Neutral Citation Number: [2023] EWHC 90 (Ch)

Claim No: **BL-2021-001553**

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 January 2023

Before:

MR HUGH SIMS KC (sitting as a Deputy Judge of the High Court)

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Between:

(1) MARGARET ANNE RYAN **(2) PATRICK ANTHONY RYAN**	**Claimants**
- and –	
(1) HSBC UK BANK PLC **(2) MAR CITY PLC**	**Defendants**

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Mr Stephen Davies KC (instructed by **Horwich Farrelly Limited**) for the **Claimants**
Ms Bridget Lucas KC (instructed by **Eversheds Sutherland (International) LLP** for the **First Defendant**

Hearing dates: 13 and 14 December 2022

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Approved Judgment

I direct that 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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MR HUGH SIMS KC:

Introduction

1. I have before me an application dated 20 September 2022 by the claimants, Mr and Mrs Ryan ("the Ryans"), seeking an order that HHJ Gerald ("the judge") be recused from hearing their application dated 3 September 2021, for permission to continue a derivative claim under s 261 of the Companies Act 2006 ("CA 06"). The derivative claim was issued, together with a personal claim, on 3 September 2021 and is in respect of causes of action vested in the second defendant, Mar City Plc ("MCPLC"). In their capacity as shareholders in, and on behalf of, MCPLC, the Ryans seek relief in the derivative claim against the first defendant, HSBC UK Bank Plc ("HSBC" or "the bank"). I shall refer to the application before me as the recusal application (or simply the application), and the application for permission to continue the derivative claim as the permission application.

2. The recusal application alleges apparent bias. This is to be taken in two stages: first, all the circumstances which have a bearing on the suggestion that the judge may be affected by bias must be ascertained; second, it must then be determined whether those circumstances would lead the fair-minded informed observer (the "FMIO") to conclude that there was a real possibility of bias; see *In re Medicaments and Related Classes of Goods (No 2)* [2001] WLR 700, at [85], and *Porter v Magill* [2002] 2 AC 357, at [102]-[103].

3. The application arises in unusual circumstances and includes the question of whether the judge was affected by subconscious bias. This is a topic which is gaining greater attention: see Lord Neuberger, Judge not, that ye be not judged: judging judicial decision-making, (last updated 1 October 2021, published by the Judicial Commission of New South Wales).

4. I stress no allegation of actual bias is made. Instead the question is one of perception of possible bias, assessed by reference to the standard of the fictional hypothetical person vested with the attributes of the FMIO. The FMIO standard reflects the well-known adage: justice must not only be done – it must be seen to be done. This reflects one of the three basic principles guiding judicial conduct, that a judge should be impartial and be seen to be so. There is also a third category of bias case – presumed bias, where disqualification is automatic. This is where the judge has an interest in the outcome of the case to be decided. That does not arise in this case.

5. As for the unusual circumstances in which the application has arisen, the hearing process before the judge was almost complete. He had heard submissions on the permission hearing on 21 and 22 June 2022 and judgment was handed down by him on 24 June 2022 [2022] EWHC 1874 (Ch) ("the judgment"), in which he concluded the permission application should be dismissed. As a result, not only is the application for an order that the judge be recused, on the grounds of apparent bias, but also that the judgment be set aside, on the grounds that the judge's apparent bias disqualified him from hearing and determining the permission application.

6. The reason the recusal application arises in this way is because the principal matters which are said to give rise to the perceived bias, relating to an alleged business association between the judge and HSBC, were only ascertained by the Ryans after the judgment was handed down, as a result of searches carried out by them. They were dissatisfied with the judgment, which dismissed their application, and they were dissatisfied with the hearing process which led to that conclusion. This prompted them to make enquiries, and this led them to raise the questions as to the business association when they did.

7. After their consideration of the question of apparent bias had been brought to the judge's attention by the Ryans, on 8 July 2022, he provided a statement, dated 12 July 2022, giving information in relation to the business association identified ("the judicial statement"). He did this so that they could consider whether they wished to make an application for recusal. The judge concluded, in a second judgment handed down on 15 July 2022 [2022] EWHC 2342 (Ch) ("the second judgment"), that he would not provide any further information on the matter beyond what he had given in the judicial statement. The Ryans indicated they wished to proceed with their recusal application as they remained dissatisfied. In the second judgment the judge also concluded it would be better, in the circumstances, for another judge to hear and determine the recusal application, and for no further order to be made on the permission application in the meantime. He subsequently made directions on the recusal application which has led to it being listed before me.

8. The grounds for recusal advanced by Mr Davies KC on behalf of the Ryans, all on the basis of apparent bias, are many. They may be summarised, however, as falling under three main headings (or cases, as they were described). The first is that the judge has a current relevant business association, which may be said to potentially impact on his impartiality in ruling on the Ryans' claim against HSBC. This is alleged to be so by reason of his interest and involvement in a company called Hot Yoga Brixton Limited ("HYB"), which has lending from HSBC, and alleged similarities between the situation HYB is or may be in and that of MCPLC in the underlying derivative claim ("(1) the business association ground"). The second heading concerns the judge's alleged failure to disclose the fact of the business association ground before the hearing commenced before him coupled with his reaction to the issue when it was raised before him, and the alleged incomplete picture arrived at following the judicial statement in relation to the business association ground ("(2) the stage 1 enquiry ground"). The third main ground is that there are manifestations, or indicators, of alleged failure by the judge to discharge his judicial functions in accordance with a fair process during the hearing, and as reflected in the judgment, such that the FMIO would conclude there was a real possibility of bias ("(3) the unfair process ground"). These three main grounds (or cases) were relied on independently and cumulatively.

9. The application for recusal is opposed by HSBC which contends that none of the grounds supports the conclusion that the FMIO would conclude there was a real possibility of bias. Ms Lucas KC, for HSBC, submitted that if the business association ground failed then that should really be the end of the matter and,

whilst she addressed the other grounds, she submitted that any other points were really procedural unfairness points which could and should be taken on appeal. She submitted that my role was to pick up from where the judge left off, and conclude the second stage of the recusal application.

10. The nature of the grounds for recusal and the manner in which the issue has arisen, are such that it is necessary to consider the matter with considerable care and caution. The question needs to be assessed by reference to the nature of the enquiry which was before the judge, and on which he was embarked, and the context in which the matters complained of arose. It is all too easy to be critical after the event. But equally, as I discuss further below, the characteristic of the hypothetical FMIO does not assume judges are infallible: even experienced, well-trained and well-intentioned judges may be perceived to be affected by bias, particularly of a subconscious nature.

Recusal and apparent bias – further consideration of the legal principles

11. There is a useful collection and review of the authorities on the question of judicial bias in the commentary in Vol. 1 of The White Book at 1.1.3, when considering the overriding objective and equality of arms. In addition counsel provided me with much further learning on the subject. What follows is my effort to distil the points.

12. The starting point is to ask, what does bias mean? Bias exists where the judge may unfairly regard with favour, or disfavour, the case of a party to the issue under consideration; see *R v Gough* [1993] AC 646, at 670 (Lord Goff), quoted in *Porter v Magill* at [99] (Lord Hope). However, this description may be said to still beg the question, when will it be unfair? In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, in a judgment of the court (Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C), it was stated at [2] (bold emphasis added by me):

"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 for the Protection of Human Rights and Fundamental Freedoms, 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.****"*

13. In short, the judicial function is to focus on the facts of the individual case, and the law to be applied to the facts, without being influenced by any other considerations. If the court allows extraneous considerations into the judicial process, or method, which render it partial in favour of, or prejudiced against, a party before it, then it is unfairly biased. It is important to recognise bias can come in many forms and be caused by many things: "*It may consist of irrational*

prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or the issues before him"; *In re Medicaments and Related Classes of Goods (No 2)* at [37]. The critical focus is on the state of mind of the decision maker – is there potential bias in the tribunal? Where there is an enquiry into bias, if the enquiry uncovers bias, or, more precisely in this case, apparent bias, that is enough. Whether the apparent bias is based on the particular association or relationship which started the enquiry, or another cause discovered in the course of that enquiry, or indeed an unascertained and unascertainable cause, does not matter if the end result is a finding of bias, or, in this case, apparent bias.

14. Secondly, when will apparent bias be such as to require a judge to be disqualified or be recused? This is answered, after ascertaining all the circumstances which have a bearing on the issue (the first stage), not by the court's assessment of whether there is a real possibility of bias, but the court's assessment (the second stage) of whether or not the fair-minded informed observer – the FMIO for short – would conclude there was a real possibility, or reasonable apprehension, of bias; *Porter v Magill*, at [103] (Lord Hope). The FMIO is gender neutral and given attributes which "*many of us might struggle to attain to*": *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416, at [1] (Lord Hope). The FMIO:

    a. is a member of the public who is reasonably balanced: "*neither complacent nor unduly sensitive or suspicious*"; *Johnson v Johnson* (2000) 201 CLR 488, 509 (Kirby J), approved in *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187 at [14] (Lord Steyn), and in *Helow* at [2];
    b. is not to be confused with "*the opinion of the litigant*" – the litigant lacks objectivity, and may think there is bias where the FMIO would not; *Harb v HRH Prince Abdul Aziz* [2016] EWCA Civ 556 at [69];
    c. knows that "*judges, like anybody else, have their weaknesses*" and "*will not shrink from the conclusion, it if can be objectively justified, that things that they have said or done or associations they have formed may make it difficult for them to judge the case before the impartially*"; *Helow* at [2];
    d. recognises a slip in judicial standards, or even apparent hostility to an advocate on one side may not equate to bias: "*From time to time, the patience of judges can be sorely tested by the behaviour of advocates. Sometimes, a judge will overreact and unwisely make an intemperate comment. But judges are expected to be true to their judicial oaths and not allow their feelings about an advocate to affect their determination of the case they are hearing*" *Harb v HRH Prince Abdul Aziz* at [71];
    e. is "*informed*" such that she "*will take the trouble to inform herself on all matters that are relevant*", "*takes the trouble to read the text of an article as well as the headlines*", "*is able to put whatever she has read or seen into its overall social, political or geographical context*" and understands the importance of "*context*"; *Helow* at [3];
    f. will be less inclined to consider there is a real possibility of bias where the issue is a hard edged question of law, but will recognise that bias may be more easily in play where the issue involves a discretionary, or

fact sensitive process (this necessarily means concerns as to bias are likely to be more prevalent at first instance);

g. will consider the "tone" and "trenchancy" of past and present opinions expressed by, and language used by, a judge and whether these might be indicative of unconscious bias – these may be more influential than the actual substance of any findings, depending on the circumstances and facts of the case: *In re Medicaments* at [85] & [89];
h. will consider the proximity in time of any of the events or matters relied on: *Locabail* at [25];
i. "*always reserves judgment on every point until she has seen and fully understood both sides of the argument*"; *Helow* at [2];
j. understands that judges are "*trained to have an open mind*"; *El-Farargy v El-Farargy* [2007] EWCA Civ 1149, at [26];
k. will give significant weight to traditions of judicial integrity and of the judicial oath to "*do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will*"; *Helow* 2007 SC 303 (Extra Division, Inner House) at [35], *Helow* (House of Lords) at [57], and so may be said to initially approach an allegation of bias with some scepticism, particularly where it relates to present or past associations between the judge and a lawyer appearing before them (cf. *Harb* at [69]);
l. recognises the oath is not a complete answer, and unconscious, or subconscious, bias may still be an issue; *Broughal v Walsh Brothers Builders Ltd and another* [2018] EWCA Civ 1610, [2018] 1 WLR 5781, at [23] (Patten LJ);
m. is not to be treated as having the same level of specialist knowledge as to the law or "*minutiae of procedure*" – the informed member of the public is not a lawyer; *Locabail* at [17]; and
n. overall looks at the matter on a "*broad view*" basis; *Davidson v Scottish Ministers (No 2)* [2004] UK HL 34, at [56].

15. It might be said there is some tension in the case law as to how sophisticated the FMIO is. On the one hand, according to Lord Hope in *Helow*, the FMIO is able to put everything in its right context. But it appears, from Lord Bingham (and others) in *Locabail* and *Davidson*, that there may be limits to the sophistication to be attributed to the FMIO. This tension is eased when it is appreciated that in order for the FMIO to be an effective test the court must not slip into the trap of treating the FMIO as akin to a lawyer or judge. It is how the reasonably sophisticated member of public would view the matter: see *Broughal* at [20]-[23] (Patten LJ), citing *Southern Equities Corpn Ltd v Bond* (2000) 78 SASR 339 (Bleby J, at [126]). The reasonably sophisticated member of the public is taken to know and be alive to patterns of behaviour as manifested by the judge which might be suggestive of apparent bias. The FMIO will be aware of the fact that a judge who is alive to a potential bias is more likely to be able to control its potential adverse impact than the judge who is not conscious of it: *Lesage v The Mauritius Commercial Bank Ltd (Mauritius)* [2012] UKPC 41 at [52]. They will however primarily be concerned about the overall general impression created by the external indicators of alleged bias.

16. Third, what as to the facts available to the FMIO? They are taken to know all the relevant facts. This will include those in the public domain, but not necessarily limited to those facts: *In re Medicaments* at [83], *Harb v HRH Prince Abdul Aziz* at [72]. This is because sometimes the relevant facts are known only to the judge.

17. Fourth, is the FMIO to know everything the judge knows and accept everything the judge says? Whilst a judge may be expected to disclose facts which are not necessarily in the public domain in order to assist with the enquiry, there is a limitation on what the FMIO, and thus the court, can expect to receive from, and indeed necessarily accept from, the judge who is the subject of the recusal application. This was summarised in *Locabail* at [19] as follows (bold emphasis added):

> *"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."*

18. An example of the FMIO being treated as sceptical of what was contained in a statement issued by the tribunal is *In re Medicaments.* The Court of Appeal concluded the FMIO would not be convinced that all prospects of later employment by one of the tribunal members had been destroyed, notwithstanding what was said by the tribunal on that topic (see at [95]-[98]). It is important to understand that the court is not seeking to make a finding as to the truth or otherwise of any judicial statement but instead assess its impact, together with the conduct of the judge, on the impression it would have had on the FMIO (see at [93]).

19. Fifth, what is the standard to apply when considering whether there is a matter which requires disclosure by the judge? It has been said that: *"Judges should be circumspect about declaring the existence of a relationship where there is no real possibility of it being regarded by a fair minded and informed observer as raising a possibility of bias" Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528 [64]. In other words, if the judge does not consider there is any real possibility of it being regarded by the FMIO as raising a possibility of bias, he does not need to disclose the relationship. To do so unnecessarily sets hares

running and unnecessarily undermines the litigant's confidence in the judge. It should not be overlooked, however, that the threshold test is a double "real possibility" test: the judge should disclose the existence of a factor where there is a real possibility that it could result in the FMIO concluding there was a real possibility of bias (I note in *Taylor* quoted above the word "real" is absent from the second reference, but it is implicit in my judgment, since that is the test to be applied at the end of the second stage). Necessarily, this double "real possibility" threshold test, must connote a lower threshold for disclosure, and contemplate an inquiry involving a wider range of views and possibilities, than the final test/conclusion. And if the position is borderline disclosure should be made so that the judge can receive the submissions of the parties to assist in the final decision.

20. Sixth, if this threshold test is crossed does full disclosure become necessary? The short answer is yes in relation to material facts: *Taylor v Lawrence* at [65]; *Jones v DAS Legal Expenses Insurance Co* [2003] EWCA Civ 1071 at [35]; *Re L-B (Children)* [2010] EWCA Civ 1118 at [22]; *Watts v Watts* [2015] EWCA Civ 1297 at [24]. This does not mean that the judge is obliged to give disclosure, after all the judge is entitled to privacy. But if the judge finds that their desire for privacy results in a disinclination to provide further disclosure, when that is required, of matters which might be material, then it should be expected that the FMIO would weigh this in the scales against them. Therefore, however understandable the reasons, and notwithstanding there is no obligation on a judge to give disclosure, the fact of non-disclosure of something which a FMIO might reasonably consider to be material "*must inevitably colour the thinking of the observer*"; *Davidson* at [19]. If it is not possible properly to apply the informed bystander test (i.e. the FMIO) by reason of non-disclosure (where some disclosure is called for) this is likely to result in a conclusion of apparent bias; see *L-B (Children)* above at [22]. The statement or disclosure from the judge does not need, however, to go beyond an explanation of what is necessary for a fair adjudication of the recusal application; *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, [2014] 1 WLR 1943, at [42]. This can only promote the opportunity for speculative arguments. The dividing line between what is necessary to negative any realistic inferences and unnecessary in order to prevent speculative inferences is necessarily fact sensitive. However disclosure of more than is necessary usually helps to show a judge is fully conscious of factors which might be apprehended as influencing his or her judgment and when such disclosure is made it is unusual for any objection to be taken: see *Davidson* at [19]. Thus it may fairly be said that the effect of disclosure is prophylactic.

21. Seventh, the court must view the proceedings as a whole, up to the date when recusal is being considered, and the question of a possibility of bias is to be judged at the time of the application both prospectively and retrospectively: *Lesage* at [51]. Lord Kerr said (at [51]): "*Whether, in the mind of the informed observer, the failure to consider the propriety of their continuing to hear the case creates a possibility of bias is to be judged both prospectively and retrospectively. The actual conduct of the judges during the trial is to be examined therefore to see whether it supports or detracts from the suggestion that there was the appearance of possible prejudice*."

22. See to similar effect the recent decision of *UCP Plc v Nectrus Ltd* [2022] EWCA Civ 949, at [23] where it was noted: "*…it might be thought that the fair-minded observer would be more likely to sense a real possibility of bias in circumstances where the judge is said to have adopted a process which was unfair in more than one respect*." The time when the application falls to be assessed, and the process followed by the judge up to that point, are relevant.

23. This can also work the other way: in *Harb* it was a close examination of the chronology of the trial, after the event, which assisted in demonstrating that any possibility of bias was unrealistic: see at [75].

24. Eighth, to what extent can categories or analogies be used to assist with recusal decisions and in particular this case? Some helpful guidance exists in the Courts and Tribunals Judiciary Guide to Judicial Conduct (March 2019), and in the case law (see *Locabail* at [25]), as to potential categories of case where there may be a risk of an association resulting in potential bias such as to require a judge to consider recusal. In the Guide whilst noting that there are no hard and fast rules it is suggested that:

    "*A current or recent business association with a party will usually mean that an office-holder should not sit on a case. A business association would not normally include that of insurer and insured, banker and customer case. or council taxpayer and council*"

25. Thus a current or recent business association between a judge and a party will usually mean that a judge should not sit, but a banker and customer association will not normally be of such a type so as to warrant recusal. It is readily apparent therefore that a banker and customer association may result in a current or recent business association which should result in disqualification, though the expectation is that the standard lending relationship is not one which would usually be expected to give rise to such a disqualifying association. The reason for this is the subject of some discussion in the decision of the Court of Appeal, New South Wales, in *Dovade Pty Ltd v Westpac Banking Group* [1999] NSWCA 113.

26. In *Dovade v Westpac* at the time the trial took place, and judgment was given, the judge was a customer of Westpac, a well-known Australian bank. He operated a cheque account with the bank and the bank held a registered mortgage over land belonging to the judge. There was no evidence as to the status of the account. There was also an issue relating to shares in the bank held by the judge's wife. In addition the judge held a share in a company, as trustee, which had granted a fixed charge to the bank. These points were relied on individually and cumulatively as raising an "apprehension of bias" (the *"*Livesey*"* test then applied in Australia, which is, now, following *Porter v Magill*, very similar, if not the same, to the test applied in this jurisdiction). The judge's trustee shareholding was not found to give rise to any bias.

27. The fact that the judge's wife had shares in the bank was also not found to result in automatic disqualification (by reason of an indirect pecuniary interest in the

outcome) or give rise to apparent bias. As for the third ground relied on in *Dovade v Westpac*, namely the judge's account with the bank and his mortgage, the Court also rejected this as giving rise to apparent bias on the facts. The Court analysed the reasons why the banker and customer relationship will not normally give rise to a need for recusal in the following way at [100]-[102] (bold emphasis added):

> *100 The suggestion that the* ***mere relationship of banker and customer could give rise a reasonable apprehension of bias*** *in accordance with the Livesey test* ***should be firmly rejected*** *(as it was in the Bank Nationalisation Case: see par 95 above). Whatever the situation in times past,* ***the relationship*** *that now exists between a banking corporation and its customers* ***is necessarily highly impersonal and remote.*** *Modern banking is, for most customers, a relationship in which the intercourse takes place at the ATM and through the mail and the telephone. It is analogous to that which exists with a telecommunications service provider, a motor vehicle or general insurer, or a large supermarket chain.* ***No one would reasonably apprehend that the judge might be diverted from the judicial oath to do justice without fear or favour, affection or ill will by the mere existence of such a link****.*
> *101 And,* ***as regards the judge who is a customer*** *of a particular bank, telecommunications service provider, motor vehicle insurer or supermarket chain,* ***nothing turns upon the state of accounts at any point of time, at least with a customer who pays accounts as they fall due****.* ***For many people, short-term indebtedness to the provider of goods or services is a relationship of pure convenience, which in no way places the debtor at the pecuniary mercy of the creditor or establishes any sense of obligation beyond the immediate indebtedness from time to time****.*
> *102* ***Obviously, there will be situations where the affairs of a particular bank branch or group of bank personnel are involved in litigation, or where the judge has some special association with the branch or bank personnel****.* ***And it is conceivable that a particular judge may be in such financial difficulty or may through some dealing with a present or former bank have a such a level of obligation towards or animus against a bank that there may be actual bias or at least its appearance to a reasonable observer. But these are exceptional cases****.* ***They are no different from the infinite range of adventitious relationships*** *with litigants, counsel or witnesses* ***that could arise in any piece of litigation****, and which are dealt with (in the ultimate resort) by application of the Livesey principle to the particular facts of the case.*

28. It is important not to treat any case like a tablet of stone, but this case does usefully draw attention to five main points where a banking business association is in issue: first, a judge who has a banking relationship which is being serviced in a regular way will not normally be considered to be in a recusal situation; secondly, however, personal relations involving servants or agents of the bank might place the case into a different category; thirdly, the state of the account may be such as to place the judge in such financial difficulty, or put the judge in such a position of pecuniary mercy or obligation, as to put the case into a different category, where the objective bystander would or may consider there is at least the appearance of bias; fourthly, the amount of lending or state of the

account will not normally be considered to be relevant, but where there is a question of default or financial difficulty the state of the account may become relevant; and fifthly, the lending relationship is not in a special category of its own: the nature of the relationship (impersonal, remote, routine) is such that usually it will not give rise to an appearance of bias, but this is a starting point and does not avoid the need for further consideration of that issue where, unusually (or exceptionally) for such a relationship, the threshold test for disclosure may be met.

29. I note in passing that the judges in the Court of Appeal in *OFT v Abbey National Plc* [2009] 2 WLR 1286 at [3] felt it appropriate to disclose the fact that they were customers in the banks who were parties to the appeal in that case, which concerned the fairness or otherwise of bank charges for overdrafts. The reason why they are likely to have done so in that case is because the outcome of the decision might have had a direct financial impact on them as customers such as to potentially give rise to presumed bias (either because they had overdrafts, or because, if they did not, the charges which might be applied to their account as a result might increase), albeit it might have been argued as being minimal, and of no materiality. The point as to apparent or presumed bias was not argued in *OFT v Abbey National Plc* (the point was merely mentioned in the judgment), and so provides little assistance to me when determining the issues before me in this case. The case does not suggest to me, however, that a judge should always disclose that they are a customer of a bank in a case where the bank appears as a party before them. Out of an abundance of caution, and in case the contrary might be argued, I did disclose, before I heard this case, that a company of which I am a director holds a current account with HSBC. Neither side wished to contend this should result in my recusal from this recusal application. I doubt I would have felt it necessary to make this disclosure but for the fact that I was cognisant that similar issues might be arising on the recusal application, and I did not wish to pre-judge, or be seen to be pre-judging, any points which might be raised.

30. Ultimately, in recusal cases, everything will depend on the facts of each case. This may include not only the potential cause of the manifested apparent bias, such as a commercial or business association, but also the nature of the issue to be decided and whether this may be said to have any bearing (*Locabail* at [25]).

31. Ninth, does a causal link need to be shown between the apparent bias and the outcome? The short answer is no. It is not necessary, if apparent bias is shown, to show that there is a causal connection between the apparent bias and the outcome of the case. Nor is the enquiry concerned with ascertaining or finding as fact whether the tribunal was biased: see *Smith v A-G of Trinidad and Tobago* [2022] UKPC 28 at [49]. The focus is on the impression given to the FMIO.

32. Tenth, is the end result binary, or is there a potential range or element of discretion? The question whether there is a real possibility of bias is assessed by the standard of the FMIO – so it is either a yes or no answer. If the apparent

bias test is made out the judge is disqualified. There is no discretion: see *Smith v A-G of Trinidad and Tobago* at [74]. The question of any inconvenience caused to other court users, or the parties, should not be taken into consideration: efficiency and convenience are not the determinative values in this context: *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, at [6]. The test does not alter whether the matter is viewed before or after a hearing commences: see *Resolution Chemicals*, at [38].

33. Eleventh, how should the court proceed in marginal cases? If, ultimately, the court's assessment is that the FMIO would consider there are real grounds for doubting the ability of the judge to try the matter objectively then the benefit of the doubt is to be resolved in favour of recusal and securing a judicial outcome which is not tainted by the risk of apparent bias: *Locabail* at [25]. This ought to lead judges to take a precautionary approach, particularly before a hearing has commenced. However, it is important to remember that the test is not one of mere possibility but one of a real possibility. And this test is to be applied even if it leaves the applicant dissatisfied, and bearing a sense that justice has not or will not be done: see *Resolution Chemicals Ltd* at [40]; *Triodos Bank v Dobbs* [2005] EWCA Civ 468 at [8]. Litigants are not to be permitted to pick and choose their tribunal (see *Ghadami v Bloomfield* [2016] EWHC 1448 (Ch) at [16]-[17]).

Conclusions as to the scope of my task

34. It should be apparent from the above review that it is not open for a judge tasked with assessing a recusal application which takes place some way into a hearing process, and which involves allegations concerning that process, to ignore what has happened in the hearing process. The parties are entitled to make allegations on the basis of all that has happened up to that point in time. The FMIO keeps an open mind until she has heard all the evidence and argument. Her decision is based on all the circumstances known to her at the time of assessment. So where the application to recuse, unusually, falls to be considered near the end of the process, and where there is no question of waiver of the apparent bias issue earlier in the process (which is not alleged in this case, but might apply), then the FMIO is taken to assess all the circumstances which bears on the issue at the time of the hearing - looking at the matter prospectively and retrospectively. The FMIO would view all the conduct of the judge up to that point of time as being potentially relevant. They would also know that a litigant who has become aware of an association alleged to give rise to apparent bias, after a hearing has not gone well for them, may be overly sensitive and seek to ascribe all the blame to bias. The FMIO would regard all of that with objective detachment.

35. Nor can it be satisfactory for a judge who is asked to consider a recusal application, not to consider the adequacy of the information provided under the stage 1 exercise, and instead leave that for a potential appeal. HSBC invited me to adopt this approach in supplemental written submissions lodged after the hearing concluded, but I decline to do so. In my judgment that would be contrary to the above cited authority, which makes plain that the FMIO's view may be affected by what has been provided under the stage 1 exercise.

36. I should add that even if it might be said that some of the above authority could be distinguished on the basis that in those cases recusal was not being considered by another first instance judge, as opposed to the appellate court, in my judgment this is not a valid distinguishing factor. The learning derived from the appellate authorities must inform my approach to this recusal application, notwithstanding that I am not sitting as an appeal court, because the appeal decisions were assessing the test to be applied in relation to an allegation of apparent bias.

37. Moreover, it is only likely to result in greater cost, delay and expense if the process is curtailed in the manner suggested by HSBC. It is of course right that the Ryans could have invited the judge to proceed to hand down his judgment, perfect his order, and then sought to include the recusal point as a ground of appeal alongside others. But they did not do so. Instead they positively invited him not to make or perfect an order so they could raise the point before him. Consequential orders have not been determined and no dispositive order has been made, or sealed, on the permission application. Both parties proceeded on the basis that the judge needed to deal with the apparent bias issue once it had been raised with him, and it was dealt with as a matter of priority before all other matters. Whilst it might have been open for the parties to have agreed to take a different approach, or one of the parties to press the judge to adopt a different approach and for him to accede to such a submission, that did not happen.

38. It would be inconsistent with the overriding objective, and further compound the cost, delay and expense which has already been incurred, if I restricted the role I should perform on this application in the manner contended by HSBC, much as it would be tempting to do. I have been provided with all the documentation that was before the judge. I have also been provided with the transcripts, the judgments and I have received detailed written and oral submissions in relation to all three main grounds over 2 days.

39. In the circumstances, the task at hand requires me to carry out a review of what the judge has said and done, including in his two judgments, in order to assess all three main grounds: (1) the business association ground; (2) the stage 1 enquiry ground; and (3) the unfair process ground. I should emphasise however that it forms no part of my function on the recusal application to assess whether or not the judge was right or wrong on the merits of the permission application. Any investigation of matters which may be said to relate to the merits, including in the judgment, are only in order to assess whether they are indicators of potential bias: to illuminate the question of whether the bystander (the FMIO) would conclude there was a real possibility of bias. Where I refer to substantive merits points below therefore I do so only in order to assess the allegations of apparent bias in context.

The nature of the enquiry before the judge – the permission application

40. Some of the context to the permission application can be gleaned from the judgment, though what is said in it as regards the parties' respective evidence

and submissions is contentious. What follows is a summary to understand the circumstances in which the apparent bias issues arise: it does not represent any final findings in relation to the underlying matters.

The permission application up to the hearing on 21 June 2022

41. The permission application, under s 261 CA 06, also arose in unusual circumstances. MCPLC no longer has any directors, is no longer trading, and has no remaining resources of its own (other than the potential contingent value in any potential choses in action, such as the derivative claim). MCPLC's principal (it is said only substantial) creditor is HSBC, which is alleged to be owed a sum of c. £20m odd plus interest (it is contended there are no other substantial creditors, other than some potential historic creditors amounting to c. £150k). HSBC also claim to be owed the sum of £7m (or possibly £10m) from the Ryans personally, in the circumstances explained further below. The derivative claim, including the permission application, is being funded by the Ryans. They do not seek an indemnity from MCPLC in relation to the costs they are incurring or in relation to any potential adverse costs order which may be made against them.

42. The claim form dated 3 September 2021 (which covered both the personal and the derivative claims), together with a supporting statement from Mr Mark Neville Dennis of Horwich Farrelly Limited, solicitors for the Ryans, of the same date ("Dennis 1"), were lodged with the court seeking permission on the papers. This was then, initially, supplemented by a statement from Mrs Ryan dated 8 September 2021. She explains in it that, together with Mr Ryan, she owns 29.2% of the issued share capital of MCPLC, and also that they indirectly own 14.1% via Capita Trustee Services Limited and 2.9% via Mar City Developments Limited (in administration) ("MCDL"). Thus the Ryans hold, directly or indirectly, 46.2% of MCPLC's issued share capital. Mrs Ryan confirms she has read Dennis 1 and agrees with its contents. She goes on to explain in further detail her business career history, the nature of MCPLC's business and her dealings and communications with HSBC.

43. MCDL, a private limited company, operated as a residential housing developer, initially principally based in the Midlands. It formed part of a private group of companies owned and controlled by the Ryans: MCDL was owned by Mar 50 Ltd ("M50L) and M50L was owned by the Ryans. An inter-company account operated in relation to sums due from time to time between MCDL and MCPLC. Before MCDL went into administration (in 2016) it carried on the business of property development in the residential, educational, health care and commercial sectors.

44. MCPLC appears to have commenced trading under that name in or about 2010. The Ryans became the principal executive directors of MCPLC in 2011. Mr Ryan was appointed as chief executive officer and Mrs Ryan became managing director. The house-building team from MCDL was transferred across from MCDL to MCPLC to focus on business as an independent house builder specialising principally in the affordable housing sector. MCPLC in particular

developed modular design and build methods, including for a scheme in Colindale, London (the title to which was held by a company called South Staffs Group Ltd, itself part of the private group of which MCDL formed part). MCPLC was the ultimate parent of a group of companies including Mar City Homes Ltd ("MCHL"), which acted as building contractor for MCDL from time to time under fixed price JCT contracts, and Mar City Land Ltd ("MCLL") which held title to certain development sites. MCPLC and other companies in its group are referred to as the public group to distinguish it from MCDL and the private group.

45. Following the provision of additional finance provided by HSBC to MCPLC/MCDL and the Ryans, the relationship between the Ryans and HSBC deteriorated. Mr and Mrs Ryan ceased to be directors of MCPLC on 10 December 2015 in circumstances which are contentious.

46. HSBC provided various banking services to both MCPLC and MCDL, and their associated companies. The Ryans had a friendship with Mr Noel Quinn, now HSBC's chief executive officer. The Ryans claim that Mr Quinn and another senior manager in HSBC, Mr Andy Armstrong, were instrumental in bringing the banking of MDCL (and associated companies) and MCPLC (and associated companies) to HSBC. They say that relationship was and continued to be supportive. They contrast that with the attitude of HSBC's less senior relationship managers ("RMs"), who were responsible for the daily conduct of the accounts, who they say were less supportive (this view appears to be informed, at least to some extent, by hindsight). In particular, in that respect, they highlight the conduct of RMs in the loan management unit ("LMU") of HSBC, who became involved in the management of the relationship from the latter part of 2014 and/or early 2015, and which they consider adopted a course of conduct, and purpose, which was inconsistent with that communicated to them by what is referred to by the Ryans as "senior management".

47. MCPLC was listed on the Alternative Investment Market ("AIM") on 17 December 2013, raising in excess of £27m, and with net reported assets of c. £65m. In April 2014 the MCPLC share price reached 170p, suggesting a market value of c. £187m. However, by the end of 2014 MCPLC was facing cash flow difficulties, notwithstanding having the benefit of (amongst other things) a revolving credit facility ("RCF") with HSBC from July 2014 for up to £40m. MCPLC had carried out various works for MCDL, in particular in relation to the Colindale development. As a result of various intercompany transactions (including in particular a transfer of land from MCDL to MCPLC and a contemplated further transfer which either could not or did not proceed), by early 2015 there was a substantial related party debt ("RPD") owed by MCDL to MCPLC, said to be in the region of c. £29m. MCPLC's difficulties were said to be exacerbated by the substantial RPD - HSBC contend that both the amount of the lending, and the market's perception of such a significant debt, created problems for MCPLC. The Ryans consider part of the problem related to HSBC not being willing to release sufficient funds under the RCF which was already in place (only £17m had been permitted to be drawn down), though no claim is made that HSBC were in breach of the RCF. Another shareholder, Henderson Global Investors ("Henderson"), which held about 11% of the issued shares in

MCPLC, was also said to be hostile to any equity fundraise. The precise reason for the short-term cash flow difficulties is subject to some dispute, therefore, but it is common ground that there were such financial difficulties by early 2015.

48. In January 2015 Henderson offered to provide finance of about £15m to MCPLC on terms which the board, and the Ryans, regarded as unattractive, including an apparent attempt to obtain managerial control over MCPLC and its associated subsidiaries. This offer was discussed by the Ryans with, amongst others, HSBC in February 2015. Shortly after this, also in February 2015, HSBC agreed to provide this additional finance instead of Henderson, and following representations which the Ryans contend reassured them that HSBC did not intend to obtain managerial control (unlike Henderson) and would support them in their long-term objectives of building shareholder value (defined as the 2015 representations). In the events which transpired the HSBC finance was not provided as a loan to either MCPLC or MCDL, but instead as a personal loan of £10m to the Ryans, as purported business partners, and in accordance with a LIBOR term loan facility dated 23 February 2015 ("the personal loan" or "2015 facility"). It was agreed under this facility that the £10m was to be lent by the Ryans to M50L and for M50L to lend it MCDL, and then paid on to MCPLC in order to reduce the RPD. The balance of the RPD was supposed to be repaid by the end of 2015, according to HSBC.

49. The 2015 facility for the personal loan provided for substantial interest and capital repayments and was secured by charges on the Ryans' shares in MCPLC and M50L. In accordance with the facility terms, the Ryans granted to HSBC (among other security) a charge on the shares held by them in MCPLC on 23 February 2015, and procured a charge to be granted to HSBC on the shares held for their benefit by Capita Trustee Services Ltd on 3 March 2015.

50. By letter dated 24 March 2015 HSBC informed the Ryans that relationship management responsibility for, amongst others, MCPLC and MCDL, would be transferring to a specialist manager within the bank's corporate LMU and Nick Thompson of LMU was to become their relationship manager. The Ryans contend that until they received the letter dated 24 March 2015 the Ryans did not know that Mr Thompson was a manager of LMU, but believed him to be a member of Mr Armstrong's property team based in Canary Wharf. The Ryans do not know the date on which HSBC determined that LMU would take responsibility for MCPLC and MCDL but believe the decision may have been taken in about December 2014. In addition, although the Ryans say they did not know it at that time, or fully appreciate the significance of its role, LMU is the team within HSBC responsible for corporate debt recovery and restructuring.

51. The Ryans now contend that HSBC (via the agency of the RMs) had an ulterior, and undisclosed, purpose which was different from that presented to them at the time (by senior management). They allege that HSBC transferred responsibility for the banking relationship to LMU with a view to managers of LMU taking control over the public group, and over the Ryans' shareholdings in the public group, so as to reduce HSBC's exposure by winding down its affairs and realising the assets – this is described as the "LMU Purpose". The LMU Purpose

has two limbs to it: the first is concerned with the ability to exercise control over the public group, and MCPLC in particular, and the second with conduct after control has been achieved, in particular by seemingly pursuing, as a primary purpose, the maximisation of realisations for the benefit of HSBC as secured creditor/lender. The latter appears to be similar to one of the three statutory purposes of an administration as set out in paragraph 3 of Schedule B1 to the Insolvency Act 1986 ("IA 86"). However, so it is said, LMU/HSBC wanted to achieve control and a scenario akin to administration, but without the disadvantages which come with administration (such as a depressed sale price).

52. The Ryans contended before the judge, pending full disclosure, that the existence and pursuit by HSBC of the LMU Purpose was to be inferred from three things: the way in which LMU in fact conducted the banking relationship (the actual conduct evidence); the fact that managers of LMU had long-standing relationships with the persons and firms identified who assisted LMU in other cases to assert control of and to wind down businesses so as to realise assets and reduce HSBC's exposure (the similar fact evidence); and the fact that at HSBC's insistence all, or a very substantial part of, the £10m personal loan was sent in a circle through (amongst others) M50L, MCDL and MCPLC and back out (if not immediately then in over a period of some months) to repay HSBC in reduction of HSBC's exposure.

53. The Ryans also alleged that, at all material times from around the time when responsibility for the banking relationship with MCPLC was transferred to LMU, and by its conduct, HSBC assumed the role of a shadow director of MCPLC. It is said that the board of directors of MCPLC were accustomed to act on directions and instructions given on behalf of HSBC by representatives of LMU with responsibility for the banking relationship with the Business and/or by LMU's nominee, a Mr Martyn Everett.

54. The Ryans contended that HSBC as shadow director and via its nominee director breached its duties to MCPLC, at common law, in equity and under ss. 170-177 CA 06, by pursuing the LMU Purpose, by failing to pursue a proper purpose, and/or failing to promote the best interests of MCPLC, and/or acted in a position of conflict and/or without disclosing material conflicts and/or in breach of its duties of skill and care. As a result damages and/or equitable compensation and/or an account are sought.

55. The Ryans alleged before the judge that the value of the public group, and which was alleged to be lost by HSBC's breaches, was to be quantified at approximately £107m (being its value at about 23 February 2015, as reflected in its then AIM share price, and at about the time of transfer into the LMU) alternatively £55m (being its value based on an offer made by "Siahaf" to MCPLC in the latter part of 2015 called "the Siahaf offer"). The derivative claim also relates to sums paid to Mr Everett and others in an amount unknown to the Ryans, including to a Mr Johnson (another appointment, as company secretary, which they allege was procured by HSBC) via a company called Amerial, and to Deloitte. These sums are alleged to be in the hundreds, or tens, of thousands, rather than millions.

56. The Ryans also contended that in transferring responsibility for the banking relationship to LMU, and in pursuing the LMU Purpose by its conduct, HSBC acted contrary to the 2015 representations. As such, as part of their private claim (not the derivative claim) they contend misrepresentations were made to them as a result of which they claim to have suffered personal losses. They also plead out allegations of unlawful means conspiracy, and the unlawful means alleged include the same allegations of breach levelled against HSBC and Mr Everett. Whether or not they can pursue loss in value based on such claims, as a personal claim, or whether such a claim is properly so called a derivative claim, is controversial. The close inter-relation between the personal and derivative claims is therefore readily apparent.

57. At the end of Dennis 1, in a section entitled funding, it was stated as follows:

"[95] The Claimants appreciate that, as derivative claims are for the benefit of a company rather than the shareholders who bring the claim on the company's behalf, it is often the case that the company will be ordered to indemnify the shareholders' costs. The Claimants also understand that, in the present case, due to the financial position of MCPLC, any such indemnity would be meaningless, unless the derivative claims are successful. Mr and Mrs Ryan are therefore willing to indemnify MCPLC for its reasonable costs to be incurred in connection with the derivative claims.
[96] Mr and Mrs Ryan have sufficient personal funds to pay not only their own legal fees but also any adverse costs order that may be made if the derivative claims are unsuccessful, together with MCPLC's costs. HF have provided them with an estimate of their costs and counsel's fees to trial. They have also estimated the likely level of any adverse costs order. Although those estimates are privileged, Mr and Mrs Ryan have confirmed to me that they have sufficient personal funds to cover them. If it would assist the Court, they would be happy to provide the Court, but not HSBC, with a confidential statement showing their current financial position."

58. Much of the above, and more, is set out in the initial evidence served by the Ryans, as referred to above, and also in the Particulars of Claim dated 22 October 2021 ("PoC"), which were required to be served in support of the personal claim, but which also plead out the main elements of the derivative claim. It was on the basis of that material that Fancourt J ordered on the papers, on 8 November 2021, that the defendants be joined as respondents to the permission application, and directions were set out down for the filing and service of evidence and for a hearing. In accordance with the statutory procedure, he must have been satisfied that the derivative claim passed the prima facie case threshold as required under s. 261(2) CA 06. The next hearing of the permission application, as took place before the judge, would be concerned with whether the threshold and discretionary tests for permission under s. 263 CA 06 would be satisfied. I will return to these below but at their heart lies the consideration of what a hypothetical director (another fictional character deployed for the purposes of assessing permission applications) would do in relation to the derivative action, acting in accordance with their duty to promote the success of the company.

59. HSBC filed evidence in opposition to the permission application in the form of a statement from Mr Flack of Eversheds Sutherland (International) LLP, the solicitor for HSBC, dated 28 January 2022. His statement exhibited certain documentation from the bank's records which HSBC contended demonstrated that the derivative claim lacked any merit and contained what might be said to be a mixture of submission, articulation of what would be HSBC's defence if permission were granted, and evidence. In the statement Mr Flack contends that HSBC supported MCPLC in its attempts to restructure and fend off attempts from other creditors of MCPLC to wind it up. He draws attention to the fact that it was not obliged to do so, and as a creditor HSBC was ultimately entitled to exercise its rights as lender and creditor and to seek to recover debts owed to it. The restructuring efforts started many years ago and were sustained for a number of years according to his evidence.

60. HSBC primarily assert there is no basis for the allegation that it acted as a shadow director of MCPLC. The allegation is said to be wholly unparticularised, and not supported by the matters pleaded in the PoC, or in the Ryans' own evidence lodged in support of the permission application. This allegation was said to be inconsistent with the contemporaneous documentation.

61. HSBC also contend that the suggestion that there was an LMU Purpose is without foundation, and inconsistent with the factual position as demonstrated by MCPLC's and HSBC's respective contemporaneous documents. It is alleged by HSBC to be an artificial construct derived to create a vehicle for the Ryans to pursue a claim against HSBC which they would not otherwise be able to bring.

62. HSBC take issue with the suggestion that they advised the board of MCPLC in relation to, or had any other substantive involvement in, the Siahaf offer. It contends that there was no relationship between HSBC and Mr Everett, or adverse prior track record of Mr Everett, that gave rise to any conflict of interest.

63. Overall HSBC contend that, contrary to the thrust of the permission application, MCPLC and the shareholders of MCPLC welcomed and were grateful for the support of HSBC in keeping MCPLC afloat, and had significant concerns about the actions of the Ryans in their stewardship of MCPLC. It was therefore HSBC's position that the derivative claim did not meet the test set out in s. 263 CA 2006, no hypothetical director, acting in accordance with their duty to promote the success of MCPLC under s. 172 CA 06, would have considered it appropriate to continue the claim, and that permission ought not to be granted. HSBC also alleged that the derivative claim should be dismissed on discretionary grounds. They contended that it was not brought in good faith, suggesting it was being pursued for the collateral purpose of seeking to avoid their liabilities under the personal loan and/or put pressure on HSBC in relation to it. Mr Flack referred to the fact that on 16 September 2021, after the Ryans had issued their claim, HSBC issued its own separate claim in relation to the personal loan (variously said to be £7m or £10m in the evidence). HSBC had agreed to stay that claim pending the determination of the permission application.

64. The Ryans joined issue with HSBC on these matters in their evidence served in reply, and in argument before the judge. In particular they served a statement from Mr Ryan dated 17 February 2022. At paragraph 5 Mr Ryan referred to Dennis 1, the statement of Mrs Ryan, the PoC, a second statement of Mr Dennis ("Dennis 2") (which exhibited the PoC). He confirmed he had read and agreed with their contents and in addition to noting the absence of any witness statement from any primary witness of fact from HSBC he went on to deal, in particular, with points in response to that of Mr Flack, why it was contended the LMU Purpose was a sustainable allegation, and indeed alleged to be supported by certain of the disclosure provided by HSBC as exhibited to Mr Flack's statement.

65. Mr Ryan draws attention in his responsive evidence that in HSBC's internal credit memorandum produced in advance of the 2015 facility, concerning the personal loan ("February 2015 CM"), a decision had already been made to transfer the relationship to LMU. That apparently also included the lending to the Ryans, which had not then been made, but appears to have been viewed as being in likely default as soon as it was advanced, which the Ryans contend to be a singularly odd feature.

66. So far as concerned the introduction of Mr Everett, he was appointed in June 2015. However before his appointment, in April 2015, MCPLC's NOMAD (nominated adviser), Shore Capital, resigned, and by 20 May 2015, its shares were delisted from AIM. In order to be listed on AIM, a plc must have a NOMAD. The Ryans state that an agreement to transfer land and assets to settle the RPD was all agreed and verified to be completed before and they are suspicious as to its timing, and consider Henderson may have been involved in this, but they have no evidence to suggest HSBC were involved.

67. The Ryans had, up to June 2015, retained the services of a corporate restructuring officer called James Docherty. He was not a de jure director but assisted MCPLC in its restructuring efforts and communications with HSBC. He had previously undertaken a restructuring role within Lloyds Bank. The Ryans contend (as set out in Mr Ryan's statement) that, at a meeting on 19 June 2015, Mr Thompson of LMU ordered them to terminate Mr Docherty's employment and appoint a Mr Everett as executive chairman. The Ryans say they acquiesced in that order (or to put it another way, acted in accordance with that direction or instruction). They say they did so due to their continued belief that HSBC was intending to support them, and did not intend to take over managerial control of the board. On 24 June 2015 Mr Everett was appointed. Mr Everett is a restructuring and turnaround specialist. He was introduced to the Ryans by HSBC, but, HSBC allege, his appointment was not mandatory – they say he was one of three potential candidates put forward.

68. The Ryans contended however (in particular in Mr Ryan's responsive evidence) that HSBC's own credit memorandum dated 25 June 2015 ("June 15 CM") was relevant in this respect in that it stated, "*By agreeing to this funding, we get what we have been after for the last three months, a business plan, weekly CFF's, the appointment of advisors on both sides and the appointment of a CRO in whom*

we can trust." The Ryans contend this supports their case that Mr Everett was, in effect, HSBC's "man", a person that HSBC could trust to do what they wanted. This is denied by HSBC.

69. There is thus a dispute of fact concerning the circumstances in which Mr Everett was appointed, and whether it was at the direction or instruction of HSBC. This may be said to turn, at least to some degree, on an assessment of the evidence of the Ryans, and that of Mr Thompson (according to paragraph 38 of Mr Ryan's statement, at least pending full disclosure of any internal records of the bank, which has yet to take place).

70. So far as concerned the LMU Purpose allegation, the Ryans also contend that HSBC's credit memorandum dated 24 July 2015 (the "July 2015 CM") supports their case. In particular they seek to draw attention to the recognition in it by HSBC that they had little option to do what they did: to continue to provide funds to MCPLC, and to keep it out of administration, because their position was likely to be considerably worsened in that event, and they hoped by doing so they might limit the damage to any potential shortfall on the personal loan to the Ryans. The Ryans point to part of the July 2015 CM of HSBC which states: "*In a solvent trading, we would hope to minimize this to, say, the value of the Ryan's loan security shortfall. In an insolvent trading, the impairment could be sizeable, despite the hard work of all parties recently to salvage the position. So, on balance, the Bank has no choice but to fund the current position and will review this upon receipt of BDO work*".

71. In relation to the Siahaf offer, the Ryans contended that Mr Howman of HSBC's LMU stated, at a meeting on 16 October 2015, that MCPLC would be worth a lot more than the Siahaf offer of £55m in 12 months' time, and therefore it should be rejected. The Ryans also contend that Mr Everett blocked discussion concerning the Siahaf offer by the board before the meeting on 16 October 2015. The Siahaf offer appears to be relied on therefore both as evidence of HSBC advising the Ryans/MCPLC what to do in relation to the Siahaf offer and also evidence of them acting in accordance with what Mr Everett directed, it also being alleged that Mr Everett was acting under the direction of HSBC.

72. Another matter the Ryans rely on is their dismissal as directors from the board of MCPLC in December 2015. They contend this occurred under the direction of HSBC through Mr Everett, Mr Howman and others in LMU. From at least around October 2015, the relationship between the Ryans and Mr Everett had become strained, and HSBC contended the board was divided between the Ryans, on the one side, and the third party directors (including Mr Everett) who were not shareholders, on the other. HSBC point in particular to the continued existence of the RPD and the failure to resolve it by the Ryans, which they contend put the Ryans in a position of conflict of interest which they seemingly failed to appreciate. Further, HSBC submitted that it was apparent that under the Ryans' stewardship MCPLC suffered from poor corporate governance.

73. The Ryans contend that at a meeting on 10 November 2015 they were directed by Mr Howman that they should leave the business, become consultants, and let

Mr Everett, Mr Johnson (company secretary) and Mr Underwood (another director) run MCPLC. They contend at this meeting Mr Everett referred to HSBC as the primary creditor, and his duty being to HSBC. The Ryans say a similar stance was taken at a meeting on 24 November 2015, with Mr Howman of the LMU asking them to stand down. Mrs Ryan is said to have asked why they could not continue as non-executive directors, to which it is said there was no answer. Mrs Ryan also contends that the next day Mr Long of the LMU rang her and directed her to step down from the board. Ultimately on this point the Ryans did not act in accordance with HSBC's direction, but they contend the majority of the board did. The vote for their removal, on 10 December 2015, was passed with Mr Everett's casting vote, against their wishes.

74. The Ryans contended (particularly as set out in Mrs Ryan's statement) that the directors did not have the requisite skills to make MCPLC a success. HSBC for its part contends that after the Ryans were removed the loss-making was reduced. HSBC referred to the fact that MCPLC was in serious financial difficulty when it stepped in to support MCPLC with additional lending in 2015 and continued to trade with the support of HSBC for over 5 years. They contended before the judge that if there is any criticism of Mr Everett then such a claim lies solely against him.

75. The Ryans also relied on a responsive (fourth) statement from Mr Dennis ("Dennis 4") which refers to various information concerning public concerns as regards the conduct of certain UK banks towards their customers, including in particular in relation to their behaviour and conduct after the customer has been transferred into parts of the bank dealing with financial distress and recovery (sometimes referred to as business support units). This was relied on by the Ryans to show that the fact pattern they complained of was not perverse, the financial crisis and certain effects which followed it did result in behaviour in business support units which was not transparent to the customer and inappropriate and to show that banks do "loan to own" or loan to control.

76. After the Ryans' responsive evidence was served HSBC sought to rely on a further statement from Mr Howman, of HSBC's LMU, dated 22 March 2022. This was served out of time, and no formal permission was granted for it, but the Ryans did not oppose its introduction in evidence. In this statement Mr Howman confirms that, insofar as Mr Flack referred to information from named individuals at HSBC, this information had come from him or others he had spoken to, and thus that what was said by Mr Flack was true to the best of his knowledge. He went on to note that, without waiving privilege, at the preliminary stage of the case he understood it was not necessary for several HSBC employees to give evidence. He does not himself go into any great detail as regards the evidence of what was said at meetings or in relation to statements which are attributed to him. He also gave some evidence explaining why HSBC's own records may have recorded a nil value for the shares of MCPLC, and states this is for internal accounting purposes only and did not reflect a belief within HSBC at the time that they were indeed worthless. He also deals with other more peripheral matters.

77. In addition to the evidence referred to above the Ryans and HSBC both filed and served skeleton arguments, dated 16 June 2022, and running to 23 pages and 39 pages respectively. In brief summary here the judge was treated to a full articulation of the case law and principles relating to derivative claims, the circumstances in which a bank may be said to be a shadow director and detailed submissions on the facts of the case. The Ryans sought to emphasise the various disputes of fact, the early stage the matter was at, and their good faith intentions in bringing the claim. HSBC for its part sought to emphasise the alleged lack of merit in the claim, the difficulties in making out a case of shadow directorship against the bank, and that it was entitled to pursue its interests as lender and creditor. HSBC sought to attack the credibility of the alleged LMU Purpose case and also sought to attack the case on quantum as being unparticularised and inconsistent with the notion that MCPLC was already in financial difficulty. HSBC went on to contend that it was concerned that the derivative claim was not being brought in good faith, but instead to exert pressure on HBC in respect of the personal loan/debt claim/issue.

The hearing on 21 and 22 June and the judgment on 24 June 2022

78. I have been provided and read the transcripts of the hearing before the judge which occupied all of 21 June and the afternoon of 22 June 2022. The judge then gave an oral judgment, in open court, on 24 June 2022. The parties and legal representatives did not attend the oral hand down of judgment due to an apparent mix up in communications, though the Ryans attended the latter part of it having become aware of it taking place shortly after it had commenced. The Ryans make a number of forensic points about the submissions they made to the judge, and his judgment, in support of the unfair process ground (3). I will consider those points when determining that ground later in this judgment.

79. In the judgment at [8] and following the judge noted the central and first question before him was whether any hypothetical director would consider it in the best interests of the company to continue with the derivative claim. If that threshold is not passed that is the end of the matter and permission must be refused (s.263(2)(a)). If a hypothetical director, acting properly, might have considered it in the best interests of the company to pursue the claim then the importance such a person would attribute to continuing it becomes relevant to the exercise of discretion (under s.263(3)) and there are also certain (non-exhaustive) discretionary factors for the court to consider.

80. The central basis on which the judge disposed of the permission application was that on the basis the threshold was not satisfied (under s.263(2)(a)), because he formed the view that no hypothetical director would seek to continue the claim. This was on the basis that the judge concluded the claim had no real merit. The reason he did so was because he concluded the pleaded LMU Purpose was nothing more than an "*ex post facto* construct or assertion ungrounded in reality and unfounded in evidence" (see at [74] and [89]) and thus the main substance of the breach of duty allegations fell away (see at [91]). The judge viewed the

allegations as having "*no evidence*" in support of them (see at [75]) and wrongly attempting to "*blacken…HSBC*" (see at [80]). He found the Ryans' evidence/case to be "*incredible*" (see at [53] & [87]). He also found the shadow directorship case to be inadequately pleaded at [90] (see also the linked observation at [27]). He also concluded that it was impossible for the hypothetical director to conclude that damages in excess of £20m would be awarded (which would be necessary to repay to HSBC before monies would flow back to shareholders) (see at [96]). He also concluded there was insufficient evidence to show that the Ryans could fund the litigation, and he viewed what had been said by Dennis 1 as containing a material non-disclosure for its omission to refer to the personal loan (of £10m) (see at [98] and [35]). All these matters lead him to the conclusion that no hypothetical director acting in accordance with their duties would seek to continue the claim (see at [108]).

81. The judge also went on to make some obiter observations on the discretionary element of the test (at [108]-[109]). This included observations by him that he had grave doubts as to whether the claimants were acting in good faith, and indicating that he would have been inclined to reject the application on discretionary grounds as well (under s.263(3)). The judge therefore concluded that the permission application should be dismissed.

The letter of 1 July 2022

82. The Ryans first raised their concern about apparent bias in a letter written by their solicitors to the judge, and copied to HSBC's solicitors, on 1 July 2022. At paragraphs 2 and 3 it stated as follows:

"2. The Ryans were concerned by comments made by the Judge during the Hearing and also by what they perceived to be a marked difference between the Judge's attitude to them on the one hand and HSBC on the other. These concerns caused them to discover following the Judgment that the Judge might have an interest which ought to have been disclosed to the parties before the Hearing.

3. At this stage, this matter is raised informally by letter in line with the guidance on recusal applications provided in El-Farargy v El-Farargy [2007] EWCA Civ 1149 (at [32]). In doing so, the Ryans are also invoking the court's jurisdiction to reconsider matters prior to its perfection of its order (Re Barrell Enterprises [1973] 1 WLR 19 (CA) and paragraph 40.2.1 of the 2022 White Book) and pursuant to the obligation of legal representatives to seek elaboration or explanation from the court in relation to an extempore judgment (as noted in paragraph 40.2.1.3)."

83. The letter went on at paragraph 7 to set out what they considered to be facts of relevance to the question of apparent bias as follows:

"7. The relevant facts that have been brought to our attention by the Ryans are in the public domain and are as follows:
7.1. The Judge and, the Ryans believe, his wife, Mrs K Gerald, each own 50% of the entire issued share capital in Hot Yoga Brixton Limited (company registered number 08862316) ("HYB").
7.2. The sole Director of HYB is Mrs Gerald.
7.3. The latest filed accounts of HYB dated 28 February 2021 show that:
7.3.1. Whilst previously profitable, HYB was materially and adversely affected by the Covid-19 pandemic;
7.3.2. In the year ended 28 February 2021, HYB made a loss of £122,103;
7.3.3. In the year ended 28 February 2021, HYB took out a bank loan in the sum of £45,000 (from an un-named bank); and
7.3.4. As at 28 February 2021, HYB was balance sheet insolvent, with net liabilities of £31,262.
7.4. As recently as 1 April 2022, HYB gave a fixed and floating charge over all of its assets ("the Debenture") to HSBC UK Bank plc ("HSBC") as security for the payment of all sums owed by HYB to HSBC."

84. They went on, at paragraph 8, to note the alleged parallels with the Ryans' case, as follows:

"8. On the face of it, if accurate, these facts have relevant similarities to the material facts that give rise to the Application in that:
8.1. Mr and Mrs Ryan jointly own (directly or indirectly) 42% of the entire issued share capital in Mar City plc ("MCPLC").
8.2. At all material times, MCPLC's bankers were HSBC. The Application is for permission to continue a derivative claim made on behalf of MCPLC against HSBC.
8.3. Whilst previously profitable, MCPLC encountered cash-flow difficulties in February 2015. HSBC advanced the sum of £10m to Mr and Mrs Ryan for onward payment to MCPLC. It is alleged by the Ryans that loan to them was made improperly and was part of a wider scheme defined in the Particulars of Claim as the "LMU Purpose".
8.4. Although we have not yet seen a transcript of the judgment (a copy of which has been requested and is, we understand, currently with the Judge for approval), we understand from the Ryans that in giving judgment the Judge stated that HSBC was motivated by a desire to turnaround MCPLC and that HSBC continued to support MCPLC for several years (by contrast, the Ryans' case is that HSBC acted improperly by pursuing the LMU Purpose - and the Judge made it clear that he considered the Ryans to be making very serious allegations against HSBC which he was required to assess)."

85. The letter went on at paragraph 9 to note that:

"9. At this stage it is not clear:
9.1. What level of debt is owed by HYB to HSBC;

9.2. Whether the Debenture was given in April 2022 to secure existing borrowings or whether HSBC advanced further sums to HYB at that time;
9.3. Whether any additional sums advanced by HSBC were necessary to rescue HYB in or around April 2022;
9.4. Whether the Judge and/or Mrs Gerald have given personal guarantees to HSBC or any other creditors to secure HYB's debt;
9.5. Whether any other security has been given to HSBC to secure HYB's debt;
9.6. Whether any individuals within HSBC who were involved in its dealings with the Ryans have been involved with HYB's relationship with HSBC;
9.7. Whether the Judge has any other relationship with HSBC in addition to the indirect relationship via HYB."

86. At paragraph 10 the Ryans' solicitors went on to note why they considered these facts were potentially relevant to the question of whether a FMIO would conclude that there was a real possibility of bias in the judge.

87. The letter concluded at paragraphs 11 and 12 as follows:

"11. Although the Ryans consider that there were circumstances which may give rise to a suggestion of bias, or appearance of bias, which should have been disclosed to the parties before the hearing, it is accepted that the test is an objective one. The Judge is invited to consider whether disclosure should have been made and, if so, to disclose any relevant facts. If the Judge should not wish to do so informally, the court is respectfully requested to list the matter so that the Ryans can make submissions formally in court.

12. We should emphasise that the Ryans are not inviting the Judge to recuse himself. At this stage, we are instructed to invite the court to consider whether disclosure is necessary and, if so, to disclose such facts and matters as would be material to the Observer when considering whether there is a real possibility of bias in the Judge."

The hearing on 8 July 2022

88. In advance of the hearing on 8 July, due to deal with consequential orders, the parties submitted brief skeleton arguments. In the Ryans' skeleton, at paragraph 9, there is reference to the letter of 1 July 2022, and it is noted the court had been invited to consider if there are circumstances giving rise to the suggestion of bias. In HSBC's skeleton argument for the same hearing HSBC did not refer to the 1 July 2022 letter, though it is common ground they had received it. In their skeleton they refer to the judge's finding of material non-disclosure in the evidence of Dennis 1, in relation to the Ryans' liability to HSBC, in support of their submissions that indemnity costs should be ordered.

89. I have read the transcript of the hearing on 8 July 2022 and it is apparent from reading it that the judge had not received the letter of 1 July 2022 before the

hearing, due to the fact that the email address it had been sent to was not an email address which was in use. But he had picked up on the reference to bias at the end of the Ryans' skeleton, and this was addressed at the outset of the hearing. After it became apparent the judge had not received the email sending the 1 July 2022 letter, a hard copy was handed up to the judge. After reading it the judge stated as follows: "*Well, I think most of what is said there is accurate but, to be completely frank, it had not even crossed my mind but I think you will have to make whatever application you want to make in relation to that*". In the course of further exchanges with counsel as to how the matter might proceed he went on to state: *"Yes, but it did not cross my mind because, I mean, it is---- My wife and I, we own a small yoga Brixton -- a yoga business in Brixton whose bankers have been HSBC since 2014 and there was, from memory, a bounce back loan and then a recovery loan and the recovery loan has a charge over the premises or over whatever it is. No, not over the premises. Over the business, I think it is, a floating charge, I think, but all of that is done electronically. There is---- Most of it was done by the studio manager. So I do not personally think that a reasonable or objective observer would reach the conclusion that the mere fact that a judge has an interest in a business which banks with HSBC is something which should be disclosed. That is my view but -- and it is a bit like my personal bank is Lloyds Bank and if this case involved Lloyds, it would not cross my mind to disclose that. Now, if the business or me personally, using that as a parallel example, had been involved in some sort of restructuring problems/issues possibly with the same individuals, then obviously that would have to be disclosed and, in fact, I probably would have just recused myself and said, "Well, actually, I know Mr Quinn," for example, and it would be obviously quite improper for me to continue."*

90. After further discussion the judge made plain that he considered a formal application needed to be made if the Ryans wished to take the matter further. The judge indicated he felt the matter had "*been jumped*" on him without any skeleton or authorities. HSBC's counsel acknowledged that they had seen a copy of the letter, but indicated they felt the matter had also been "*bounced*" on them. In response the judge noted the reference to bias had been "*slipped in at the bottom*" of the Ryans' skeleton. He went on to observe that he was "*not very impressed*" with the approach taken by the Ryans, but noted either way the matter would have to be adjourned. There was then some discussion as to how the matter would be addressed thereafter. There appeared to be some confusion in this respect at the hearing because the Ryans wished to understand from the judge whether he was going to make any further disclosures, and understood the judge to indicate he was not going to, but it subsequently became clear the judge wished to consider the matter further, having the benefit of skeleton arguments and consideration of authorities, before deciding whether he would give further disclosure or not. Ultimately therefore it was concluded that the next hearing would be to determine whether he should provide further disclosure, thus stage 1 of a potential recusal application, with the Ryans to then decide whether they

wished to make a formal application for recusal in the light of any further disclosure or such a ruling.

91. The order made on 8 July 2022 was drawn up by the judge and sealed without it being circulated to the parties in advance and contained the following recitals (underline emphasis added by me):

"UPON THE CONSEQUENTIALS HEARING following judgment given on 24th June 2022 ("Judgment"), Stephen Davies QC appearing for Claimants, Bridget Lucas QC for First Defendant, Second Defendant not appearing or being represented

UPON IT APPEARING that Claimants wished to pursue an oral application for HHJ Gerald to recuse himself and set aside Judgment before finalising consequent order based upon the content of a letter dated 1 July 2022 which had not been received by the court until handed up during submissions (and had only been provided to First Defendant's counsel shortly before hearing) AND FURTHER that such application had not been identified as one of the matters for consideration in paragraph 2 of Claimants' 7th July 2022 Skeleton Argument ("Skeleton") and was only obliquely referred to in the last short paragraph 9 of that Skeleton

UPON THE COURT refusing to accede to Claimants' invitation to determine "stage 1" as to whether or not judge should have disclosed interest referred to in said letter at outset of previous hearing as giving "rise to a suggestion of bias" and what his decision would have been BECAUSE Claimants attended without prior notice to the court or First Defendant, proper skeleton argument or authorities AND THAT Claimants invited judge to disclose matters relating to his personal affairs in respect of which no authority was cited as to the nature and extent (if any) of such obligation"

92. I have underlined certain points because the judge later accepted, on 15 July 2022, that they were factually incorrect. The underlined text was removed/revised by him at and following the adjourned hearing before him on 15 July 2022. The Ryans rely on this as indicators of the judge's apparent animus towards them/their counsel, and suggest the judge only adopted a different approach when he became aware on 15 July 2022 that the whole of the judicial process might be scrutinised for apparent bias.

93. The order of 8 July 2022 provided for the matter to be adjourned and stated at paragraphs 2 and 3 that (underline emphasis added by me):

"*2. If Claimants wish to pursue recusal application:*
a. Claimants to file and serve skeleton argument in support by 4pm on Tuesday 12th July 2022

b. First Defendant to file and serve skeleton argument in response (if so advised) by 4pm on Thursday 14th July 2022
3. If Claimants do not wish to pursue recusal application, matters identified in paragraph 2 of Claimants' Skeleton shall be determined"

94. This underlined text was also recognised as being inaccurate on 15 July. It was revised to make clear that the question was whether or not the Claimants wished to pursue consideration of recusal, not a recusal application itself.

The judicial statement of 12 July 2022

95. After the hearing on 8 July the judge concluded he would provide formal confirmation of the oral disclosure he had already given on the 8 July, and a response to the questions raised in the 1 July letter, and to do so before the adjourned hearing. Thus, on 12 July 2022 the judge provided a statement which was circulated to the parties and stated (materially) as follows:

"Having now had an opportunity to consider Claimants' 1st July 2022 letter (received by the court on 8th July 2022) setting out certain matters of public record, I felt it might be of assistance to confirm the position.

My wife and I each own 50% of the shares in HYBL, a small single-premises yoga studio based in Brixton run by a full-time manager serving the local community.

From inception, its bankers have been HSBC. There were no bank borrowings until during the pandemic when a £50,000 Bounce Back Loan was applied for on-line with automatic offer generated by HSBC. It has been fully drawn-down.

Latterly, a £75,000 Recovery Loan was similarly applied for on-line, HSBC responding by email offer to the manager conditional on grant of a charge over HYBL's assets which has been provided. It has been fully drawn-down.

The HSBC relationship is essentially transactional i.e. the provision of current and deposit accounts to process payments and receipts without provision of other banking services apart from the BBL and RL. As far as I am aware, there is not and never has been any relationship or assigned account manager.

There are no personal guarantees from myself or my wife, and no security has been provided by either of us. No other security has been provided by HYBL.

I have no personal or other HSBC bank accounts. I have no idea if my wife does."

The adjourned hearing on 15 July 2022

96. The parties prepared skeleton arguments in advance of the hearing on 15 July 2022. In the Ryans' skeleton for that hearing they drew the court's attention to inaccuracies in the recital to the order of 8 July and in the order itself. The skeleton went on to refer to the judicial statement. It went on to explain that an informed decision could not be made on whether to proceed with an application to recuse without understanding the nature of the interest and asserted connection. Authority was cited on the level of disclosure which might be considered to be necessary or material. At paragraph 21 it was submitted that information was needed from the judge because:

"At one end of the spectrum, the Judge might have no involvement at all in the business and affairs of HYB, regarding it as his wife's business and having no involvement at all in it or its financial recovery. At the other end of the spectrum, the Judge might be very close to the business, perhaps as its founder and/or due to a personal commitment to its objects and/or be closely involved with ensuring its survival. The Ryans could not know the true position."

97. The skeleton went on to state that it was unclear whether or not the judge intended to provide any further disclosure, or viewed stage 1 as being complete, but if the judge had concluded stage 1 was complete then, on the basis of that information, the Ryans would wish to invite the judge to recuse himself, and on substantially the same grounds which are now advanced before me. In short that the judge should have disclosed the HYB and HSBC association at the outset and recused himself if the Ryans had objected. At paragraph 32 of the skeleton it was submitted:

"It might be thought that, on the limited facts available, the connection between HYB and HSBC is too indirect, remote and/or speculative/trivial to amount to a perceived disqualification by association. It is submitted that such matters are not to be judged by fine legal analysis alone. That is not how the reasonable lay Observer thinks or how a court giving effect to that standard should reason. Given the purposes of the law of disqualification and the interests those purposes protect, the question is ultimately one not of a lawyer's professional evaluation but of public perception."

98. The Ryans then went on to submit:

"The relationship between the judge and his wife, in the absence of any other information, should reasonably be regarded as close. The Observer must assess the particular association of the Judge and his wife with HSBC as the provider of rescue finance during 2022 to their jointly-owned company and decide whether there is a real risk that that association might affect the Judge's ability, without fear or favour, to determine the Ryans' complaints about the same bank's conduct when providing rescue finance to their company. In this respect, the difficulty is that nothing is known about the Judge's involvement in or attitude towards the business of HYB, the importance to the Judge of its survival

or even its prospects of survival and/or the need to find additional rescue finance. It is invidious to expect a judge to reveal (e.g.) whether his own personal finances were involved in propping up HYB or the intensity of his own involvement in the business of HYB. It is to protect against non-disclosure of such matters that a precautionary approach should be adopted at the outset. After the event, the Ryans might be wrongly made to look as if they are searching around for excuses in response to the judge having taken against their case."

99. The skeleton went on to explain how the apparent bias argument would be based not simply on the business association but also the judge's conduct during the hearing process and the language he used in the judgment suggesting an unfair disfavour towards the Ryans and unfair favour towards HSBC.

100. HSBC, in its skeleton argument, deployed many of the same arguments it now deploys before me. In short it submitted that the judge was right not to disclose the association involving HSBC, and the current situation was far removed from ones where recusal might be required. It was submitted at paragraph14.2 (footnote references omitted):

"If it were relevant (and it is submitted it is not) the relationship between HYB and HSBC is one of bank and customer: including in relation to the provision of a Bounce-Back Loan and Recovery Loan. Such lending is common-place, and is part of a government-backed scheme to aid viable businesses in their recovery from the pandemic. It is entirely wrong for Cs to infer that "the funding was advanced on the basis of the insolvency of HYB". That is not what the schemes were about. All that can be said is that the Judge is a shareholder (not a director) in a company that has a standard banking relationship with HSBC."

101. In addition, by the time of the hearing on 15 July 2022, the Ryans had also discovered from public documents that a freehold property, registered in the sole name of the judge, was charged by a charge dated 7 May 2021 as security in favour of Clydesdale Bank Plc. The Ryans considered this might be relevant to understanding whether or not the judge had been involved in using assets of his to raise finance to help support HYB. They raised this point orally.

102. From reading the transcript of the hearing on 15 July 2022 it is apparent the judge, quite understandably, did not appreciate the intrusion into his personal affairs. He warned counsel at one stage not to seek to cross-examine him, when it was suggested that there was further relevant information that the Ryans would wish to know about, suggesting that the course the Ryans' counsel was indicating might be "*abusive*" if it amounted to an attempt to cross-examine. There was also some confusion at this hearing as to whether or not the judge would proceed to deal with all of the recusal application himself, at that hearing, or whether he should just give a ruling on stage 1 of the enquiry. Ultimately, after some prevarication, the Ryans requested he rule on stage 1 first. The judge did so, and ultimately he decided to withdraw himself from being involved

further in the recusal application process thereafter, other than providing for directions for the application to be issued and heard by another judge.

103. As for his decision on stage 1 of the recusal application, as set out in the second judgment, the judge refused to give further information. That notwithstanding, the second judgment contains some further discussion about the business association at [26]-[31]. The judge seeks to contrast the HYB business and association with HSBC against the position the Ryans faced with HSBC. He points to: the amounts involved in relation to the Ryans' case as compared with HYB; and the personalised nature of the dispute the Ryans had with HSBC, and contrasts that against the impersonal and Covid-19 driven nature of the transactions HYB had with HSBC. In response to the suggestion that further information should be provided he stated at [40]-[43] as follows, indicating HYB's survival was of some considerable importance to him:

"40 It seems to me, on the basis of the information which has been provided and the nature of small family businesses serving the local community, a reasonably-informed fair-minded observer would properly infer and conclude that its survival was of some considerable importance to the judge (and his wife), particularly given that the company had gone to the trouble of getting a Bounce Back Loan and then a Recovery Loan; that seems to be a statement of the obvious. It is not necessary or material for the judge to start saying what his or her personal position or views are in relation to particular matters because if that were so, the judge would get sucked into something which would be or begin to resemble an informal type of cross-examination which, in my judgment, crosses the line.

41 That was brought into harsh relief when, as part of Mr Davies' oral submissions about two or three hours ago, it was identified that the correspondence address of my wife stated in the published records is [home address redacted], which apparently (if I may say correctly, there being nothing to hide), is said to be registered in my sole name and has been re-mortgaged according to public (HMLR) records sometime last year, I think. That indicates that further enquiries have been made by the claimants' solicitors, albeit that these submissions were made orally and not referred to in the skeleton or elsewhere.

42 From that it was submitted that it would be in the mind of the reasonably-informed fair-minded observer that that charge was or might be linked to raising funds for HYBL. If, it was submitted, the address is the present address of myself, therefore it is my home, and it is my home that is at risk in the event of HYBL default and, therefore, the claimants, and the reasonably-informed fair-minded observer, would not know but would want to know if there was a family interest in the business.

43 What that is doing is inviting the court down a perilous path in which an aggrieved party embarks upon investigations of public records and speculates without any foundation at all as to what might or might not be the situation, and then invites the court to engage in that speculative exercise to in effect elicit further information from the judge which becomes or is tantamount to a form of cross-examination or disclosure request. In my judgment, that sort of thing, particularly when it is said on the hoof during oral submissions, is a bridge too far or possibly more than one bridge too far."

The recusal application & further evidence

104. In accordance with directions provided by the judge the Ryans issued the recusal application on 20 September 2022, with detailed grounds for recusal in support. It was also supported by a fifth statement of Mr Dennis ("Dennis 5") which sets out, amongst other things, certain publicly available information concerning HYB. In addition to the matters put in evidence before the judge Dennis 5 also exhibits documents relating to a company called Bikram Yoga South Limited, a company which was incorporated on 29 March 2007 and which was dissolved on 22 September 2009 and a Wikipedia page for Bikram yoga, and certain documents relating to another company called Bespoke Textiles Limited ("BTL"). The Ryans invite the conclusion, from this further information, that the judge's wife has a fashion company of her own and that the judge is (or has in the recent past been) a hot yoga teacher (they infer a qualified instructor). From these latest discoveries they seek to draw the inference that the judge's primary interest is HYB and his wife's primary interest is her fashion company (BTL) and the FMIO would not be influenced by the separate legal personality of HYB for the purposes of apparent bias.

105. HSBC chose not to put in any formal evidence in response to the recusal application, though they, and the Ryans, provided me with some further information in relation to HYB, in the form of its latest filed accounts, and concerning the Bounce Back Loan and Recovery Loan Schemes.

106. As regards the latest financial accounts for HYB, for the year ended 28 February 2022 (approved on 17 October 2022), these indicate that at the end of 28 February 2021 HYB was balance sheet insolvent in the sum of £31,262 and by the end of 28 February 2022 the position had worsened such that HYB was balance sheet insolvent in the sum of £70,508. Creditors falling due within one year are showing at £114,389, and creditors falling due after more than one year at £44,510, a total of £158,899. It is not immediately apparent from this information whether or not the judge might also be a direct or indirect creditor of HYB as well as a shareholder.

Discussion and conclusions on the grounds of apparent bias

107. I shall now consider the grounds for recusal, the parties' main submissions on them, and my conclusions on each of them.

(1) the business association ground

The submissions

108. As noted above, the first ground is that the judge has a current relevant business association, via HYB, which may be said to potentially impact on his impartiality in ruling on the Ryans' claim against HSBC. This is said to be so both due to the nature of that relationship and also due to the alleged similarities between the situation HYB is or may be in and that of MCPLC in the underlying derivative claim.

109. It was further submitted on behalf of the Ryans that the FMIO would consider that:

a. HYB is owned 50/50 by the Judge and his wife, suggesting its fortunes were close to his heart;
b. the judge and his wife might have committed their own resources to save their company before resorting to rescue finance from HSBC;
c. there is a real possibility that the judge is keen to keep on the right side of HSBC as a person who could cause it to become formally insolvent;
d. there is a logical connection between the complaints made against HSBC in the derivative and personal claims (about its alleged misconduct when agreeing to provide rescue finance to the Ryans' company) and the fact that HSBC has this year advanced rescue finance to HYB;
e. this being a case where nothing was known of these matters prior to judgment, the approach adopted by the judge in favour of HSBC in the judgment might reasonably be referrable to a desire to avoid criticising HSBC; and
f. on these limited and assumed facts, there is a real risk that the Judge had favoured HSBC unduly and thereby deviated from impartial decision-making.

110. For HSBC it was submitted that it was unclear what the Ryans were alleging the judge's relevant association with HYB was. It was submitted, if and in so far as it is said to be that the judge being (or having been in the past) a "hot yoga instructor" (qualified or not), this was not of any relevance. They submitted there was no reasonable basis to suggest that this indicates *"a likely emotional attachment"* to HYB. They submitted it has no obvious relevance to the issue of recusal, over and above his acknowledged 50% interest as a shareholder in HYB: a small company owned by him and his wife.

111. HSBC noted it was asserted that the judge's wife's interest in BTL means that that was her primary interest - rather than HYB. They note the Ryans then invite the Court to go one step further, and (building on that baseless conclusion) to draw the inference that the judge's primary interest (aside, presumably from

sitting as a judge) is HYB. HSBC submitted there is no possible basis upon which either inference could reasonably be drawn, and it is precisely this type of speculation against which the guidance in *Resolution Chemicals Ltd* seeks to protect.

112. HSBC further submitted that neither of the points referred to above add anything to the critical point which is, for present purposes, whether or not the fact that HSBC made two Covid-19 loans - in relation to one of which HYB has provided a charge over its assets - would predispose the judge to be favourable to HSBC. As to that it was submitted:

a. a disclosable business association would not normally include a direct relationship between banker and customer, let alone some indirect perceived relationship between banker and a shareholder of a company that is a customer;
b. there is no, or no logical, connection between (1) the complaints made against HSBC in this litigation, and (2) the fact that HSBC has this year advanced Covid-19, government backed lending (widely made available through the means of a number of commercial lending banks) to HYB (a business that the Ryans accept was, prior to the pandemic, profitable) to address the adverse impacts on businesses arising by reason of the pandemic;
c. as regards Covid-19 lending, as is said to be clear from information readily available on the internet (1) a Bounce Back Loan is 100% government backed, and there is no recourse on the part of the bank to the borrower; and (2) a Recovery Loan provides financial support to businesses as they recover and grow following the coronavirus pandemic. The government provides a 70% guarantee, and a business is only eligible if it would be viable but for the pandemic, and has been adversely affected by the pandemic;
d. the lending by HSBC to MCPLC is completely different in numerous respects. It consisted of multi-million pound loans negotiated on a commercial basis over a period of years (all prior to the pandemic) by the Ryans with individual named managers at HSBC, and with the assistance of legal advisors for all relevant parties. The attempt to conflate the loans provided to HYB (not the judge) with those provided to MCPLC is entirely misguided. It is simply wrong to equate Covid-19 government backed schemes to MCPLC's extensive, significant, commercial borrowings in this case, and to refer to them both compendiously as "rescue finance": thereby suggesting that the judge and the Ryans are somehow "in the same boat".

113. HSBC noted that the Ryans were alleging that they were presenting a case to the judge to the effect that they/MCPLC had been tricked into accepting rescue finance from HSBC and were wishing to be relieved of their obligations and were submitting that there was, as a result, a real possibility that this could be a source of considerable irritation to the judge. HSBC submitted there is no

reason why the judge ought to have been irritated by this, or that the facts would be in any way relatable to the judge, or that this would lead to a pre-disposition against the Ryans or their case.

114. HSBC also submitted that a judge is not required to disclose the existence of a factor that might possibly form the basis of a bias challenge, except where it is such that a FMIO with that knowledge might conclude that there was a real possibility of bias. HSBC submitted that a FMIO knowing of the facts that have now been disclosed, would not conclude that there was any real possibility of bias. The factors raised by the Ryans in this case *"unnecessarily [raise] an implication that it could affect the judgment and approach of the judge."* They submitted the judge was simply not required to disclose them.

115. HSBC further submitted that, in any event, even if the Court were to conclude the judge ought to have done so, the FMIO would not conclude that there is any real possibility whatsoever that the Judge would be biased, or *"keen to keep on the right side of HSBC"*. This is not least given that the judge has disclosed that he has no personal dealings with HSBC, the relationship is purely transactional, no relationship or account manager has been assigned to HYB, neither the judge nor his wife have provided any personal guarantee, and he has no personal or other HSBC bank accounts.

Conclusions

116. In my judgment if the limit of any business association between the judge and HSBC was that HYB, a small company of which the judge was a 50% shareholder with his wife, was a solvent business which had obtained routine lending which was being serviced without any difficulty then I do not consider a FMIO would view this as an association which suggested there was a real possibility of bias. The nature of the lending, even if it included some element of recovery finance, was impersonal in nature, and there are no indications of financial difficulty which might involve or overspill onto the judge's own financial affairs. Nor do I consider this would be an association which suggested there was a real possibility that it could result in the FMIO concluding there was a real possibility of bias, in other words that it crossed the threshold into a matter which required to be disclosed.

117. Secondly, however, in my judgment a FMIO would consider that if HYB was insolvent, or in financial difficulty, and the judge's financial affairs were in some way inter-connected with HYB such that financial difficulty in HYB could result in him or his family suffering substantial financial detriment, or difficulty, then even though the nature of HYB's relationship with HSBC was impersonal, and of a transactional nature, the FMIO would begin to view this somewhat differently. I consider the FMIO would begin to have some doubts as to whether or not the business association in this case was an association which could result in a real possibility of bias. I conclude that is so for the following reasons:

a. First, whilst the Bounce Back loan of £50,000, off the back of the Covid-19 pandemic, might reasonably be viewed as a loan on favourable terms, it nevertheless was, contrary to HSBC's submissions, a loan which the bank could have recourse to against the borrower irrespective of the fact it was supported by a government guarantee. This is made clear in the publicly available literature provided to me in the supplemental recusal bundle. The borrower remains liable for all of the loan and HSBC would always seek to recover the outstanding sum from the borrower. It is just that HSBC would also have recourse to the government guarantee for 100% of the loan too. The borrower here is of course HYB, not the judge himself, and the Bounce Back loan alone would probably be insufficient to concern the FMIO;
b. Secondly, the Bounce Back loan evidently did not solve HYB's cash flow problems, hence the need for the Recovery Loan of £75,000, in April 2022, secured by way of a debenture over the business of HYB. The Recovery Loan scheme is designed to support businesses which have suffered by reason of the impact of Covid-19, and which would be viable but for its impacts, but they can be granted to businesses which are insolvent (there is some indication that certain insolvency tests might apply in Northern Ireland, but it is not apparent the same applies in England). Some care needs to be taken about the wording used in the Recovery Loan scheme literature and the FAQs documentation because they do state such a loan is not available to business which is in financial difficulty. However this is defined in a particular way as to mean businesses not assessed as being viable or in relevant solvency proceedings. Moreover when assessing viability lenders may disregard short to medium term business performance due to uncertainty and the impact of Covid 19. In short, the fact that a Recovery Loan is applied for and obtained does not mean that the business is not in financial stress or difficulty in a wider sense. Again the bank can have recourse to the borrower for repayment and again the mere fact that the government provides a guarantee of 70% does not mean HSBC could not look to enforce in the event of a default. Again the borrower is HYB not the judge and there are no personal guarantees in place, but recovery finance is not standard finance. I avoid the word rescue, as that is a contentious phrase, which may be said to suggest similarities with the position of MCPLC which are overblown by the Ryans in their submissions. But I see no reason why the recovery finance in this case could not be said to assist with the rescue of HYB;
c. Thirdly, whilst evidently HYB greatly suffered due to the Covid-19 pandemic, like many other businesses, it is apparent from its latest reported accounts that it is insolvent, and increasingly insolvent. Its trading losses have increased over the last year, and it is now balance sheet insolvent in the sum of £70,508 as at 28 February 2022. The liabilities to creditors appear to be growing, and to sums which are not

insubstantial: in the accounts to the end of February 2022, creditors falling due within one year are showing at £114,389 and creditors falling due after more than one year at £44,510, a total of £158,899. It is not immediately apparent from the available financial information whether or not the judge might also be a direct or indirect creditor of HYB as well as a shareholder. In short, it is not implausible to consider that HYB could, or could shortly, be in a position of default, or indeed might have been close to a position of default by the time of the hearing and the judgment being handed down. The FMIO would be concerned about the proximity in timing of those events with this case, and the lack of further detailed and up to date information on the matter;

d. Fourth, I consider that a FMIO might still be somewhat sceptical that the fact that HYB might be in financial difficulty necessarily suggested this also meant that this financial difficulty would overspill onto the judge or his immediate family, after all there is a reason for the use of limited liability corporate vehicles. However, I do not consider the FMIO would necessarily be complacent, and would be interested to know more about the precise extent and nature of those connections and how significant any of this would be to the judge's financial and wider concerns – to have full disclosure - so that any potential doubts in this respect could be laid to rest. The fact that the judge may in the recent past have been involved in granting security over property owned by him, including potentially his own home, in order to support HYB, might be viewed as being of some relevance. The lack of a complete picture in this respect, overall, would be likely to begin to colour the FMIO's view;
e. Fifth, contrary to HSBC's submissions, but consistently with the judge's second judgment, I conclude a FMIO would consider that HYB's survival was of some "*considerable importance to the judge*". It does not seem to me the FMIO would consider the fact that HYB was dear to the judge's heart, or that he was an instructor, or that the judge's wife had other business interests (including in BTL), would add particularly to this analysis, save perhaps to reinforce that a FMIO would conclude there was a close connection between the judge and HYB in this case. To put it another way, the FMIO who reads beyond the headlines would conclude there is more to this case than the headline that the judge was a 50% shareholder in HYB which had an entirely standard banking relationship. HYB needed not only a Bounce Back loan, but then also a Recovery Loan. It was insolvent. It was far from clear that such recovery finance would be sufficient to enable HYB to avoid terminal insolvency, at least not without further support, possibly from the judge;
f. Sixth, the FMIO would not view the judge and HYB as being in the same proverbial boat as the position of the Ryans and MCPLC. The scale of the lending and the highly personalised nature of the relations in the latter case are very different from the former case. A subject matter/issue overlap is not so stark in this case. However, the mere fact that the original cause of HYB's problem was Covid-19 related would not be

viewed as being a panacea either. A FMIO would look at the finances of HYB and consider that HYB's financial trajectory was still apparently in the wrong direction, some time after Covid-19. The FMIO may also consider that HYB's own positive experience of finance support from HSBC in times of difficulty, for something which was important to him, might subconsciously render the judge more hostile to the notion that a bank might provide loan support for improper purposes, and have some feelings of gratitude for the support rendered for/to HYB, even if subconscious;

g. Seventh, a FMIO would still probably consider that it was doubtful that the judge's connection, via HYB, with HSBC gave rise to a real possibility of bias, either because the judge might feel a sense of obligation, or gratitude to HSBC, or wanting to be on the "right side" of HSBC. Knowing of the judicial oath, and the training of the judge, and his experience, the FMIO would still think it doubtful that simply because HYB had a moderate, and perhaps increasing, sense of reliance on finance with HSBC, this was not such as to put the judge in an exceptional position of pecuniary mercy, or with a sense of any special obligation to HSBC. To put it another way a FMIO would not view this as clearly falling within the extremes contemplated in *Dovade* where the need for recusal was obvious, but more in a twilight category of case;
h. Eighth, a FMIO would be interested to know to what extent the judge gave any conscious consideration to the issue before he gave his judgment. The FMIO would be alert to any signs, either in the way the manner the judge dealt with the issue when it was raised before him, or in the way in which he dealt with the case more generally, which might give rise to such concerns being either assuaged or exacerbated;
i. Ninth, thus, overall, the FMIO would be alert to any signs of a lack of apparent objective consideration of the issues and fairness in the manner in which the judge dealt with the recusal issue, and indeed matters before then. The FMIO would remain concerned, but also open minded, about the question of apparent bias.

(2) the stage 1 enquiry ground

Submissions

118. The Ryans submit that the failure to disclose the fact of the business association with HSBC via HYB, before the hearing commenced before him, coupled with his reaction to the issue when it was raised before him, and the alleged incomplete picture arrived at following the judicial statement in relation to the business association ground, constitute an additional ground for considering there is apparent bias. Their submissions in this respect focused, in addition to the fact of non-disclosure from the outset (which I will call the first limb), on matters concerning and relating to the hearing on 8 July 2022 (the second limb), and then on matters relating to the hearing 15 July 2022 (the third

limb), and where the matters were left, at the end of the stage 1 enquiry (the fourth limb).

119. The Ryans relied on the fact that at the hearing on 8 July 2022 the judge was said to be irritable and hostile to them/their counsel: they submit this was reflected in the sealed order that he sent to the parties later that day, including recitals and operative terms which were not justifiable and later withdrawn. They submit that the FMIO would perceive that was laying the ground for a wasted costs order against the Ryans' lawyers. The judge treated the recusal as having been raised at the 11th hour in order to postpone the consequentials hearing.

120. The Ryans relied on the judge's comments and attitude at the 15 July 2022 hearing as also indicating he had prejudged the recusal issue. They submit he wrongly sought to press the Ryans to agree to recusal at a hearing which had been organised to determine stage 1, and then made attempts to get them to drop their recusal complaint (by amongst other things suggesting they could appeal anyway, and this might be more cost efficient).

121. HSBC submit these submissions seek to bolster what they contended was a weak argument on the business association ground. They contend that it was plain that the judge had not received the 1 July 2022 letter before the hearing on the 8 July 2022 and this plainly disconcerted him. But they submit his reaction to the suggestion that he consider the matter, and provide further disclosure, does not mean that there was a real possibility of bias in favour of HSBC or against the Ryans. They point to there being genuine uncertainty as to what the Ryans were proposing should happen and any irritability on the part of the judge towards the Ryans was understandable for reasons unconnected to apparent bias.

122. In relation to the 15 July hearing they submitted that the fact that the judge explored with the Ryans' counsel other more cost-effective routes to the present one does not mean there was a real possibility of bias or indicate any nefarious need to deflect the Ryans from their recusal application.

Conclusions

123. So far as the first limb of this argument is concerned, namely the mere fact of non-disclosure from the outset, the judge confirmed that it had not crossed his mind to disclose the business association identified by the Ryans. It is not entirely clear to me whether the Ryans accept this or not, but I am required to assess the matter from the point of view of the FMIO not the Ryans. In my judgment, for reasons which have already been substantially traversed when dealing with the business association ground above, the fact of non-disclosure and the reasons for it would be relevant to the FMIO. The FMIO would consider the real grounds for doubting the ability of the judge to try the matter objectively

which arose from the business association, or lack of clarity as to how it might be affecting the judge, was not assuaged by the explanation provided as regards non-disclosure. In particular:

a. The FMIO would, taking the judge's explanation as to non-disclosure on its face, consider that a potentially relevant matter which could give rise to a risk of bias remained in the sub-conscious and there remained a risk of sub-conscious bias;
b. The FMIO would more likely have been reassured if the judge had consciously considered the question before the hearing and either satisfied himself it was not an issue, but was mindful of it, or if the judge had given the parties the opportunities to make submissions on it before he heard the matter. This would have meant that the points raised by the parties would have been firmly in his mind, and might have been more readily guarded against once brought to his notice, even if he thought he could properly continue;
c. Before reaching a final conclusion on the real possibility of apparent bias, the FMIO would therefore consider carefully events both before and after the explanation provided by the judge.

124. As for the second limb, concerning the language and conduct on the 8 July 2022, it is common ground that the judge displayed some irritability and apparent hostility to the manner in which the matter had been raised before him. The FMIO would however make some allowances for the fact that the letter of 1 July 2022 had not been read by the judge before the hearing and he was being invited to engage in matters which were personal to him in an open court setting. I also accept the submissions of HSBC that there does appear to be some confusion, at least in the judge's mind even if the Ryans contend their position had been clearly articulated, as to how he should proceed. All of this would, in the eyes of the FMIO, go some way to explaining the judge's conduct at the hearing on 8 July 2022. However there are indicators which would be of serious concern to the FMIO:

a. The major concern of the FMIO would be in relation to the inaccuracies in the sealed order issued on and following the hearing on 8 July 2022 which was sent out without giving counsel the opportunity to consider it before it was sealed, and how those linked to the judge's approach and language used by him at the hearing itself;
b. It is not simply that it contained errors but that they were all errors which a FMIO would conclude indicated a real possibility of bias on the judge's part against the Ryans:
    i. The Ryans had made plain they had not yet decided to move their recusal application, and were seeking to ascertain all the relevant factual information concerning the business association identified so that they could assess whether to make such an

application. The order was wrong to suggest they had made an oral recusal application at the hearing;

ii. The letter of 1 July 2022 was evidently not received by the judge due to the email address to which it was sent not being active or used, but it is also clear that it was sent to HSBC in good time before the hearing and was not simply provided to their counsel shortly before the hearing;

c. It is therefore clear from the transcript that some of the errors were not easily explicable. HSBC had acknowledged they had received the letter of 1 July 2022, but also referred to being bounced due to the lack of a skeleton and authorities on the point. The judge does not appear to have troubled himself to enquire precisely when the letter was received by HSBC, and instead seemed very quick to conclude this fact (i.e. that they had only received it shortly before the hearing), and include it the recital, without any fair or balanced enquiry on the point, or indeed notice to the Ryans. A more balanced approach would have led to the conclusion that the Ryans were not seeking to jump, or bounce, anyone and the recitals would not have been included in the terms originally drafted. The judge also stated at the hearing that the reference to bias had been "*slipped in at the bottom*" of the Ryans' skeleton for the hearing as in some way indicating sneaky behaviour by the Ryans' counsel and that he was "*not very impressed*" with the approach taken by the Ryans. This was not an easy point for the Ryans or their counsel to raise and this type of language, and the tone and hostility it demonstrates to the Ryans, would be a concern to a FMIO. In short, a FMIO's pre-existing concerns would be reinforced rather than being assuaged by the language and attitude displayed by the judge in these respects;

d. The Ryans indicate that they considered the judge was clearly teeing their legal team up for a wasted cost order. The judge rejected that suggestion when it was put to him on the 15 July 2022. In my judgment the FMIO would not look at the matter at that level of detail or be unduly concerned or sensitive as to whether or not this was teeing up the lawyers for a wasted cost order – the FMIO would simply get the overall impression of hostility to the Ryans from this hearing, and its outcome, namely an inaccurate court order drawn up in terms which were unfavourable to the Ryans.

125. As regards the third limb of this aspect of the grounds, and the judge's comments and attitude at the 15 July 2022 hearing, in my judgment a FMIO would be less sensitive to the points identified in this respect than the Ryans. The FMIO would not view it in the same way as they urged on me, but nor do I consider the judge's conduct of the hearing would have assuaged the FMIO's concerns. In particular:

a. I do not consider the judge's indication at the outset of the hearing that the parties should "do the recusal first, and then we can come back to

the order later" would be viewed as a prejudgment on the recusal issue. The reference to coming back to the order later does not indicate to the FMIO that the judge's mind was already made up on the recusal issue, as the later order might simply mean that the judge should recuse himself and the order would indicate a fresh hearing was required before a different judge. The FMIO would recognise this as sensible case management;

b. Moreover, a FMIO would have regard to the fact that the judge's ultimate decision to withdraw from concluding the recusal issue himself shows he had not identified a predetermined course which he stuck to, albeit the FMIO might also conclude this could also be a recognition by the judge of his inability to determine the point objectively given that overall judicial conduct was being put in issue and so the issue of a "self-review" threat in relation to his past conduct in the case had become greater;

c. The judge's suggestion that the parties might now after all treat the hearing on the 15 July as a final hearing of the recusal application would not be viewed as an indicator of apparent bias by the FMIO. Nor that he pressed the Ryan's counsel for a yes or no answer on the issue, or apparently displayed some irritability, or inconsistency with what had been agreed at the hearing on 8 July. I consider a FMIO would view that as all part of the potential friction one gets in litigation, and a judge seeking to case manage the matter efficiently having got a better understanding of the points by the time of the 15 July;

d. Similarly, the judge's reference to each hearing potentially costing the Ryans a few hundred thousand pounds was not one sided, but also a reference to costs being incurred on HSBC's side too. I do not consider a FMIO would view it as falling into an "in terrorem" category, and being used to try to pressure the Ryans or their counsel to back down;

e. The fact that the judge raised the question of whether or not an appeal might be a more sensible route for the Ryans to follow, which might include allegations of apparent bias, would not in my judgment have caused any greater concern to the FMIO;

f. The judge's warning to counsel that he should not be "cross-examined" and the conduct of counsel in this respect was potentially "abusive" in this respect might be said to raise more concerns. This demonstrates the sensitivity of the issue involved, as does the judge's labelling of the approach taken by the Ryans in seeking to extend the factual enquiry as "disingenuous" (second judgment, at [51]). A FMIO would understand there might be legitimate reasons for that sensitivity, but would also get the overall impression that the area was an uncomfortable one for the judge, and would be concerned that any understandable desire for privacy was not trumping a detached enquiry which would provide for all the relevant facts to be on the table. This would leave the FMIO with an overall impression that full disclosure of potentially material facts

would be difficult. This is the same, or reinforcing the same point of concern, as has been considered under the first main ground above.

126. This final point also leads me to conclude that at the end of the stage 1 enquiry (the fourth limb) the FMIO would conclude there was a real possibility of bias. This does not mean the judge had any obligation to make any further disclosure, but does support the conclusion that the judge should have recused himself.

127. When reading the transcripts I wondered whether part of the problem in this case was a communication breakdown between Mr Davies and the judge at the hearings. A FMIO might put any apparent disfavour to the Ryans down to that, and the judge simply viewing the Ryans' case with incredulity. It might be thought that this was part of the cause for the approach taken by the judge, rather than any bias against the Ryans. However, my role is not to ascertain the precise cause for any particular process or route taken by the judge, but instead whether or not a FMIO would be left with an overall impression of disfavour to the Ryans due to matters not obviously connected to an objective assessment of the facts and application of the law to those facts.

128. Overall, having reviewed the first and second main grounds together the FMIO would perceive that there was a real possibility of bias by the judge against the Ryans and in favour of HSBC. The FMIO would remain open minded, however, as to whether or not that perception of real possibility was reinforced or assuaged by the approach taken by the judge at the substantive hearing on 21 and 22 June, and how this was reflected in his judgment. I also have in mind that whilst the Ryans presented their recusal case in a way which invited consideration of the first and second main grounds first, the hearing process and judgment happened before they became aware of the business association issue or raised it. It is wrong to exclude from the FMIO's overall perception what happened at this earlier stage, and the result should be the same if the process of consideration of the grounds were to be considered in a different order.

(3) the unfair process ground

Submissions

129. The Ryans submit there are manifestations, or indicators, of alleged failure by the judge to discharge his judicial functions in accordance with a fair process during the hearing on 21 and 22 June 2022, and as reflected in the judgment and the judgment handing down process on 24 June 2022. They submit these indicators are also such that the FMIO would conclude there was a real possibility of bias.

130. The Ryans submitted that there were a number of indicators of a departure by the judge from "judicial method" such as to indicate apparent bias against the Ryans and in favour of HSBC. The Ryans drew my attention in this respect to what is said in the Australian Law Reform Commission report on Judicial Impartiality and the Law on Bias (ALRC Report 138, December 2021), in particular at paragraphs 2.39-2.47 (see in particular at 2.41) and 2.60, 2.71 and 11.77. This report considers public confidence in the judiciary and how questions of apparent bias can be informed by the judicial method or process followed by a judge. This discussion as to judicial method is effectively the same as the discussion of the judicial function or fair process which a judge must follow in the case law of England and Wales, and the requirement for exclusion of influence of extraneous matters and for the public to see that is so. It should also be recognised, however, that this report does not suggest an absolute standard in relation to impartiality. Judges are human beings. Instead what is required is sufficient impartiality, demonstrable in the way the judge goes about their functions (see at 2.61 of the ALRC Report 138, above), so as to maintain public confidence. In my judgment the same approach should be followed here, and is reflected in the case law principles I have already considered above. What is required is that which is sufficient to maintain public confidence, judged by reference to the FMIO standard. Relevant indicators are whether the judge followed accepted standard norms for fair process in relation to the way he proceeded with the hearing and in the manner in which he disposed of the issues in his judgment, irrespective of whether or not he came to the "right" conclusion on the disposal of the permission application.

131. The Ryans identified what they submitted were a number of departures from standard judicial method, and which were indicators of apparent bias, namely (and I list here the main ones emphasised in oral submissions): (a) he wrongly concluded the Ryans had not sought to adduce admissible evidence on certain key facts, and wrongly downgraded how he viewed their evidence due to the way in which they had sought to adduce it; (b) wrongly sought to reject their evidence/case as incredible when he had no proper basis to do so on paper; (c) wrongly focussed on the pleading; (d) treated the case as a mini-trial rather than as part of an early stage statutory filter; (e) failed to recognise the unusual features of the derivative action; (f) a number of departures from judicial method said to be apparent in the judgment itself; and (g) his conduct in handing down the judgment, without proper notice to the parties and to an empty court, were also an indication of bias.

132. HSBC submitted that there were no, or no serious, departures from fair process in this case such as to give rise to an indication of apparent bias, and that the points raised by the Ryans could and should be pursued as appeal points, rather than part of this application. They further submitted that: (a) the judge was entitled to make the observations he did about their evidence, but the observations were not an indication of bias against them; (b) the judge was entitled to reject their evidence/case as incredible, but in any event this was not

an indication of bias against them; (c) the judge was entitled to focus on the pleadings, and did not do so unfairly; (d) the judge approached the filter test on a derivative claim in the right way, but in any event his approach did not indicate bias; (e) the judge did not fail to recognise the relevant features, but any points do not indicate bias; (f) there is nothing in the judgment to support an allegation of apparent bias, and the points can be pursued as grounds of appeal; and (g) there is nothing about his conduct in handing down the judgment to indicate bias and both parties were treated in the same way in relation to notification of hand down.

Conclusions

133. I shall consider the Ryans' unfair process ground under sub-headings which summarise some of the main points raised by them.

(a) Inadmissible evidence/approach to evidence

134. The first point raised by the Ryans is that the judge treated what was said in Dennis 1 as effectively inadmissible hearsay evidence. He viewed it as dealing with matters, particularly in relation to what was represented to the Ryans, which should have been addressed in their own words, in their own evidence, and treated that failure as a significant factor going against them. In my judgment the FMIO would not view what the judge said in his judgment on this point alone, in particular at [73], as being so outside judicial norms and methods as to give rise to an indication of bias, but instead might view the genesis of this point, and how it sits alongside other approaches to the evidence, as indicating a disfavour to the Ryans and favour to HSBC. In particular:

a. The part of the judgment under consideration in this respect is not the derivative claim but instead the personal claim and in particular the misrepresentation element of it: see at [74] of the judgment;
b. The point the judge found striking was that the plea as to misrepresentations set out in PoC [19] did not form part of the witness statement evidence. Given the current judicial emphasis, and encouragement, for matters to be put in a witnesses own words, I do not consider the judge's observations in this respect are entirely misplaced, though it should be noted that the PoC was not only verified by Mr Dennis, but also that the PoC was referred to as being approved by Mr Ryan in his responsive evidence too. I do not read the judgment as obviously indicating that the evidence adduced via Dennis 1 was being viewed as inadmissible, but simply that the judge's perception of its overall quality was affected. I do not think that a FMIO would be concerned about that observation by the judge, at least on its own;
c. A FMIO would note, however, the more general point that this was not a point which HSBC raised in argument. In fact HSBC had adopted a very similar approach to the filter application, with a large part of their evidence and case being presented via their solicitor, Mr Flack. Both

sides seem to have approached the permission application hearing on a similar basis. The judge picked up this point and ran with it himself. He seems to have thought adopting a different approach to the Ryans might be justified because they were the claimant, but an FMIO would be concerned if a judge was picking up on points of his own against one side. The Ryans did raise in their evidence points as regards what was said to them orally, and in meetings, which does not appear to have been expressly addressed in the judgment, and HSBC did not adduce evidence from the individual persons involved on their side (save to some degree, and somewhat late, a statement from Mr Howman). This is not addressed by the judge and would trouble a FMIO;

d. A FMIO would probably not view this item on its own as indicating sufficient material apparent bias, but it would be viewed as part of the overall picture. Was this an isolated instance of the judge taking up points against the Ryans, and not HSBC, or does it form part of a pattern which might give rise to the conclusion in the FMIO's mind of a real possibility of bias?

e. A FMIO might also note in passing that at [74] the judge is viewing the personal claim as intertwined with the substance of the derivative claim. That is legally questionable: it is perfectly possible for a shadow director to act for an improper purpose (the derivative claim) without positively representing they are going to do something different (the personal claim). But the FMIO would be more inclined to look and consider the more general question of whether the judge has adopted a consistent approach on the "intertwined" nature of the claims, when it came to assessing whether or not a hypothetical director would consider it in the best interests of MCPLC for the derivative claim to be able to proceed.

(b) Rejection of evidence/case on paper as incredible

135. The essential complaint by the Ryans is that the judge used conclusory language in the judgment to describe their case/evidence which was not balanced or warranted, such as: "*simply incredible and incoherent*" [53], "*simply disconnected from reality and unreal*" [57], "*simply unreal*" [61 and 69], "*a very big and incredible ask which I am not prepared to take*" [81], "*this is quite simply incredible*"[87]; "*ungrounded in reality and unfounded in evidence*" [89] and unfairly described the Ryans as seeking to "*blacken*" the name of HSBC [80].

136. The Ryans submit that it is settled practice that the court should not disbelieve the evidence/case of a party on paper, and without cross-examination, unless their evidence is manifestly incredible and they have drawn my attention to the recent decision of *Kireeva v Bedzhamov* [2022] EWCA Civ 35 at [34]-[41] on this point. They say the judge's approach was inconsistent with that norm and unjustified.

137. I conclude that the FMIO would view this as more of a headline point and would instead be interested in understanding the text - why it was the judge made the findings he did, and look at the judicial process he followed in order to arrive at them. Did it involve a consideration of the Ryans' evidence and case and an explanation as to why this was being rejected as incredible? Does that underlying process show an apparent systematic propensity or inclination to reject their evidence or case which is not obviously referrable to an objective consideration of the evidence before him? It must be remembered that the enquiry of the FMIO is not to ascertain whether or not the judge was right or wrong to reject the evidence. Instead the task is to consider the process undertaken by the judge and whether or not it would indicate apparent bias to the FMIO who would take an overall impression away with them. I consider the FMIO would assess this overall when considering the judgment points considered further below.

(c) Focus on the pleading

138. The Ryans' complaint in this respect is that the judge sought to unfairly "hem them in" on the pleading at what was an early filter stage of the case. They complained that to do so for the first time in the judgment would be unfair. They submitted that a FMIO would conclude that at an early interim hearing (and especially a filter application) the pleadings are nascent and final decisions limiting the case by reference to the pleadings will not be made if any deficiency can be cured by amendment. Although this was a filter application, they submit the judge wrongly made conclusory findings on the pleadings. This was wrong in principle, they say, and they submit it was also factually incorrect: a. The judge found at [84] of the judgment that there was no pleading that the Ryans were directed or instructed by HSBC to appoint Mr Everett as a director of MCPLC. They submit this was in pleaded in paragraphs 31-32 of the PoC. b. The judge found at [90] of the judgment that there was no pleading to the effect that in substance or reality HSBC instructed or directed the claimants or any other directors of MCPLC to act in the way they did. They submitted, in fact, such matters were pleaded at paragraphs 30-33, 35, 47 and 51-52 of the PoC.

139. So far as the second point is concerned in my judgment there is some force in the contention that there was a sufficient plea of direction and control and a FMIO might reasonably view the judge's approach as looking to identify flaws in the pleading.

140. Secondly, however, if, there is an element of potential ambiguity as to whether or not the plea is sufficient, and a wider case is being relied on, then the FMIO would look to consider to what extent that wider case was addressed. It is significant that there is no apparent mention of Mr Ryan's responsive evidence in this respect in the judgment when evaluating this point. Mr Ryan's responsive evidence does explain certain respects in which it is said the majority of the board was acting in accordance with the directions and instructions of

HSBC. It also relies more widely on disclosure from HSBC provided as part of Mr Flack's evidence, including in particular in relation to the credit memorandums (CMs) which the Ryans contended supported their case as to the LMU Purpose. The Ryans evidence does explain why they went along with what HSBC required of them in the early to mid part of 2015, and also explains why by the latter part of 2015 the position became somewhat different. These points do not seem to gain any recognition or to have been addressed.

141. Thirdly, this is linked with the judge's observations at [27] of his judgment where the judge rejected Mr Davies' complaints of "pot shots" against his pleading, stating: "*I am unable to accept that as a proper approach to considering the strength of the underlying claim. In my view, where a case has been pleaded, whether or not that is normal at this juncture of this type of application, it is only right and proper for the court to consider the pleaded case as an important aspect of what the notional director would do when considering the strength of the claim. After all, if a claim is not adequately pleaded, and there is no suggestion that it could be improved or amended, on what possible basis could the court or the notional director possibly consider what might or might not be pleaded? Thus the inadequacy of the pleading is something which should be taken into account as to the strength or even existence of any proper claim against HSBC*".

142. On its face this statement does not indicate a departure from fair judicial process. It suggests the judge is analysing the pleading and directing himself properly at what the hypothetical director would think at the time, which is that it is an important aspect of what the director would consider. The difficulty with it lies in the suggestion that there was no suggestion that the pleading could not be improved or amended. The Ryans were pointing to evidence and matters which did indicate that potential improvements or amendments could be made to their case, including arising from evidence disclosed by HSBC on the LMU Purpose after they had pleaded their case, and to support what they were saying on shadow directorship. An FMIO would recognise that the judge was entitled to conclude that a hypothetical director would consider the case as pleaded as an important aspect when considering the strength of the claim, but would also consider that the judge should also have been mindful of the wider evidential picture and ways in which the pleaded case might be improved as time went on. That is particularly so when Mr Davies expressly submitted to the judge that he was positively asserting further material had been disclosed which could be pleaded so as to improve the Ryans' case.

143. In my judgment the judge's approach to this point would not be sufficient on its own to result in a FMIO concluding there was a real possibility of bias, but it forms another indicator of a matter which swung against the Ryans, as a matter of process, which does not appear to have resulted in their position being accurately considered.

(d) Treating the case as a mini-trial

144. The filter test required under CA 06 does not expressly refer to an assessment of the merits of the claim. But this is brought in, indirectly, by reference to s. 172 CA 06, and the need to assess, via the mind of the hypothetical director, what is in the best interests of the company in question. Whilst there must be no 'mini trial' the test does require the court to form a provisional view on the strength of the claim in order properly to consider the requirements of s.263(2)(a) and 263(3)(b) CA 06.

145. The judge cannot be criticised for attempting to form a provisional view of the strength of the claim. The enquiry for apparent bias purposes is whether in arriving at that assessment he adopted an unfair process to the Ryans which means that the end of result is not a product of a fair process, and that this is manifestation of apparent bias. Again, in my view, this cannot be assessed independently of the points in the judgment, which I will consider further below.

(e) Failure to recognise the unusual features of the case

146. In my judgment the judge did recognise that the permission application before him was somewhat unusual. He noted at [11] that given it was insolvent and had no prospect of resuming trading many of the factors which might otherwise be relevant for consideration on a permission application, as reflected in s. 172 CA 06, "fall by the wayside". Again, in my judgment this headline point cannot be divorced from considering the specific points raised as regards alleged departure from accepted judicial methods in the judgment and the specific grounds relied on in that respect. I now turn to those points.

(f) Departures from accepted judicial methods in the judgment

147. The Ryans deployed a number of criticisms under this sub-heading. I shall address each in turn.

(i) wrongly inferring a concession

148. The central complaint in this respect is the finding of the judge at [24] that the Ryans submissions, in seeking to treat the merits as of no or little concern to the hypothetical director given the unusual facts of this case, "*tacitly or implicitly acknowledged the weakness or lack of merit or strength"* of the derivative claim. I was initially attracted to this submission because it seemed to be linked with the point that, at [23], the judge had wrongly suggested that Mr Davies had submitted that the notional or hypothetical director would "*not in this case be concerned with the underlying merits of the claim itself*". This is not an accurate statement of his submissions, and Ms Lucas did not seek to submit it was. She did submit however that it had to be read in context, including the point made at [24], which showed a more nuanced approach, namely that

here the judge was (correctly) summarising the Ryans' case that the court should not focus too much on the merits by reason of the unusual features of the case. I accept Ms Lucas' submissions on this, and if the word "overly" were inserted before "concerned" the two would read harmoniously together. The FMIO would look at these paragraphs together and recognise the judgment was handed down orally.

149. In addition a FMIO would not place great weight on the judge's imputation of an implicit concession as to the weakness of the case, though I can also understand how a litigant and their counsel might be annoyed by it. If the matter had stopped there I do not think the FMIO would have considered it a strong indicator of apparent bias and would have been more concerned to look to see whether or not the assessment of merits itself was conducted in a fair manner.

150. There are three further linked points to this, however. The first is that this was another point taken by the judge, not by HSBC. Secondly, the judge recorded at [24] that the Ryans' submission was to the effect that: "*The notional director would take into account what he knows and therefore the merits are very low down the totem pole of consideration*". It would appear that Mr Davies immediately regretted the "totem pole" submission as soon as he said it. That is because the judge appears to have viewed it as an invitation to conclude a director would not consider the merits at all, and to act improperly, and Mr Davies confirmed that was not his submission. The judge, without justification or explanation, then said that he was writing down the totem pole reference, which had been retracted by Mr Davis. And he subsequently put the totem pole reference in his judgment. In the circumstances this is another point which a FMIO would consider indicates disfavour to the Ryans: the judge appears to have latched on to a point dis-favourable to the Ryans in a manner which a FMIO would consider unfair. In addition, as a third point, I conclude that the FMIO would consider this alongside the judge's apparent willingness/inclination to conclude that the claim was not being pursued in good faith (which is a point I will return to below).

151. The Ryans submissions to the judge were, overall, that the unusual features of the case meant that the hypothetical director would think even a weak claim with substantial potential upsides should be continued if it was being funded by a third party and involved no downside to the company. That is not out of kilter with authority or a logical approach to how a hypothetical director might view the matter. It is also, however, linked to the question of funding and costs, and whether there might be a potential significant downside to MCPLC, which are also considered further below.

(ii) excluding consideration of the Ryans' evidence

152. The principal complaint made by the Ryans in this respect is that in analysing their case as regards the LMU Purpose the judge did not refer to a

central feature of their evidence, which was their long and close personal relationships with senior management and the trust and confidence they reposed in them. By disregarding this evidence the complaint is that the case was made to unfairly and incorrectly look speculative and/or incredible and/or unintelligible. The FMIO would, it is submitted, link this to the judge's observation that the Ryans were wrongly seeking to "blacken" the name of HSBC. They complain that this led the judge to conclude at [63]-[65] and [75] that there was no or no sufficient evidence of a differentiation or split between senior management and the lower level RMs.

153. I conclude a FMIO would be concerned about this aspect of the case. The Ryans had gone into some detail in their evidence as regards the unusually close relationship they had with senior management within HSBC, including Mr Quinn. They referred to the fact that Mr Quinn's daughter worked for MCPLC and was involved in making contact with Mr Quinn to assist in the provision of the additional finance provided by HSBC in 2015, which then led to the personal loan (after lower level RMs had become involved).

154. The FMIO's concern as regards fair dealing and process would also extend to the fact that the Ryans were relying on passages in the CMs of HSBC in June and July 2015 to support their case that HSBC wrongly pursued the LMU Purpose, and concluded that it had no option but to seek to keep MCPLC out of administration and, the Ryans would submit, effectively under its control. The judge does not refer to that evidence, or the passages drawn to his attention in that respect, when assessing the credibility of the allegations.

155. In addition, when addressing the LMU Purpose allegation the judge placed heavy reliance on the MCPLC's publicly reported accounts for the financial year ending 30 June 2015 to 30 June 2018 as being entirely consistent with the notion that HSBC had good faith intentions to assist MCPLC with a turnaround which would be of benefit to both creditors and shareholders. These accounts showed "some measure of success" as interpreted by the judge [51]. He noted at [53] that these facts, amongst others, was "unchallenged and unchallengeable". That is not correct: the Ryans evidence were to the effect that those left behind them were ill equipped to deal with the affairs of MCPLC, and their counsel made submissions that they did not accept that the accounts could be taken as either accurate, or an accurate reflection of either a "measure of success", or a good faith intention to support a turnaround for the benefit of all.

156. A FMIO would be concerned that what had been challenged had become described as unchallenged in the judgment. And in a manner unfavourable to the Ryans.

(iii) misdescribing the Ryans' case

157. The Ryans complain that the judge set up and knocked down a straw man when describing their case. In particular they cite what the judge said at [63] and [75] in this respect. At [63] the judge, having referred to the Ryans' case as regards a split between senior management and the RMs, described the Ryans' case in the following terms:

"The former allegedly having given assurances or representations to the claimants that they would continue to support HSBC (which are at the heart of the personal claim), which were not only reneged upon by HSBC, but were part of ***a conscious preconceived plan of the regional management formed back in December 2014 to effectively deceive or hoodwink the claimants into taking personal loans in order to take security over their shares to gain control of MCPLC,*** *in respect of which the claimants are said to have naively relied upon what senior management had told them, certainly one or both of those senior managers having been good friends of theirs, all the while not realising that HSBC was in fact working to pull the rug from underneath them by ultimately ousting them."*

158. This "preconceived plan" was referred to again by the judge at [75] (where he refers to one of the CMs from February 2015 on this point, the only point I have been able to identify in the judgment where there is express reference to one of them on a point relied on by the Ryans).

159. The Ryans complain that this was not their case, and a serious and unfair misdescription of it. They submitted that their case, so far as the personal loan was concerned, was not reaching back to December 2014, but instead was clearly only from February 2015. The description of inaccuracy is apt as the judge conflated two different parts of their case: the LMU Purpose case, which was linked to the introduction of the LMU on the scene, and which the Ryans stated occurred on a date unknown to them but which may have been as early as December 2014, and their case in relation to the personal loan, which clearly was not pleaded as commencing until February 2015 (even if it formed part of or was a function of the LMU Purpose). This formed part of a section of the judgment which led to the judge referring to the "unreality" of the case being advanced (see at [65]).

160. This overlaps or connects with the points considered above as regards a recognition of the points the Ryans sought to draw from the CMs in June and July 2015, to which I have already referred.

161. It also overlaps or connects with the judge's other observations about the lack of reality, as he perceived it, of the Ryans' case. A judge may properly view a case as lacking reality, looking at all the evidence, and the judge recognised that even if something appears unreal it might still be true. The Ryans' complaint here is however that the description of their case was not accurate. At [65] the judge stated that *"The mere fact that something appears to be unreal*

and wholly uncommercial does not of course mean that it might not be true. But at this stage, the court has got to look at matters in the real world and based on the evidence and material before the court. I have already referred to the simple factual position that HSBC continued and increased its funding over the four plus years and enabled all unsecured creditors, bar £150,000, to be repaid, being owed a total of £30 million themselves, which, of course, if what the claimants said is right, would indicate that they were utterly incompetent at carrying out their LMU purpose." A similar point is made by the judge at [80]. This is again a misdescription of the Ryans' case as presented to the judge: the presence of the pleaded LMU Purpose is not inconsistent with the notion that HSBC continued to provide funding and ensured that, largely, other creditors were paid. The internal CMs relied on by the Ryans showed that by June-July 2015 HSBC might have perceived it had to continue to support MCPLC for fear that an insolvent administration would make things worse for it. And the Ryans, and Mrs Ryan in particular, did refer to concerns that those who were left were not competent.

162. Looking at these points overall, therefore, the FMIO would be left with the general impression that the judge had misdescribed a number of aspects of the Ryans case in a manner which was unfavourable to them, and had omitted to refer to parts of their evidence which they contended placed those allegations in a different context. My function on this application is not to decide whether they are right or wrong in relation to the allegations, or whether the judge was right or wrong in his conclusions. The significance of this lies in the fact that the FMIO would view this as another procedural matter which did not indicate a fair treatment of the Ryans' case by the judge, and there was a real possibility it was a manifestation of bias.

(iv) treating the PoC as final and conclusive & (v) finding inconsistencies where none existed

163. This sub-heading is largely repetitive of the focus on pleadings points and misdescription points which I have already considered above. As I have indicated above they are indicators, taken with the other points above, of a process which was not favourable to the Ryans.

(vi) using rhetorical advocacy to disparage the Ryans' case

164. The Ryans complain that much of the judgment is occupied with language which is indicative of a closed mind. They submit that the judge had a predisposition to conclude that the fact that HSBC had decided to advance further funds was inconsistent with the LMU Purpose, and rather than dealing with the underlying evidence the judge used rhetorical advocacy to disparage their case. They refer to passages in the judgment at [49], [53], [59], [61]-[62] (amongst others). It is certainly the case that the judge viewed their case with

disdain. This overspilled at times into sarcastic observations during and about submissions.

165. In my judgment this is one of the areas where a FMIO would be less sensitive than the litigant. Instead the FMIO would be more concerned about the treatment of the evidence and the process reached to achieve it. It is of some significance in this respect that whilst only potentially relevant as similar fact evidence, Dennis 4 did explain why the conduct which the Ryans were complaining of exhibited features which have featured in other cases of complaint in relation to banks' business support units (the LMU being HSBC's support unit). The complete absence of a recognition of this evidence, alongside the other factors indicated above, would be noted by the FMIO as part of their overall impression. By this point that impression would have been of a perception of a real possibility of bias generated by an apparent systematic predisposition against the Ryans which was not arrived at by a careful weighing of the evidence for and against.

(vii) reliance on absence of contemporaneous complaints

166. The particular point of concern raised by the Ryans in this respect relate to the observations of the judge at [78] where he stated, after referring to a letter to them dated 21 March 2015 which notified them of the transfer to LMU, further to the meeting on 9 February 2015, that (bold emphasis added by me):

"Read at face value, informally, the claimants were told on 9 February 2015, if not before, that the relationship management will be transferred to the loan management unit where there was a specialist manager who was focused on turnaround, turning around businesses of this nature. ***That the claimants well understood that position before the 23 February 2015 facility to them personally is reinforced by the fact that when the transfer to the loan management unit did take place, there is no contemporaneous complaint, comment or other observation from either of the claimants to state how horrified or shocked they were that such could happen,*** *particularly bearing in mind that they themselves had personally put their own necks on the line to the tune of £10 million."*

167. The Ryans evidence, however, was that when they were informed of the transfer into the LMU they did not understand the significance of it. Their pleaded case (at PoC paragraph 26) was to the same effect. As explained in Dennis 4 this is not an uncommon feature of cases which make complaints about the conduct of business support units. It is to display either a lack of understanding of the Ryans' case or a predisposition against it to record this point against the Ryans. Either way a FMIO's overall impression would be that this was another indicator of apparent bias against the Ryans.

(viii) rejecting evidence without cross-examination

168. I have already substantially addressed this point above. In my judgment the FMIO would have been more concerned that the judge did not appear to have undertaken a balanced assessment of the evidence overall. However it does seem to me a valid complaint that at [85]-[88] the judge appears to be indicating a readiness to reject as incredible and fanciful the evidence of the Ryans in circumstances which can rarely be done by a first instance tribunal, without cross-examination. I consider an FMIO would view this as part of the impression gained as to the assessment of evidence, and the case, overall, rather than on its own.

(ix) concluding the derivative claim was unfunded

169. This complaint concerns the passages at [34]-[38] and [102] of the judgment. The judge found that there had been a material non-disclosure by Mr Dennis, the Ryans' solicitor. This was due to the failure by Mr Dennis to refer in Dennis 1 to the fact that the statements he had made about the Ryans having sufficient personal funds to pay not only their own legal fees, but also any adverse costs order, did not take into account the fact that there was a personal loan claim against them of potentially as much as £10m. The significance of this, in the judge's eyes, was that if this was taken into account then it would cast doubt on the ability of the Ryans to meet an adverse cost order if they lost. The judge suggested that the identification of this material non-disclosure drove Mr Davies to make the "bold submission" that the financial inability of MCPLC to fund the litigation and any adverse cost order was irrelevant (see at [38]). The judge concluded this was wrong by reference to the decision in *Iesini* and also a cased called *Hughes v Burley* (see at [97]-[99]).

170. This is an incomplete recitation of what Mr Davies had submitted. His first and primary submission had been that because the claim was being brought in the names of the Ryans, and they were not seeking an indemnity for costs from MCPLC, they would be liable for any adverse cost order not MCPLC. This submission does not seem to be analysed and rejected by the judge in his judgment. *Iesni* was not a case which involved consideration of what the position is where, unusually, the shareholder is not seeking the usual indemnity order. In *Hughes v Burley* the judge considered it a relevant factor to consider whether the shareholder could fund the litigation to a conclusion and meet any adverse cost order which might be made against the company, and the absence of such evidence was a factor which was against the claim proceeding. *Hughes v Burley* cited (at [48(e)]) an earlier decision called *Cullen Investments Ltd v Brown* [2016] 1 BCLC 491 at [55], as authority for the proposition that where the person seeking permission to pursue the derivative claim proposes to fund the action and does not seek an indemnity that is a relevant factor since it means the litigation will not diminish the funds of the company available for distribution to creditors.

171. The purpose of this discussion is not to conclude whether the judge was right or wrong in the exercise he performed in this respect but to ascertain the treatment of the issue as a matter of procedural fairness and whether that is indicative of apparent bias. Three things would strike the FMIO in this respect. The first is that the point that Dennis 1 contained a material non-disclosure on the issue of funding was not advanced by HSBC. Ms Lucas made clear to me in submissions that HSBC had not advanced the point against Mr Dennis or the Ryans on the permission application (though understandably they sought then to rely on the judge's observations about it when costs submissions were being made after judgment was handed down). It was another point raised by the judge and a point against the Ryans. I do not discount the fact that it is open for a judge to take points which are identified by him, particularly where the judge considers there may have been a failure of a duty to the court, but it is a factor, when one bears in mind the other points taken by the judge against them which had not been raised by HSBC. Secondly, it seems to me that as a matter of procedural fairness the judge needed to address first the submission that the question of the ability by MCPLC to pay costs was irrelevant. He did not do so, or not by reference to authority which decided that issue. Thirdly, given that Dennis 1 at [96] offered to provide a confidential statement to the court as regards the Ryans' financial position, then it is not obvious why the judge thought this was a point which should be latched on to. The Ryans' solicitor was offering to provide a complete picture to the court but, in the context of hostile litigation with HSBC, was understandably cautious about baring all with HSBC on this point. This approach may be viewed as being somewhat unconventional to mainstream civil litigation, but applications by trustees in other contexts (such as on a *Beddoes* application) do sometimes involve a procedure where the counter-party to the hostile litigation is excluded from part of the evidential consideration. In my judgment this may have been linked to confusion about HSBC being a creditor whose interests the director must have regard to due to the insolvent state of MCPLC. Properly understood that can only be as a creditor, not as a defendant.

172. The FMIO at this stage would remind themselves of what the judge observed at [74] – that he appears to have viewed the personal claims and shareholder claims as intertwined. The FMIO might question, if that is so, why the judge was not inclined to treat that as a point in favour of the Ryans when it came to the question of costs. If the points are largely going to be litigated anyway, as part of the personal claim by the Ryans, and they were offering to fund, this was a factor in their favour. This point gains no recognition in the judgment.

173. In any event, the FMIO would again probably be more concerned about the overall impression from all of this: a judge who approached the permission application with an open mind might have viewed the offer to disclose further information as a matter which could be dealt with by way of conditions to any permission decision, rather than as a matter to beat down the application. The

FMIO would view this as another indicator of a real possibility of bias, even if subconscious only, on the part of the judge against the Ryans and in favour of HSBC.

(x) finding of bad faith

174. The Ryans complaint in this respect is focussed on the findings in the judgment at [86], [89], [108] and [109] where the judge concluded that:

"*Not only has there been a material non-disclosure as to their financial situation by their solicitor, Mr Dennis, but also their personal claim is so intertwined with and overlaying the alleged derivative claim, broadly unsupported by any proper evidence, that it is quite difficult to avoid the conclusion that the claimants now being sued as they are for the £10 million are not pursuing this claim against HSBC for some ulterior purpose and not properly for the benefits and interest of the company in circumstances where they have at least in part at various stages actively engaged in the appointment of now alleged miscreant individuals, specifically, Mr Everett and actively participated in and approved of other now complained of acts and actions*."

175. They submitted that the judge knew that HSBC had not intimated or brought its claim for recovery of the personal loan until after the Ryans had issued their combined personal and derivative claim. The judge was wrong to state the claim was unsupported by "any proper evidence" and in this respect many of the points considered above were repeated. Ms Lucas' submissions on this point were more moderate: HSBC submitted they were concerned as to whether not the claim was being brought in good faith having regard to the question of the personal loan. Bearing in mind an allegation that a claim is being brought for an improper collateral purpose requires it to be shown that the improper collateral purpose was the predominant purpose, this is a surprising finding, especially in a judgment which has been handed down without the benefit of cross-examination. It would be a difficult conclusion to arrive at before trial in a case of this nature, particularly having regard to the timing points known to the parties and the judge. A FMIO would be concerned, particularly as what started off as a relatively modest concern was turned into something much larger in the judge's hands.

176. The judge added to this allegation of improper purpose another allegation of bad faith, relating to what he perceived to be a case based on the Ryans participating in the precise actions they were complaining of (by acting in accordance with the instructions given to them). This point cannot be sustained against the Ryans if their evidence is accepted. In addition this point cannot be sustained against them if it is found, against them, that they did know what was going on. The judge's own allegation therefore does not add anything, other than to give the impression the judge is displaying a consistent pattern of identifying, of his own motion, points which are against the Ryans. This latter

allegation of bad faith was not identified or pursued by HSBC in their opposition to the permission application. A FMIO's concern would be exacerbated.

(xi) other points

177. I simply record here that Mr Davies made other points which he indicated showed the judge apparently seeking to strain in favour of HSBC. I am not satisfied they add greatly to what I have already considered above, and so do not consider them further here.

(g) Conduct in handing down of judgment

178. The final point Mr Davies relied on was concerned with the judge's conduct in the handing down of the judgment. In particular he emphasised the fact that no proper notice was given for the oral hand down. The judge delivered his judgment to an empty court and the Ryans only managed to attend the latter part of it (because of their proximity to the court and upon hearing it was being handed down after the hand down process had commenced).

179. I do not consider the FMIO would view this as an indicator of bias. It is not uncommon for judges to hand down in the absence of the parties and any lack of notification in this respect was equal to both sides. There was, it would appear, an unfortunate miscommunication which led to the judge thinking the parties had been notified of the hand down time, when in fact they had been told of a later time. But it is a leap too far to suggest that an FMIO would view this as an indicator of apparent bias, after all both parties got the same treatment, and I reject that submission.

Overall conclusion

180. Standing back, on the third main ground, I find that the FMIO would consider there a number of indicators in the hearing process, and as reflected in the judgment, which did not indicate a process which was fair to the Ryans and from which a real possibility of bias was manifest.

Conclusion

181. I conclude that a fair-minded informed observer – the FMIO - having considered all the facts, would conclude that there was a real possibility that the tribunal was biased. I do so on the basis that (and by reference to the three main cases/grounds identified):

a. Ground/case 1 - the business association ground: The FMIO would begin to have some doubts as to whether or not the business association in this case between the judge, via HYB, and HSBC, having regard to the insolvent financial position of HYB, and its close connection with

the judge, and perceived importance to him and his family, was an association which could result in a real possibility of bias, having regard also to the potential for some subject matter, and issue overlap, with the facts of the present case. It would have left the FMIO interested to know to what extent the judge gave any conscious consideration to the issue before he heard the case and gave his judgment. The FMIO would be alert to any signs, either in the manner in which the judge dealt with the issue when it was raised before him, or in the way in which he dealt with the case more generally, which might give rise to such concerns being either assuaged or exacerbated;

b. Ground/case 2 – the stage 1 enquiry ground: The manner in which the judge dealt with the issue of apparent bias, after it had been raised, and the stage 1 enquiry, would not have assuaged those concerns, and instead would have exacerbated them. Overall, having reviewed the first and second main grounds together, the FMIO would perceive that there was a real possibility of bias by the judge against the Ryans, and in favour of HSBC. The FMIO would remain open minded, however, as to whether or not that perception of real possibility was reinforced or assuaged by the approach taken by the judge at the substantive hearing and how this was reflected in his judgment;

c. Ground/case 3 – the unfair process ground: There are a number of indicators that the judge did not discharge his judicial functions in accordance with a fair process during the hearing, and as reflected in the judgment, such that the FMIO would conclude there was a real possibility of bias. They are sufficiently widespread, and significant, that in my view the FMIO would have reached the conclusion of a real possibility of bias from them alone, and whether or not grounds 1 and 2 are made out.

182. In the circumstances I conclude that the judge should not continue to hear the permission application, or make any final order on it, and his judgment should be set aside. I shall consider what consequential orders should be made as a result of that conclusion after receiving further submissions from the parties.

Postscript

183. I reiterate that nothing I have said above should be construed as an indication of a finding of actual bias: the issue I have been asked to resolve and determine is one of perception not actuality. Secondly, nothing in this judgment should be taken as an invitation by those who receive a judgment they do not like to look to take points of apparent bias after the hand down, and before consideration of any appeal. The facts of this case are most unusual. In most usual cases any complaints about judicial process, as reflected in a judgment, are a matter for appeal. It is only because of the unusual circumstances in which the issue arose in this case, and the judge's decision that the recusal application should be determined by another judge before any order was made following

and consequential on the judgment, that I have been required to carry out the process I have.