sought a discount of 40% on the basis that the manner in which the defendants obtained access to the enquiries account and disseminated material from it warranted such a reduction. Second, they sought a further discount of 35% on the basis that, as a matter of principle, the defendants should not recover any costs incurred in connection with the formulation or prosecution of the "unlawful scheme" allegations. This was put on the basis that (a) Mr Jarvis QC had found for the purposes of the injunction application that there was no sufficient evidence of such a scheme, and (b) there had been no contradictory finding since. The defendants argued that neither discount was warranted. After hearing argument, I agreed with the defendants.

17. As is well known, if the court decides to make an order as to costs, the general rule is that the successful party should have its costs paid by the unsuccessful party: CPR rule 44.2(2)(a). Overall, there is no doubt that the defendants were the successful parties, and the claimants the unsuccessful parties. But the court may make a different order: CPR rule 44.2(2)(b). The question for me therefore was whether it would be right to make a different order.

18. As to the first of the claimants' two points, I had found that there was nothing wrong in the way that the defendants obtained access to the enquiries account. In particular, the defendants were not obliged to obtain the claimants' consent. But in any event they made reasonable offers to Mrs Brake so that she could remove her personal material from the enquiries account, which she did not take advantage of. In my judgment, there is no basis there for making a different order as to costs.

19. As to the second point, the only reason that there has been no decision on the "unlawful scheme" is that, in the event, it proved unnecessary for the purposes of deciding the claim. The defendant succeeded without it. That does not mean that they should be deprived of the costs relating to it. It was something for which they had to prepare, until at least I decided in August 2020 that it would not be dealt with at the main trial, and they should have their costs of it.

20. Although the court has the power to order that merely a proportion of costs be paid to the successful party, there was no basis for such an order here. The claimants could not be said to be the winners of any part of the claim. I could not therefore reduce the successful parties' costs on the basis that the unsuccessful parties had had some relative success; *cf Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd* [2008] EWHC 2280 (TCC). As a result, there was no basis for me to vary paragraph 5 of the order of Marcus Smith J of 31 March 2021.

The basis of assessment of costs

21. The defendants sought an order that their costs be paid on the indemnity basis. The claimants resisted that. The parties agreed that the test for awarding costs on the indemnity basis was whether the circumstances of the case took it out of the norm: see *eg Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspen and Johnson* [2002] EWCA Civ 67, [32], [39].

22. The defendants referred to five features which they said took the case out of the norm. First, the claimants issued and pursued the claim without notice or following the pre-action protocol, whereas the defendants had originally sought to accommodate the claimants' concerns about their personal information. Second, the claimants' conduct during the agreed document review mechanism was obstructive and in bad faith, prolonged the operation of the interim injunction unnecessarily, and drove up costs. Third, the claimants' conduct before and at trial was highly unreasonable. Fourth, the claimants' case was grossly exaggerated, lacked documentary support, and was reckless with the truth. Fifth, the claimants had made serious accusations against the defendants, including the commission of torts and criminal offences, and conducted a press campaign against Dr Guy.

23. After hearing the parties, I held that costs should be awarded on the standard basis only. I did not consider that the first matter was enough by itself to justify indemnity costs. The other matters *would* have justified such an order, but I was not satisfied on the material before me that more than a few elements of the conduct complained of could be established, and that therefore it would not be right to order indemnity costs. I emphasise nevertheless that I consider the claimants' approach to and conduct of the litigation to have been far from ideal, and in certain aspects unacceptable, but not to the extent needed for indemnity costs. Regrettably, many litigants today conduct litigation in an unsatisfactory manner. That is, alas, not out of the norm.

Further interim payment?

24. Marcus Smith J ordered an interim payment of £350,000 by the claimants on account of the defendants' costs, to be made by 4 pm on 23 April 2021, but subject to any application by the defendants for a further such payment. He emphasised that the sum ordered was a minimum, given the difficult circumstances and limited information available at that time. The defendants applied before me for a further payment of £350,000 on account, if costs were ordered on the standard basis.

25. The defendants' costs in this case were not budgeted, but a schedule of costs signed by a partner in the defendants' solicitors indicates total costs incurred of about £1m. I ordered a further payment of £250,000, making a total of £600,000 (being approximately 60% of the costs claimed), all to be paid by 4 pm on 23 April 2021. I ordered it to be paid at the same time as the earlier payment on the basis that in ordinary circumstances the matter would have been dealt with in one bite of the cherry, on 31 March, instead of two, then and now.

Costs reserved by Mr Jarvis QC

26. The relevant part of the order of Mr Jarvis QC of 28 November 2019, dealing with the two applications before him then, said this:

> "27. The costs of the LPP Application and the Documents Application are reserved to the judge hearing the trial of the Documents Claim."

27. Before Mr Jarvis QC, the claimants had sought their costs of these two applications. The deputy judge held that this was not an obvious case of balance of convenience at all, that there would be a trial of the documents claim, and that the view he took of the facts was only a preliminary view formed without the benefit of any cross examination of the relevant witnesses (or, one may add, disclosure or trial witness statements). He therefore decided that it would be dangerous to make a costs order, and reserved the costs of the documents application to the trial. In relation to the LPP application, this had been made in the insolvency proceedings, and there would be no further hearing in relation to it. The deputy judge decided also to reserve the costs of that application to be dealt with by the trial judge hearing the documents claim. At the hearing on 13 April, the defendants asked for the costs of both applications, and the claimants resisted this. Indeed, in their written cost submissions, they had asked for an order that the defendants pay their costs of the LPP application. After argument, I decided to award the costs of both applications to the defendants.

28. Before me, as before Mr Jarvis QC, reliance was placed on *Picnic at Ascot v Kalus Derigs* [2001] FSR 2, where Neuberger J (as he then was) had said that the costs of obtaining an interim injunction should usually be reserved, because the assumed facts on which the injunction was granted might turn out at trial to be inaccurate, or even worse. Accordingly, the court should look at the result of the documents claim in order to decide what order to make in respect of the reserved costs matters. I accept that reasoning, as far as it goes. In relation to the documents application, it is clear that the basis upon which the deputy judge granted the interim injunction has been removed by the findings that I made and the conclusions that I came to in my judgment. Accordingly, at this stage, the successful parties are the defendants, and I can see no reason not to award the costs of the documents application to them.

29. In relation to the LPP application, the deputy judge himself saw the defendants as at least partially successful, in that privilege was waived by the claimants in certain documents which had been claimed to be privileged. But he also said that he did not find that the unlawful scheme was made out on the material before him. The claimants now argue that the unlawful scheme will never be argued, and therefore the decision reached by the deputy judge will never be overturned. The defendants however rightly say that I have decided that none of the emails in the enquiries account was the subject of a reasonable expectation of privacy on the part of the claimants or was confidential as against the defendants. Accordingly, they say, those emails could not be privileged either. I accept that argument. In my judgment the defendant should have their costs of the LPP application as well.

30. In line with the decision already made, I will order these costs to be paid on standard basis. They will have to be subject to detailed assessment if not agreed. In the meantime, I will order an interim payment on account of £300,000 split 50-50 between the two applications, to be paid by 4 PM on 23 April 2021.

Stay on payment of costs

31. At the hearing before me, the claimants sought a stay of the costs orders. The defendants opposed it. The general rule is clear, that a stay is not automatic when a party applies to appeal a decision. CPR r 52.16 provides:

> "Unless –
>
> (a) the appeal court or the lower court orders otherwise; …
>
> an appeal shall not operate as a stay of any order or decision of the lower court".

32. In this connection, both sides referred to *Hammond Suddard Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065, where Clarke LJ and Wall J said:

> "20. Before it could properly grant a stay, the court needs to have a full understanding of the true state of the company's affairs. Simple assertion, particularly if it is scarcely consistent with previous assertions, is not enough. …
>
> […]
>
> 22. By CPR rule 52.7 [now 52.16], unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

33. In addition, the defendants referred to the decision of Lambert J in *Hincks v Sense Network Limited* [2018] EWHC 1241 (QB), where the judge rejected the unsuccessful claimant's application for a stay of execution on any order for payment on account of costs. The claimant had argued that such a payment would stifle an appeal. The judge said:

> "14. No evidence has been served from him or on his behalf to support the assertion that the effect of such an order would be to stifle his appeal. I have no evidence before me concerning his level of earnings since 2015; or concerning any assets which he may or may not hold; or of how he has funded the litigation. I bear in mind that a mere assertion that such an order would stifle an appeal is insufficient. The Claimant must (per *Goldtrail*) establish his position on the balance of probabilities. Mr Strelitz is inviting me to infer from the wider circumstances of the case and the exiguous evidence at trial, that the Claimant is impoverished to the extent that he would be unable to pursue his appeal if required to fund an interim payment. I do not find that such an inference can properly be drawn in the evidential vacuum in which this application is made. I also note Mr Samuel's observation that Mr Strelitz' submissions do not positively assert that the effect of a payment on account of costs will frustrate an appeal;

> only that the 'Claimant's modest means' 'would likely mean that an appeal cannot be pursued'. Nor is there evidence that, in the event of an appeal failing, the Claimant would be in a position to discharge his liability in costs to the successful Defendant (Christopher Clarke LJ's second question); nor evidence from the Claimant that in the event of an appeal succeeding there is a concern that the Defendant would not be able to repay costs paid on account (Christopher Clarke LJ's third question)."

(I mention in passing that the reference to "Christopher Clarke LJ" appears to be a slip, as the 'Clarke LJ' who sat in *Hammond Suddard* was Sir Anthony Clarke, later Master of the Rolls and later still Lord Clarke of Stone-cum-Ebony, rather than Sir Christopher Clarke, who was appointed as a judge only in 2005.)

34. The defendants also referred to *Contract Facilities Ltd v Estate of Rees (deceased)* [2003] EWCA Civ 465, where Waller LJ, dealing with an application for a stay of a costs order, said:

> "10. On the question as to whether there might be a stifling of the appeal, again a further paragraph of *Agrichem* is material. That is paragraph 18. All I need to quote from that paragraph is that the court made it clear that where somebody seeks to stay orders what they need to do is:
>
> > '… produce cogent evidence that there is a real risk of injustice if enforcement is allowed to take place pending appeal'.
>
> The court was, of course, recognising in that context, which should be stressed, the principle that it is not just a question whether the actual party to the appeal can raise the money. The question is whether money can be raised from its directors, shareholders, other backers or interested persons. This was made clear, in the context of a security for costs application, by Peter Gibson LJ in *Keary Developments v Tarmac Construction.*"

35. The Brakes argued that, unless a stay was granted on the existing costs order (at that time, the order of Marcus Smith J that £350,000 be paid by 23 April 2021), their appeal against the non-iniquity trial judgment would be stifled (and also that they would be unable to engage counsel for the next two trials). They referred to the decision of the Supreme Court in *Goldtrail Travel v Onur Air Tasimacilik* [2017] 1 WLR 3014, where Lord Wilson (with whom Lords Neuberger and Hodge agreed) said:

> "15. There is no doubt - indeed it is agreed - that, if the proposed condition is otherwise appropriate, the objection that it would stifle the continuation of the appeal represents a contention which needs to be established by the appellant and indeed, although it is hypothetical, to be established on the balance of probabilities: for the respondent to the appeal can hardly be expected to establish matters relating to the reality of the appellant's financial situation of which he probably knows little."

(See also at [38], where Lord Clarke made the same point.)

36. In support of this submission, the Brakes urged that they had "good prospects of success on the appeal". They also filed evidence, dated 9 April 2021, designed to demonstrate their weak financial position. They accepted that they had been paid a large sum of money by Mrs Foster in 2017, which they said was a gift. In the evidence section of the Brakes' application notice of 9 April 2021 it was said to be £2.6 million. The Brakes said that their witness statement evidence showed that on 8 November 2018 they had £2,353,808 in the bank, but they had since spent £2,526,531.03 on legal fees, of which £340,644.64 had been refunded, making a net total of legal fees of £2,185,886.40. As at 9 April 2021, Mr Brake had £36,045.72 in his account and Mrs Brake had £2,121.03 in hers. Redacted bank statements and screenshots were exhibited to the witness statement. They also had the sum of £40,000 in their solicitors' client account, which they wished to use for the intended appeal. Other assets, amounting to almost £500,000 in value, had largely been sold in order to pay legal fees. A horse bought for £100,000 had been injured and was now of little value, and was in Holland being cared for by her breeder. No details were given of present income of either Mr or Mrs Brake, although it was stated that Mrs Brake had "little ability at present to earn a living" and Mr Brake had "little prospect of … earning his way out of this in the immediate future", although he would be eligible for the state pension from May 2021. On the other side of the equation, they had monthly living expenses of about £5000 and medical bills of about £3000. Mrs Brake had a large family, of whom "two sisters [were] financially comfortable", and had said they would assist the Brakes in relation to living expenses.

37. So far as concerns the Brakes' prospects of success on the appeal, I have held on their application for permission to appeal that in my judgment they have no real prospects of success. I cannot therefore accept their submission in relation to the stay application that they have "good prospects of success".

38. So far as concerns the evidence of their financial position, this was challenged by the defendants as "high level and vague". They said that the gift to the Brakes was demonstrated by a completion statement from Mrs Foster's solicitors (in the trial bundle) dated 24 November 2017 to amount to £2,812,953.69, *ie* some £200,000 more than stated in the application notice. They said the redactions to the bank statement evidence made it impossible to trace this money through the bank accounts, or even to be certain how much had been spent on legal fees. Even if the legal fees amounted to £2.1 million, that would still leave £700,000 from the money paid by Mrs Foster. The evidence about the horse in Holland and about their horses generally was inconsistent or incomplete. There were suspicions that the fees of the Brakes' solicitors were being paid by someone else. The £40,000 in their solicitors' client account was said to be for the purpose of financing the appeal. Yet the costs budgets for counsels' fees for trial preparation and trial in the possession proceedings and the eviction proceedings amounted to £183,000 together, with no suggestion as to how that could have been funded.

39. But in any event since the application was about stifling an appeal, and the cost of the appeal was £40,000, there was no evidence to show that this money could not be raised elsewhere, for example by way of loan from her "financially comfortable" sisters, or from their "very generous and wealthy friend Mrs Foster". There was no attempt to deal with the risk that the defendants would be unable to enforce their costs orders if they were stayed now, and no acknowledgement that if the appeal were

successful and cost orders set aside they would be able to recover the money from Dr Guy.

40. In oral submissions, the defendants accepted that the amount received from Mrs Foster was something over £2.8 million, rather than £2.6 million. But they denied that it was not possible to follow what had happened to that sum, and submitted that the alleged £700,000 difference between what was received and what had been spent was wrong, and that it was accounted for by the other items in the evidence. As for the possibility of a loan from Mrs Foster, Ms Rogers told me on instructions that, because of a letter from the defendants (which which Ms Rogers told me she had not seen), Mrs Foster had refused to give evidence in the possession proceedings. That being the case, she would hardly wish to get further involved in this matter by lending money to the Brakes. Ms Rogers accepted that the questions of enforceability of the costs order and the defendant's ability to repay in case of a successful appeal had not been addressed in the evidence, but on the latter point there was no question about the defendants' ability to repay.

41. Although there was some attempt in the evidence to explain the financial difficulty of the claimants, in my judgment it was insufficient to persuade me that this appeal would be stifled if I did not stay the costs orders. First of all, I was not satisfied on the evidence that I had understood what had happened to all of the £2.8 million received from Mrs Foster. And the question of where the counsels' fees of £183,000 were going to come from for trial preparation and trials in the possession and eviction proceedings was left entirely hanging in the air. But, even if I had been so satisfied, I was certainly not satisfied that it was not possible for the Brakes to finance their appeal, at a cost apparently of £40,000, from resources which were not their own. The explanation given on instructions in relation to Mrs Foster was unsupported by any evidence. In any event, it did not stack up. If the defendants had somehow upset Mrs Foster, who on the claimants' own case had shown herself to be extraordinarily generous towards them, it is counterintuitive to suppose that this would lead Mrs Foster to refuse to assist *the claimants* in their hour of need, even by way of a loan. £40,000 is frankly trivial by comparison with £2.8 million. Secondly, if two of Mrs Brake's sisters were "financially comfortable" and willing to finance the claimants' lifestyle for the time being, I cannot understand why they would not lend £40,000 to a beloved sister for the purposes of this appeal, and no explanation at all was given to persuade me otherwise. I was simply not persuaded that a failure to stay these orders would result in the stifling of this appeal.

42. But that was not all. Against this weak evidential background, it was necessary also to set the risk for the defendants of not recovering anything at all if these costs orders are stayed now. In my judgment, that risk is very high indeed. And the claimants accepted that there was no risk for them that the defendants would not be able to pay back costs if they were successful on their appeal. I consider that, in all the circumstances, justice demands that the Brakes pay off at least some of their accrued costs liabilities to others before they embark on yet further litigation in their own private interest. For all these reasons I refused to stay the costs orders.

Potential contempt proceedings

43. At the hearing, the defendants asked me give certain directions in relation to potential contempt proceedings to be considered hereafter against the claimants, in respect of

suspected fraud on creditors and breach of court injunctions. No contempt application had so far been made, and the defendants made clear that they were not seeking to make one at the hearing. Indeed, the defendants accepted that they did not have standing to do so. But they referred to the new rules in the CPR concerning contempt applications, and in particular rule 81.6(1), which provides:

> "If the court considers that a contempt of court (including a contempt in the face of the court) may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings."

44. I was also referred to the very recent decision of Pat Treacy, sitting as a deputy judge of the Chancery Division of the High Court, in the case of *Isbilen v Turk* [2021] EWHC 854 (Ch), where she considered the recast Part 81, and in particular rule 81.6. In part, she said this:

> "29. CPR 81.6 imports a novel requirement for the Court to consider whether to proceed in contempt if it considers that a contempt may have been committed. The Court is to do so '*of its own volition*', although where it does so '*... any other party in the proceedings may be required by the court to give such assistance to the court as is proportionate and reasonable*'. The notes to CPR 81.6(1) explain that the provision is intended to restate the power of the Court to commit of its own volition, noting that contempt in the face of the Court provides the clearest example of when this is likely. CPR 81 makes no change to the Court's substantive powers, and it appears that the procedural aspects of CPR 81.6 are primarily intended to avoid criticisms of summary disposal of contempt proceedings." [Italics in original.]

45. After considering certain authorities cited to her, the deputy judge continued:

> "32. This suggests that the Court should commence contempt proceedings of its own volition only in circumstances where the relevant party to the litigation decides not to bring an application (implying that it would have been open to that party to do so) and where the Attorney General has not intervened in the public interest (implying that it would have been open to the Attorney General to do so). In the hierarchy of applicants, the Court is least well placed to commence contempt proceedings, and this should inform its approach to CPR 81.6."

46. After hearing argument, I gave an extempore ruling. I reproduce it here simply in order to make accessible to the parties and others what it is I actually said. I should say that I have altered a few words in the transcript merely in order to correct both grammar and syntax. It reads as follows:

> "I am not going to give the directions sought. I do think that it is premature to consider this matter. I regret the fact that it has been brought forward to today when we have so many other more pressing matters to deal with. In saying that, I do not mean to suggest that contempts of court are not subjects worthy of consideration, or that the new procedure in Part 81 should not be utilised to the full where it is appropriate to do so. In particular, I am not making any statement about the position in this case as to whether or not a contempt may or may not have been committed. I will only observe, as I think I did in the argument, that I understood that I was not making any findings in relation to any suggestion that

> particular acts of contempt had been committed. It may well be that it is a subject which ought to be considered in the future. I say nothing about that.
>
> I do, however, say that it is clear to me from the discussion in the very recent decision of Ms Pat Treacy, sitting as a deputy judge of this division in *Isbilen v Turk*, that one ought to ascertain first whether the persons who have standing to raise the question of contempt, that is in this case Patley Wood Farm LLP and Mrs Brehme, are prepared to raise it with the court, and failing that, whether the Attorney General is prepared to do so, and then come to court only if neither of those two is prepared to act, putting that at the forefront by saying that this is the last possibility, and here is the rule that allows the court to do it of its own motion. But that is not the way it has been approached today. I think that it is premature, but it does not follow that it should not be raised in the future. However, I think it should be raised properly and at an appropriate time."

Adjournment of the two further trials

47. It was made clear in correspondence before the hearing that the Brakes intended to make an application for the forthcoming trials in both the possession and the eviction claims to be adjourned. However, no such application had been formally made by the time of the hearing. The Guy Parties asked me nevertheless to deal with the question of any possible adjournment, because of the shortness of time remaining before the two trials were listed to be heard. In the event, I declined to do that, but after hearing argument decided that if the Brakes were to make a formal application for such an adjournment, they should issue the application and serve it and any evidence (apart from any further medical evidence from Dr Taube) in support by 4 PM on 14 April 2021, with written submissions and any such further medical evidence served by midday on 15 April 2021. The Guy Parties would be able to file and serve any further evidence and their written submissions in answer by midday on 16 April 2021, and the Brakes might serve any further short submission if so advised by 4 PM on the same day. I would then seek to decide the question of adjournment in principle as quickly as possible, and in any event by the morning of Monday, 19 April 2021, with written reasons to follow. In fact, I made and announced my decision over the weekend of 17-18 April, and my written reasons are in preparation.

Recusal application in relation to the possession claim and the eviction claim

48. Paragraphs 8 and 9(3) of the order of Marcus Smith J provided for an application to be made (if so advised) for me to recuse myself from trying the possession and eviction claims. This was duly made by notice dated 9 April 2021. It was argued before me at the hearing on 13 April 2021. After hearing argument, I refused it, for reasons to be given. As therefore foreshadowed at the hearing, these are the reasons for my decision.

49. The application was supported by detailed evidence in the application notice, by a separate witness statement and by detailed grounds of appeal, settled by (new) leading and junior counsel. There are two distinct parts to the detailed grounds. One relates to an alleged "Adverse view of Mrs Brake's credibility". The second relates to alleged "Instances of adverse views of and unfairness to the Brakes". I will deal with both in more detail later. At this stage I will simply say that I understood the application to be made on the grounds of apparent, rather than actual, bias.

50. The law to be applied in this matter was not in doubt. In my judgment on an earlier application for recusal, in *Brake v Swift* [2020] EWHC 1156 (Ch) (the section 283A case), I set out the law as I understood it at [13]-[18], referring to a number of authorities. At this hearing of the present application I was also referred to further authorities, including *Bates v Post Office Ltd* [2019] EWHC 871 (QB), [274]-[285], *Steadman-Byrne v Amjad* [2007] EWCA Civ 625, [10], *Hart v Relentless Records Ltd* [2002] EWHC 1984 (Ch), [38], *JSC BTA Bank v Ablyazov (No 9)* [2013] 1 WLR 1845, [70], *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315, [1], [2], [13], [32], and *Stubbs v The Queen* [2019] AC 868, [16].

51. The basic test for apparent bias was set out by Lord Phillips MR in *Re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, and then approved by the House of Lords in *Porter v Magill* [2002] 2 AC 357, where Lord Hope said ([103]):

> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

52. The Supreme Court has recently reiterated this test in *Halliburton Co v Chubb Bermuda Insurance Ltd* [2020] UKSC 48; [2020] 3 WLR 1474, [52]–[53], per Lord Hodge. The authorities establish that this is not a question of discretion but of law. Either there is no apparent bias, in which case the judge *cannot* recuse him or herself, or there is, in which case the judge *must* do so. It is like a light switch, either on or off. In this context 'bias' means an attitude of mind that prevents the judge from making an objective determination of the issues before the court. The fair-minded and informed observer is not the applicant, or indeed any litigant in the case, but is objective and dispassionate. The informed and fair-minded observer is to be treated as knowing all the relevant circumstances (whether publicly known or not), and is 'neither complacent nor unduly sensitive or suspicious'.

53. The authorities have also dealt in some detail with the case of the judge who is called upon to decide successive phases of the same or related litigation between the same or some of the same parties. A number of problems may arise. One relates to the credibility of witnesses. Thus, in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, the Court of Appeal (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C) said:

> "25. […] By contrast, a real danger of bias might well be thought to arise … 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 … 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. …"

54. On that last point, there is also the statement of Rix LJ (with whom Maurice Kay and Toulson LJJ agreed) in *JSC BTA Bank v Ablyazov (No 9)* [2013] 1 WLR 1845, where he said:

> "70. In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not 'pre-judging' by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case … He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. … The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments."

55. But of course there are limits. In *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315, Longmore LJ (with whom Laws and Moore-Bick LJJ agreed) said:

> "2. … It is obviously convenient for a single judge rather than different judges to deal with a complex case but the question can arise whether there comes a point where findings made by a judge pre-trial disqualify a judge from continuing with a case or findings made at trial disqualify a judge from hearing consequential matters."

56. And, in *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133, Floyd LJ (with whom Patten LJ agreed) said:

> "29. The mere fact that a judge has decided applications or issues in the past adversely to a litigant is not generally a reason for that judge to recuse himself at further hearings … The fair-minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, that he or she will have pre-judged, or will not deal fairly with, all future applications by the same litigant. …
>
> 30. The position might well be different if in the past the judge has expressed a final, concluded view on the same issue as arises in the application. …"

57. One other passage from that judgment is relevant to a different point which arises here. It was argued that the inclusion of a particular letter in the bundle was designed to put the applicant for recusal in an unfavourable light, making the risk of bias inevitable. Floyd LJ said:

> "39. I cannot accept this argument. Firstly, there is often material in the bundles before a judge which is not strictly relevant to the issue which has to be decided. If the material is irrelevant the judge will not rely on it. If he is alerted to the fact that it is irrelevant he will be particularly careful to put it out of his mind. In this connection professional judges are not the same as lay juries, whose decision-making may be contaminated if they are exposed to irrelevant or inadmissible material."

58. What is crystal clear is that the decision is a fact-sensitive one. As the court said in *Locabail*, just after the previous quotation,

> "every application must be decided on the facts and circumstances of the individual case",

and

> "if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal."

59. Finally there is the question of waiver. In *Locabail*, the court said:

> "26. … 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. …"

60. And, in *Bates v Post Office Ltd* [2019] EWHC 871 (QB), an application was made to for the judge managing a number of hearings to recuse himself after he had handed down judgment in one of them. Fraser J said:

> "274. Even if I had found that there were grounds of apparent bias on the face of Judgment No.3, I would not have recused myself. This is because of the fact that the Post Office waited until almost two weeks after it had received Judgment No.3 before it did anything in respect of making an application to recuse.
>
> […]
>
> 284. I consider that it was incumbent upon the Post Office to have issued its application far more quickly than it did, given it had the draft Judgment No.3 from 8 March 2019, and given the Horizon Issues trial started on 11 March 2019. Rather than acting quickly and promptly, the Post Office delayed, and as explained above, acted somewhat curiously. …
>
> 285. I have found that there is no apparent bias in any event. However, even were I to have concluded that point to the contrary, and found that there was sufficient to justify the Post Office's application for recusal, I consider the delay, and the continued conducting of the Horizon Issues trial, including both the cross-examination of all of the claimants' witnesses of fact, and the calling of almost all of the Post Office's own witnesses of fact, to constitute an unequivocal waiver of any right the Post Office might have had to ask me to abandon the Horizon Issues trial and recuse myself from further involvement as the Managing Judge."

61. As I said above, there are two main grounds for the application for me to recuse myself. The first refers to an adverse view Mrs Brake's credibility which it is said I will not be (seen to be) able to set aside for the purpose of trying the further proceedings. The second refers to adverse views of the Brakes expressed in the trial just concluded, and instances of alleged unfairness to them in the conduct of proceedings already tried by me involving them. The Brakes acknowledge that I refused an application to recuse myself in relation to the section 283A trial, and that

an application for permission to appeal from that was refused on the papers by the Court of Appeal. But I agree with them that "the present application must be considered on its own merits, in the light of circumstances at the time of the application".

62. As to the first point raised by the Brakes, I expressed views unfavourable to Mrs Brake's credibility in two trials where I had the opportunity of seeing and hearing her give evidence and be cross examined. These were the section 283A trial in May 2020, with judgment handed down in July 2020 ([2020] EWHC 1810 (Ch)), and the recent documents trial in November 2020, with judgment handed down in March 2021 ([2021] EWHC 671 (Ch). In the first judgment I stated that, whilst I did not conclude that she had told me a deliberate untruth, "I felt that I could rely with confidence on her evidence only where it was confirmed or corroborated by an independent source". In the second judgment, I considered that in certain respects she had not told me the truth, and I concluded that "as a whole I distrusted her evidence, except where it was corroborated from an independent source. Where her evidence conflicted with that of Dr Guy, or Mr Spendlove, I preferred that of Dr Guy or Mr Spendlove (as the case might be)."

63. Ms Rogers QC submitted that my view of Mrs Brake's credibility "had hardened considerably" by the conclusion of the second trial, and that the fair-minded and informed observer "would be bound to conclude that there is at least a very real possibility that the Judge's view of Mrs Brake's credibility formed in November 2020, and expressed so trenchantly in a judgment handed down only a month before the first of the trials in the Further Proceedings, will play a significant role in his treatment of her evidence in the Further Proceedings", where her "credibility will be put squarely in issue".

64. I did however point out to Ms Rogers at the hearing something that she (not having been present at the trial) could not have known. This was that both trials were conducted remotely, but that the internet connection used by Mrs Brake in the first trial was poor, and unstable, and broke down completely at some points. On the other hand, the internet connection which she used in the second trial was that at her solicitors' office, which was far superior in quality, and stable throughout. Accordingly, I had a better opportunity to observe Mrs Brake in giving her evidence in the second trial than in the first. This enabled me to reach a more detailed conclusion.

65. In the second judgment, I also referred to the fact that I had heard evidence from Mrs Brake at an earlier trial. I said this:

> "26. … In view of comments that have been made (on both sides) in closing submissions, I should make clear that I have not sought, in assessing Mrs Brake's evidence in this trial, to apply any impression gained from seeing and hearing Mrs Brake in that earlier trial, which was a different case, and when in any event conditions were sub-optimal. I am not sure whether it was being urged on me that I should have regard to my views of Mrs Brake's evidence in the earlier trial, but I take this opportunity to state that I have reached my views of Mrs Brake's evidence in the present case solely on the basis of the evidence that she gave in this case. In my judgment, in all the circumstances, it would not be right to do otherwise. …".

66. At each of the two trials I reached a conclusion on the credibility of Mrs Brake based solely on the evidence given before me on each occasion. In neither case did I conclude or intimate that I found Mrs Brake so inherently unreliable or dishonest that I could not believe her in future, or that I was pre-disposed not to do so. The judges at first instance in the *Ablyazov* and *Otkritie* cases found that, in the former case, the applicant for recusal had lied to the court, dealt with assets in breach of injunction, forged documents and relied on false witnesses, and, in the latter, he had conspired to defraud and actually defrauded the claimant. In each case the Court of Appeal held that the judge should not recuse himself from hearing a further matter involving the same parties.

67. As the courts have said, it is necessarily a fact-sensitive exercise to decide on a recusal application. In this case, I do not consider that I have done any more than reach a conclusion on the evidence before me in each case as to the credibility of Mrs Brake for the purposes of the trial then being heard. In my judgment the fair-minded and informed observer would not consider that there was any real possibility that I was biased in approaching the further proceedings between the parties.

68. But, even if there were, the Brakes have waived the objection. So far as it is based on the section 283A trial, the judgment in that case was handed down in July 2020, and no suggestion was made that I should not deal with the trial of the documents claim in November on the grounds of apparent bias. That trial went ahead without any application to recuse myself.

69. So far as it is based on the documents trial, the draft judgment was circulated on to the parties on 19 March 2021, and formally handed down on 25 March 2021. I had originally intended to deal with consequential matters on paper, and so on 19 March asked for written submissions on 25 and 26 March. But on Monday 22 March the Brakes applied (by formal application notice) for this to be postponed, specifically on the basis that the clients intended to apply for permission to appeal (thereby showing that the draft judgment had been considered), but that their counsel was involved in another trial that week. I acceded to this application, and decided to deal with the consequential matters on Wednesday 31 March, when the pre-trial reviews for the future proceedings were to be held. On Tuesday 23 March I was told by Mr Sutcliffe QC that he had been informed that the Brakes' counsel had withdrawn from the case. It was only on Monday 29 March that the Brakes' solicitors wrote to the court to indicate that not only that both their counsel had withdrawn, but that their clients were considering an application for me to recuse myself in relation to the future proceedings. Accordingly there were nine days between circulating the draft judgment and being informed of a possible recusal application, during which time I was specifically asked to, and did, postpone the consequentials hearing for the convenience of counsel instructed, specifically so that an application for permission to appeal could be formulated. In my judgment, any potential objection based on the terms of the documents claim judgment to my hearing the further hearings has been waived.

70. The second ground is that before and during this trial I formed views adverse to the Brakes on various matters. One of these related to the 'iniquity defence', although that was not in issue at the trial, and those issues had not been the subject of full evidence and argument (Grounds, [9]). A number of statements by me in the judgment are relied on for this purpose. It is in particular complained of me (Grounds, [10]) that I

referred in my judgment to some documents which were in the trial bundle but which had not been agreed by the Brakes, and were only in there because there was insufficient time to remove them. The bundle was not agreed, and I was wrong to proceed on the basis that all the documents in the bundle were admissible evidence.

71. A further aspect of this is the complaint (Grounds, [11]) that I made findings adverse to the Brakes in relation to the question of the use and disclosure of documents in the enquiries account by the defendants, when these matters were reserved to the second stage of the trial. In addition, there is a complaint (Grounds, [12]) that my judgment contained other statements and observations adverse to the Brakes.

72. A related complaint (Grounds, [13]) is that in determining the documents claim I "departed from the approach that had been agreed prior to the trial and on the basis of which it had been conducted". This was in "striking contrast" to the way in which Mr Jarvis QC decided the interim injunction application and the LPP application in November 2019 (Grounds, [14]).

73. Lastly the Brakes make the point (Grounds, [18]) that the credibility of Dr Guy "will be directly in issue on matters determinative of the outcome" in the possession claim. They note (Grounds, [17]) that Dr Guy will be a witness in both trials, but in the documents trial I accepted him "as a witness of truth, upon whom cross-examination made no impact". They then refer (Grounds, [18]) to a factor raised in the previous recusal application, namely the fact that Dr Guy and I were in the same form at school in the late 1960s and early 1970s (although we have had no contact since), and regard should be had to this.

74. As to Grounds, [9] (matters relating to the 'unlawful scheme') I had been referred during the trial to some person or matter, and had found in the bundle, and referred in passing to, documents concerning that person or matter. I had read them, and thought it desirable to make clear in each case (except one) that I was not making a finding or drawing any inference, because I had not heard from the Brakes on them. In relation to the point at [136] of my judgment, however, this was a point in issue, and I was accepting the evidence given by Dr Guy in relation to it.

75. As to Grounds, [10] (unagreed documents in the bundle), all the relevant documents had in fact been disclosed in or exhibited to witness statements in the proceedings. My recollection (without having seen any transcript) is that, very shortly before the trial, when the parties were unable to agree on the bundle, I said that documents should go in even if not agreed, on the basis that a party could object subsequently. The passage from *Zuma's Choice Pet Products*, at [39], cited above, deals with this problem. But, in any event, no complaint was made about the bundle or any objection taken to any particular document, either during or after the trial, until the Grounds for recusal were lodged a few days ago. If there were any proper objection to be made, it must have been waived by now.

76. As to Grounds, [11] (adverse findings in relation to use and disclosure of documents), it is not correct to say that this was the trial only of the first stage of the claim for misuse of private information (*ie* reasonable expectation of privacy). I have already in this judgment set out paragraph 2 of my order of 31 July 2020 (sealed 4 August 2020), which makes this clear. *Imerman* was, as I said in the preliminary issue judgment (at [54]), a quite different case. Amongst other things, the defendants were

not the claimant's employer, and the documents were not in the business email account. Whether I was right to draw the distinction is for the Court of Appeal to judge, but it is not a matter demonstrating apparent bias. I held that disclosure to the defendants' lawyers for the purposes of obtaining advice was not part of the iniquity defence, but was subject to different considerations. Again, that view might be overturned on appeal, but would not demonstrate bias. As I said in the earlier recusal judgment (at [41]), "this line of argument is elevating the 'informed and fair-minded observer' from an intelligent layman to an appellate judge.".

77. As to Grounds, [12] (other comments adverse to the Brakes), these relate to various points arising in the course of other findings. Merely rejecting Mrs Brake's evidence on a point, or observing a curiosity in the documents in the bundle without drawing any conclusion, or scepticism about a failure to adduce obvious evidence without explanation as to why it was not available, does not demonstrate apparent bias. I did not suggest impropriety in relation to the bank account in Mrs Holt's name, merely that I did not understand what was going on. I did not say in my judgment at [202] that I "did not regard the Claimant as an 'honest' partner." Instead, I *assumed* she was honest, and said that therefore her decision to use partnership funds to pay fees for the internet domain was only consistent with a decision that the domain should belong to the partnership rather than to her personally. I made clear at [207]-[208] that the cases I referred to had not been cited to me, but said they were well known. Indeed *Ramsden v Dyson* is a leading case in the field of proprietary estoppel, and the other two are in all the textbooks. If the Brakes or their lawyers wished to challenge my use of them, or to argue that they did not support the (obvious) propositions stated, the time for doing so was when I circulated the draft judgment. They did not do so. Indeed, they have not done so since. No part of the draft grounds of appeal refers to these cases, or challenges my statement of the law. The point about the postscript was simply to refer to the true terms of a letter which had been summarised (wrongly) in the chronology provided by the Brakes for the trial, and which had led to sensationalist press coverage, but which had not been in the bundle. I drew no conclusion from it.

78. As to Grounds, [13] (departure from agreed procedure), the parties agreed a list of issues. I accept that I did not follow it precisely, but that was because I considered that I did not need to in order to resolve the dispute. To the extent (if at all) that a "proper analysis" would show that all the categories of documents set out in the list of issues were private or confidential in nature, that would show that I fell into error, rather than that I was biased.

79. As to Grounds, [14] (contrast with the decision of Mr Jarvis QC), I do not understand why the fact that a different judge at trial after disclosure, full witness statements and cross-examination of witnesses, reaches a different conclusion on contested matters than a judge at an early stage deciding whether to grant an interim injunction to hold the ring should demonstrate bias on the latter's part. The tests which the two judges apply are not the same, and neither is the material on which they make their respective decisions. In any event, if the two judges differed, and if (as of course I do not accept) that difference were indeed to demonstrate bias by *someone*, there is no *a priori* reason why it would be more likely to be bias by the second judge than the first.

80. As to Grounds, [16]-[18] (positive view of Dr Guy's credibility), I have already referred to authorities dealing with the impact on further hearings of a negative view

of a witness's credibility formed in earlier hearings. In my judgment, the same applies where the previous view was positive rather than negative. Provided it amounts to a proper exercise of the judicial function, and does not overstep the mark, the fact that a judge has found a witness to be credible on one occasion does not mean that the judge shows apparent bias against the opposing party for the purposes of further proceedings in which the same witness will be deployed.

81. In my judgment none of the various grounds put forward satisfied the test for apparent bias set out earlier. For these reasons, therefore, I dismissed the application to recuse myself in the further proceedings.

Adjournment of one or other of the possession claim and the eviction claim

82. A further point was raised on the possible adjournment of the forthcoming trials of the possession and eviction claims. This arose out of a suggestion by the Guy Parties that, if the court were minded to make suitable accommodation to Mrs Brake so that she was able to conduct the proceedings as a litigant in person, one possibility would be to sacrifice one of the trials and use the extra time to take the other proceedings at a slower pace, sitting only four days a week and mornings only (for example). But this would require a determination as to which of the two trials ought to be postponed. Rather than leave this matter to be determined only if it actually arose for decision, that is, after my decision on the adjournment application had been made, I agreed to decide this contingent question at the hearing, in order to save time. It did not involve making any pre-judgment as to what my decision would be on the question of adjournment. It would take effect *only* if, having considered the adjournment application, I came to the conclusion that the best course was not (as the Brakes wanted) to adjourn both trials, nor (as the Guy Parties wanted) to adjourn neither, but instead to press on with one and adjourn the other.

83. On this basis, the Brakes argued that the possession trial should be sacrificed and the eviction trial should go ahead, whereas the Guy Parties argued that the eviction trial should be sacrificed and the possession trial should go ahead. After hearing the arguments, I decided that, if I had to make this choice, it would be the eviction trial that would be adjourned and the possession trial that would go ahead.

84. The Guy Parties put forward five reasons why the eviction trial, rather than the possession trial, should be postponed. First, they said that the possession claim was simpler than the eviction claim, although the number of witnesses was the same in each case. Second, there was the relative prejudice to the parties if the eviction trial were adjourned. The cottage was not essential to the running of the Axnoller events business whereas the house and the equestrian arena were. So more prejudice was caused to the Guy Parties by adjourning the possession trial than the eviction trial. From the Brakes' point of view, a success for them in the eviction trial would not (contrary to their belief) provide them with a home, because they have no beneficial interest in it which would entitle them to live there. At most there would be a claim for damages. Third, there was the relative prejudice to the parties if the possession trial were adjourned. The Guy Parties would suffer from not recovering possession of the "jewel in the crown" of the Axnoller estate for the purposes of their business. This was not just the house, but also the large, indoor equestrian arena. They had been kept out of possession of them since November 2018, so nearly two and a half years. There had been an interim injunction in place since December 2018. The claim for mesne

profits/damages for trespass had now reached £650,000. The pandemic restrictions were being lifted in stages, and the wedding business was likely to be able to resume in due course. There was of course no prejudice to the Brakes in postponing the possession trial, because they lived in the house. I was told that, in addition to paying nothing for their occupation, they paid nothing for utilities either, because the Guy Parties did not wish to leave the Brakes without those services. The fourth point was that all the proceedings between the Brakes and the Guy Parties had been instituted by the Brakes, except for the possession claim, which had been instituted by the AEL, as legal owner. So far there had been two trials of claims between the parties, both in claims instituted by the Brakes. The possession claim had however been adjourned twice already. The fifth point was that, although Mrs Brake had indicated that she might be able to fund the eviction trial, the Guy Parties could not see how, with the Brakes' lack of resources and the costs orders made, that would be possible.

85. Mrs Brake told me that she had seven points in response. The first concerned procedural history. Mrs Brake dealt with this, and submitted that they were not substantively responsible for the two adjournments of the possession trial. Next, she said she would be a litigant in person against a large legal team of QCs, juniors and solicitors. She had stage 5 kidney failure, and the medical evidence was that she should not be working more than five hours a day, but there were nine witnesses to cross examine in possession proceedings, yet only five in the eviction proceedings, and of those only two were important. There was a fixed amount time available before each of the two trials was listed. The only way to extend the preparation time was to postpone the first trial (possession) and hold the second trial (eviction) at the originally listed time. She also told me that she had just been told by text from her solicitor that there was "a chance" that her originally retained QC for the eviction trial would in fact be able to act at that trial. A further point related to the legal complexity of the two claims. She submitted that the eviction claim was more straightforward because the Guy Parties did not have any legal or beneficial interest in the cottage and yet Chedington had sent in agents to take possession and evict the Brakes. Moreover, the Guy Parties were conflating ownership and occupation. The Brakes had legal title, and had been living there on a "second home basis" for a considerable time. The eviction claim was not pointless for the Brakes. The possession proceedings however were, she said, "incredibly difficult to deal with legally".

86. The next points dealt with prejudice to the parties, one way and the other. She argued that the defendants would not be missing wedding bookings at present, because they took a long time to set up and were booked long in advance. She also said that the injunction required the Brakes to move to the cottage for the purposes of allowing the Guy Parties to hold a wedding, but that the Guy Parties had never asked the Brakes to do so, apparently fearing that, if they moved in, they would "never move out". Yet the preparation and delivery of a judgment in the possession claim would take 3-6 months from trial, and time would be allowed to the Brakes to move out, so the wedding season would be over before possession was in fact recovered. She also referred to the fact that at the CMC in September 2020 I had said that I was intending to give judgment in the possession claim at the same time as in the eviction claim, so that the Brakes would know what rights they had in relation to both properties at the same time, which might give them a home. She accordingly submitted that to postpone the eviction proceedings had the potential to make them homeless, and would be unjust. Also, the Brakes had not had access to their possessions, still detained in the cottage.

Only the eviction claim could deal with that. She also submitted that resolving the eviction claim might "unlock something" in the litigation between the parties. Finally, she submitted that it was irrelevant that only one of the claims was brought by the Guy Parties and the rest by the Brakes. She said the Brakes were the injured parties, and had no choice but to bring claims. What mattered was the overall justice of the situation.

87. I decided that, if it were necessary to hear only one trial, and postpone the other, I would reluctantly, but clearly, choose to adjourn the eviction trial rather than the possession trial. This was for a number of reasons. First of all, I agreed with the Guy Parties that the possession claim involved fewer issues, and appeared simpler, than the eviction claim. It would therefore be more suitable for a litigant in person to deal with than the eviction claim. Secondly, in the light of the submissions made to me, I considered that (contrary to what Mrs Brake has argued) it was unlikely that success for the Brakes in the eviction claim would confer on them a substantive right to occupy the cottage. But I accept that this is for determination in the eviction claim and the point was not fully argued before me. Third, on the material I had, I concluded that there would, overall, be greater prejudice caused to the Guy Parties than to the Brakes by adjourning the *possession* trial than the eviction trial, whereas there would be no greater prejudice caused to the Guy Parties than to the Brakes by adjourning the *eviction* trial than the possession trial. In addition, with the accumulated experience that I had acquired of this litigation, I did not consider that there was any real prospect that simply resolving the eviction claim would "unlock something" in the litigation between the parties. Lastly, I did not see any real difference between the funding for the possession trial and the eviction trial. If the Brakes had no money to fund the one, I did not see on the evidence before me how they could fund the other. For these reasons I decided that, if it were necessary to adjourn one trial but not the other, I would adjourn the eviction trial rather than the possession trial.

Other matters

88. There were some other, more minor matters, which were left over to be dealt with in writing, because of lack of time at the hearing. In the light of my decision on adjournment of the two trials, some of these fall away. I will deal with these matters separately in writing as soon as possible.

89. I am very grateful to all the lawyers involved for their co-operation and assistance in dealing with the various applications that had to be fitted into one day. I am particularly grateful to Heather Rogers QC, who took on the responsibility of making submissions for the Brakes in really very difficult circumstances, and discharged that responsibility with admirable tenacity and flair. I should also add that, having heard some submissions from Mrs Brake herself, I should thank her too for her clear, focused and well-argued submissions, and her attention to detail, which were of great assistance. They were, if I may respectfully say so, well above the standard of ordinary litigants in person. It is clear that, even if she is untrained in the law, she is nevertheless a natural advocate.