Neutral Citation Number: [2020] EWHC 2957 (QB)

IN THE HIGH COURT OF JUSTICE **Claim No. QB-2003-000001**
(formerly: HQ03X03979)

QUEEN'S BENCH DIVISION

BEFORE MASTER YOXALL

As at: Royal Courts of Justice,
Strand, London, WC2A 2LL

Date: 12 November 2020

BETWEEN:

MICHAEL WILSON & PARTNERS LIMITED

Claimant/Judgment Creditor

-and-

[1] CJSC KAZSUBTON
[2] KAZPHOSPHATE LLP

Defendant/Judgment Debtor

-and-

SOLVAY SOLUTIONS UK LIMITED

Third Party

……

Joseph Dalby SC (instructed by Michael Wilson & Partners Ltd) for the Claimant

Giles Maynard-Connor (instructed by Addleshaw Goddard) for the Third Party

Hearing Date (by Skype): 18th August 2020

JUDGMENT

I direct that pursuant to CPR r.39.9 (1) this judgment will not be tape recorded or digitally recorded and that copies of this Judgment as handed down may be treated as authentic

Master Yoxall :

1. This is an application by the Claimant dated 27th April 2020 for an order that my order dated 26th March 2020 be set aside and that the Claimant's recusal application dated 2nd October 2019 be reinstated.

The 26th March 2020 order

2. My order of the 26th March 2020 is an unusual order made in unusual circumstances. By an application dated and issued on the 2nd October 2019, the Claimant sought an order that I recuse myself "from all and any further involvement in these proceedings, and with immediate effect, on the basis of apprehended bias". On the 22nd October 2019, the Claimant and Third Party having provided me with their and, presumably, their counsel's available dates, I listed the application for hearing on 13th January 2020 at 2.00pm and notified the parties of the listing by email. In the email I stated that the Claimant must provide me with a hard copy hearing bundle not less than 3 working days before the hearing and that skeleton arguments must be provided by the same time.

3. On the 13th January 2020 Mr. Wilson, a solicitor and director of the Claimant, attended the hearing. The Claimant's counsel was unable to attend. Mr. Craig Morrison, of counsel, attended on behalf of the Third Party. Mr. Wilson told me that he had assumed counsel would be available and had tried several other counsel who were not available. The Claimant had filed a hard copy of the hearing bundle that very day and the Claimant's hearing bundle was delivered to me (in the course of the hearing) at 2.45pm. I was able to print off from the court file Mr. Wilson's skeleton argument dated 13th January 2020. Mr. Wilson also produced a witness statement (his 13th) dated the 13th January 2020. Both the skeleton argument and the witness statement were in support of the application to adjourn *and* the recusal application.[1] Notwithstanding the available written submissions made in support of the recusal application and having previously appeared as an advocate in these proceedings, Mr. Wilson felt unable to proceed without counsel. In all the circumstances, I wished the recusal application to proceed but the hearing ended up being adjourned as there was insufficient time to hear the recusal application. I would add that one of the submissions made by Mr. Wilson in support of the application to adjourn was that the Claimant had no valid notice of the

[1] Mr. Wilson refers to "apparent and/or actual bias"; see 13th WS para 5.2, para 7+

hearing. I rejected that submission on the basis that I had given direct notice of the hearing to the parties on 22nd October 2019.[2]

4. At the conclusion of the hearing, I made an order directing that the parties provide me with their available dates for the hearing of the recusal application by 20th January 2020. I also directed that any supplemental skeleton argument (i.e., a skeleton argument by counsel) was to be provided to me not less than 3 working days before the hearing of the application. Costs were reserved.

5. On the 28th January 2020, having been provided with the parties' available dates, I listed the recusal application for hearing on 26th March 2020 at 2.00pm. As matters turned out, this hearing had to be held remotely given the outbreak of the Covid-19 pandemic. On behalf of the Claimant, Mr. Wilson applied for an order that the hearing be adjourned generally to a date when the hearing could be heard in person. The Claimant's counsel did not attend the hearing and I was not provided with a skeleton argument as directed. I refused the application to adjourn and dismissed the recusal application. However, I directed that the Claimant may apply, by application notice, to set aside or vary the order. I also directed that any such application was to be made by 4.00pm 27th April 2020 and was to be supported by a skeleton argument by counsel setting out the facts and matters relied upon in support of the contention that I should recuse myself. Two half day hearings having been wasted, my object was to oblige the Claimant to properly prepare its application.

6. I did say that the order was unusual and that it was made in unusual circumstances. I refer to my Notes to that order which, inter alia, set out the protracted correspondence passing between Mr. Wilson and me. For ease of reference, I attach a copy (unsealed) of my order dated 26th March 2020 as ***Annex 1***.[3]

7. The Claimant duly issued an application on 27th April 2020 and it was supported by a skeleton argument by Mr. Marc Beaumont of the same date.

8. In the circumstances, the present application is, in effect, the recusal application. I have not required submissions on the principles relating to the setting aside or variation of orders.

9. I should mention at this point that by email on 1st May 2020, I wrote to the parties in relation to the listing of the application with a time estimate of 1 day. I informed the parties that I was due to retire on the 2nd October 2020 and that if the hearing was to be

[2] I understand that the Claimant received the application notice endorsed with the hearing date on 2nd January 2020.
[3] The order was amended under the slip rule on 22nd April 2020.

listed in October onwards it would have to be before me as a Deputy Master.[4] On behalf of the Claimant, Mr. Dalby submitted that the question of my retirement should be a completely neutral factor on this application given that there remained a possibility that further cases or applications involving the Claimant might be assigned to me as a Deputy Master. I entirely agree with that submission. In any event, in my view, whatever the chances of cases or applications being assigned to me in the future are, the recusal application is more than academic. Although the Claimant only seeks an order that I be recused from "*further* involvement", if I was subject to bias in reaching a previous decision – the status of that decision could be called into question.

Recusal

10. The hearing of the Claimant's application proceeded on the 18th August 2020 by Skype (with video). Mr. Joseph Dalby SC appeared on behalf of the Claimant and Mr. Giles Maynard-Connor, of counsel, appeared on behalf of the Third Party.

11. I have a number of skeleton arguments before me:

[1] Mr. Beaumont's skeleton argument of 27th April 2020;

[2] Mr. Dalby's supplemental skeleton argument of 14th July 2020;

[3] Mr. Wilson's skeleton argument of 13th January 2020; (re adjournment and recusal);

[4] Mr. Morrison's skeleton argument of 23rd March 2020;

[5] Mr. Maynard-Connor's skeleton argument of 28th July 2020.

Both Mr. Dalby and Mr. Maynard-Connor adopted the skeleton arguments of their predecessor counsel.

12. I am grateful for the written and oral submissions of counsel. All the skeleton arguments must be read with this judgment.

13. I also have Mr. Wilson's 13th, 14th and 15th witness statements ["WS"] and exhibits.

14. I have been referred to a number of authorities on recusal. I do not propose to rehearse them in full.

[4] On the 18th May 2020, I directed the release of the Claimant's Third Party Debt order application against Kazphosphate Ltd to another Master. Solvay's "unless order" application and the Claimant's 2018 Third Party Debt order application against Solvay have to await the outcome of this application.

In *Porter v Magill [2001] UKHL 67; [2002] 2 A.C. 357, HL*, the House of Lords approved the test formulated in *Re Medicaments and related Classes of Goods (No.2) [2001] 1 W.L.R. 700, CA*:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead *a fair-minded and informed observer* to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased." (My emphasis).

I bear in mind that the fair-minded observer is not unduly sensitive or suspicious; see *Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 W.L.R. 2416, HL*.

I also bear in mind the following extracts from *The White Book* 2020 at 1.1.2

> … Where there are real grounds for doubt as to a lack of bias, it should be resolved in favour of recusal. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions (*Locabail (UK) Ltd v Bayfield Properties Ltd [2000] Q.B. 451* at [21]–[25].) Actual or apparent bias against a witness is as serious as bias against or in favour of a party (*Phillips v Symes [2003] EWCA Civ 1769; (2003) 147 S.J.L.B. 1431, CA*).
>
> … The disqualification of a judge for apparent bias is not a discretionary matter; either there is a real possibility of bias or there is not. A judge's concerns about the prejudicial effect that their withdrawal would have on the parties and on the administration of justice (delays, costs, listing problems) are not relevant, as efficiency and convenience are not the determinative legal values in this context (*AWG Group Ltd v Morrison [2006] EWCA Civ 6; [2006] 1 W.L.R. 1163, CA* (appeal allowed where, shortly before trial, assigned judge realising that a prospective witness was known to him but dismissing defendant's application for recusal)).
>
> … More will be needed to make out such an allegation than the mere fact that a judge has decided applications against a party previously; see, *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133, CA, at [29]–[30].

15. I conclude this outline exposition of the legal background by stating that I completely take the point that any protestations by me that I have done my best to comply with my judicial oath would be irrelevant. What matters is what the fair minded

and informed observer would conclude. The fair-minded observer would take all relevant circumstances into account and would understand that context is crucial.

The Recusal Application

16. The recusal application was issued on the very day that I handed down judgment on the 2nd October 2019 and made my order of that date. That judgment was sent out in draft on the 11th July 2019 and no doubt the Claimant formed a view about it. By my order of the 2nd October 2019, I dismissed the Claimant's application dated the 31st July *2018* whereby the Claimant sought to set aside or vary an order I made on 2nd August *2013* which set aside an Interim Third Party Debt Order made against the Third Party on 12th July 2013 and required the Claimant to pay the Third Party's costs of £18,141.94. I further ordered that the Claimant's application dated 21st December 2018 to adduce further evidence in support of the application to vary be dismissed. I recorded that the Claimant's application to vary was totally without merit and ordered that the Claimant pay the Third Party's costs on an indemnity basis; such costs to be the subject of detailed assessment if not agreed. I ordered that the Claimant pay £55,000 on account of those costs.

17. Mr. Dalby informed me that the 2nd October 2019 order has been appealed. I am not aware of whether or not permission to appeal has been considered.

18. As far as the protracted history leading up to the 2nd October 2019 order is concerned, I can do no better than refer to my judgment of the 2nd October 2019. For ease of reference, I attach a copy of my judgment as ***Annex 2*** to this judgment. I recommend that ***Annex 2*** be read before proceeding further.

19. On handing down the judgment on 2nd October 2019 I said:

> "I consider that the application to set aside the 2 August 2013 order was totally without merit. I shall record that in the order. On the question of indemnity costs, the fact that the application was totally without merit is not in itself decisive, but I do think the number of allegations of dishonesty and misconduct which were made and which were not substantiated and the way the variation application was dealt with, justifies an order that costs be ordered on the indemnity basis. That, of course, does not give the third party *carte blanche*, so to speak. The costs must still be reasonable."

20. Given the Claimant's submissions, in addition to the history set out in my October 2019 judgment, it is necessary to consider the case of *Michael Wilson & Partners Ltd v Sinclair* which concluded in the Court of Appeal: *[2017] EWCA Civ 55;*

[2017] 1 W.L.R. 3069, ["the Sinclair case"]. In that case by order dated 9th June 2015, I granted Mr. Sinclair a stay of execution of certain judgments in favour of the Claimant against Mr. Sinclair which had been registered under the Administration of Justice Act 1920. The Claimant appealed my order. By order dated 7th October 2015 the appeal was dismissed by Whipple J. The Claimant appealed that order and on the 7th February 2017 the Court of Appeal handed down judgment allowing the appeal and lifting the stay of execution ordered by me.

21. By an email dated 20th November 2018, in the midst of the present proceedings, Mr. Wilson emailed me a letter drawing my attention to the Court of Appeal judgment in the *Sinclair case* and to linked 2017 proceedings in that case in New Zealand. Not seeing the relevance of the *Sinclair case* to any issue I had to decide, I replied on the same day asking Mr. Wilson if he had any submissions in relation to the material which he had provided to me in his email. There was no reply to my email.

22. The Claimant has sought to make the *Sinclair case* relevant for the purposes of the recusal application and I shall return to it below.

The Claimant's complaints

23. In summary, the (overlapping) matters which are said to show bias are as follows.

[1] That the Claimant "has never received, and has not been receiving fair and impartial treatment, fair and impartial hearings, as well as the fair and the reasonable judgments, decisions, directions, rulings and orders to which it is entitled, especially as a judgment creditor."; see Mr. Wilson 13th WS para 9.

[2] That I have decided against the Claimant and in favour of the Judgment Debtor, Kazphosphate Ltd and Solvay Solutions UK Limited even though the Claimant has proven that they have lied. Or as Mr. Wilson puts it (13th WS):

> 10. Despite the fact that MWP is a very substantial judgment creditor, and by any measure is owed very many millions of dollars, and that in English law, and in the courts and through English public policy which requires judgments and orders to be complied with, upheld, enforced and paid, and despite Master Yoxall being a member of the QBD Enforcement Unit whose very existence and entire role and purpose in life is to faciliate and enable enforcement, and to assist and help judgment creditors such as MWP do so.
>
> 11. Instead of the QBD Enforcement Unit and Master Yoxall so assisting MWP in ensuring that its final and binding judgments and orders are complied with, enforced and paid, MWP has had to suffer from and endure Master Yoxall's

apparent and/or actual bias against MWP where, as the Record shows and proves, instead of ever once even beginning to do the job properly for which he is employed and paid, Master Yoxall has instead consistently chosen and decided to do everything possible and within his power, straining himself in his every sinew, and at every at possible turn, to favour the Judgment Debtor, KPL and Solvay over and against MWP, even though MWP has proven they have lied to and sought throughout to deliberately mislead the Courts on almost every occasion, and by doing so as to ensure delay, increase in the costs of and to hinder, stop and prevent MWP from ever being able to recover and enforce its millions of dollars of final and binding judgments debts that are long overdue to it in England.

12. This is even the case where, after great efforts and expense, and despite the counter-measures of the Judgment Debtor, KPL and Solvay, MWP has succeeded in being able to unearth, discover, find and identify very specific tangible and liquid assets in England that were and are available for enforcement by MWP of its millions of dollars of final and binding judgment debts, arising out of the very many judgments and orders in favour of MWP in the English Courts, including those as reciprocally recognised from Holland, the Bahamas (including the JCPC, the Court of Appeal and its Supreme Court), and also the New Zealand High Court and Court of Appeal, and over a number of years, and all because of Master Yoxall's apparent, apprehended and/or actual bias.

[3] That I was wrong to stay execution in the *Sinclair* case; 13th WS para 13.7 et seq. At para 13.9 Mr. Wilson states:

13.9. Master Yoxall's entirely misconceived and wrong judgment was then, unfortunately, followed and upheld by Belinda Whipple J in her very first judgment after first being appointed to the Bench and as a Judge, which was also made against MWP on 7 October 2015 at *[2015] EWHC 2847* (QB), and very clearly she simply followed Master Yoxall's erroneous, regrettable, disappointing and unfortunate lead in doing down and damaging MWP, for no good reason.

[4] That the decision of the Court of Appeal in the *Sinclair case* turned my mind against the Claimant. If true, this would be particularly relevant in relation to the orders made on 17th December 2018, 22nd May 2019 and 2nd October 2019. Mr. Wilson states:

13.22. *No doubt entirely incensed, enraged to learn that MWP had exposed him for what he really is* and his wrong actions, and this time even more fully determined to find against, do down and yet further damage MWP, and motivated to further delay, increase the costs of and to stop MWP ever enforcing in whatever way he possibly could, and just as he always had since 2012/2013,

and for no good reason given MWP had informed him of his errors by its letter of 20 November 2018, once again, and entirely predictably, given his apparent and/or actual bias against MWP, for which there is and never was any good reason, less than one month later on 18 December 2018, Master Yoxall also wrongly gave a yet further judgment against MWP, again seeking to stop MWP enforcing, by refusing, and with no good reason, this time by refusing to join KPL as a party to these proceedings, and also by refusing to make KPL a party to an amended TPDO, so as to enable MWP to also enforce against KPL in the jurisdiction, where MWP had also discovered and proven that KPL, in actual fact, forms part of the Judgment Debtor, rather than a mere seperate parent company, as Master Yoxall wrongly believed, given that KPL is the Judgment Debtor's ultimate management body exercising management and control of the Judgment Debtor from within the jurisdiction, and where MWP had also proven that since KPL was first incorporated in 2004, it had also always owed millions of dollars of debts to the Judgment Debtor, because the Judgment Debtor has always financed KPL, and which comprised yet another asset of the Judgment Debtor unearthed and discovered by MWP, at much cost and expense in the jurisdiction, and which could be enforced against. (13th WS);

(The emphasis is mine).

Mr. Beaumont submits that a fair minded and informed observer would "discern that, whether at a conscious or sub-conscious level, that appellate decision would have caused embarrassment to Master Yoxall." (skeleton para.16). "That was because it involved overturning his decision on an elementary point of law…" (skeleton para 17).

Mr. Beaumont submits in his skeleton:

"22. The fair minded and informed observer might then ask: what might some Masters, who have served without promotion from 2002, think of appeal court judges? Is there a sense of frustration that Masters do not tend to be promoted to the High Court Bench? Is there any resentment that younger lawyers with less (or, in the case of criminal lawyers, absolutely no) experience of civil procedure, tend to be promoted to be High Court Judges of the Division in preference to QB Masters? The fair minded and informed observer would usually have no evidence with which to resolve such questions, or suspicions, if they be suspicions. But on a perusal of the judgment of the Master dated 9.6.15 in *Michael Wilson & Partners Ltd v Sinclair & Ors*, the fair minded and informed observer would notice this passage at [11], (p 254 of the Bundle):

"11. I should just refer to page 475 of the bundle, volume 2, which is I

think a transcript of the hearing before Flaux J. At page 42 of the transcript, Flaux J said this:

"In the context of the cross-undertaking of damages and any inquiries as to damages, the issue will be whether the costs of the Bahamian proceedings and any liability to Wilson's costs as a result of an Order of the Bahamian courts was caused by the Freezing Injunction or by your client's own actions in unreasonably commencing proceedings in the Bahamas, which has been held to be without jurisdiction."

Then at page 477, Flaux J said this:

"I could say it seems to me if you have an arguable case that these costs would not have been incurred but for the Freezing Injunction and that, therefore, they would be recoverable on an enquiry as to damages that the whole point becomes circular and there is, therefore, on the face of it, an arguable case to stay."

Then later on, the learned Judge said:

"You can then go and see whether the Master agrees with me or not."

Then later, the learned Judge said:

"If he does not agree with me, you can appeal to a Queen's Bench judge."

Now, that did cause me to think about not agreeing with the Judge **for the hell of it** but, in fact, I have reached my own view on what the correct outcome is. *I am fortified by the indication given by the learned Judge and for all those reasons, I grant the application."* [The emphasis in **bold** is that of Mr. Beaumont. The emphasis in *italics* is mine].

23. The necessarily thoughtful and inquisitive fair-minded and informed observer would note the injudicious use of the vernacular. He would ask himself: does it connote a momentarily unmasked antagonism towards more senior judges, possibly bossy and interfering judges who try to tell Master Yoxall what to do? The fair minded and informed observer might very well think that, quite naturally after 18 years in the job, Master Yoxall is not best pleased when men and women in higher positions tell him what to do, or how to do it."

[5] That my decision on *2nd August 2013* to set aside the interim third party debt order against Solvay was wrongly decided on the basis that the judgment debtor might have been a LLC rather than an LLP when all the evidence was that there

was no possibility of it being a LLC; that the judgment was enforceable in the Netherlands; see 13th WS para 13.

[6] That my order of the *17th December 2018*[5] dismissing the Claimant's application to add Kazphosphate Ltd to the claim and to the 2018 interim third party debt order against Solvay was wrongly decided. In my judgment I described the application as hopeless, misconceived and a recipe for a mess. Mr. Wilson states that he found the words "hopeless" and "mess" to be gratuitously offensive and hostile; see 14th WS para 17 and 18.

[7] Linked to [6], that I wrongly failed to require Kazphosphate Ltd and the judgment debtor to take an active part in the *2018-2019* proceedings and

> "failed to realise what was and is plain for all to see, namely that in reality Solvay and Addleshaw Goddard are and always were, in effect, fronting for them, that they always were and are acting as one team, no doubt with Solvay being also financed and reimbursed by the Judgment Debtor, albeit behind the scenes, because they thought the Court and Master Yoxall would more likely believe Solvay, as an alleged innocent third-party when, in reality, they were no more than obvious stooges of the Judgment Debtor and KPL, dancing to their tune and playing to their every whim."[6] 13th WS para 13.33

[8] That in the *2018/2019* proceedings, I ignored and failed to deal with the Claimant's inspection and disclosure applications; 13th WS para 3.30.

[9] That the hearing of the application to adduce further evidence on *the 22nd May 2019* demonstrates bias. Mr. Wilson produces a transcript of the hearing and states:-

> 17. … I have produced this transcript because it reinforces my belief that the apparent bias does not merely manifest in individual instances, albeit that they have significant adverse consequences, but as further evidence of apparent bias pervading through the hearings, not just by means of positive statements, but by inattention. My serious concern with the hearing on 22nd May 2019 is that it demonstrates that the final decision taken to refuse the new evidence, was taken without any real or proper understanding of the nature, purpose, relevance and context of the new evidence, such that it demonstrates that the learned Master was not in a position to determine the application impartially, and was biased in favour of a refusal.

[5] The order was made on 17th December 2018 but is erroneously dated 18th December 2018.
[6] Addleshaw Goddard are the solicitors for the Third Party.

[10] That my order of the *2nd October 2019* (i) refusing the Claimant's application to adduce further evidence in the set aside application and (ii) dismissing the Claimant's application to set aside or vary the 2nd August 2013 order, was wrongly decided; see Para 13.22 above; and see 15th WS paras 17 et seq. and that I failed to understand the evidence.

[11] That under the *2nd October 2019* order, I improperly ordered the Claimant to pay the Third Party's costs and that £55,000 on account of costs was grossly excessive "by any measure, not least because of the grossly duplicative and excessive number of lawyers they involved and time and expense incurred."; 13th WS para 13.29. See also: 14th WS paras 19-20.

[12] That I ignored evidence of illegal conduct by the judgment debtor and Kazphosphate Ltd on about *23rd July 2018 and 28th September 2018*; or as Mr. Wilson puts it:

> 13.32. Master Yoxall also wrongly ignored that fact that MWP also proved that, acting quite improperly on or about 23 July 2018 and 28 September 2018, the Judgment Debtor and KPL had wrongly and falsely sought to cancel and release all indebtedness owed by KPL to the Judgment Debtor, pursuant to illegal and invalid so-called "netting" agreements, which MWP also proved to be no more than crude forgeries because Mr S. H. Landes, the alleged signatory for KPL was never in Kazakhstan at the relevant time, although the agreements purported to have been signed in Kazakhstan. Therefore, such was his actual and apparent bias that Master Yoxall ignored clear evidence before him of pure forgeries and falsification, and further evidence of the Judgment Debtor, KPL and Solvay stopping at nothing to avoid paying MWP, which actions Master Yoxall's own conduct has continuously assisted and furthered. (13th WS).

[13] That I wrongly held that Mr. Wilson had lied to the court during the hearing of *13th January 2020*; see 14th WS para 24; that I was also insulting in that I described a statement by Mr. Wilson as being completely fallacious; and that I wrongly accused Mr. Wilson of professional misconduct; i.e., filibustering. Mr. Wilson states:

> "28. As at 13th January 2020, I consider that the Master was now being openly hostile, denigrating and rude towards me. I do not consider that C can possibly have a fair hearing of any application in the present proceedings before this particular Master."

[14] That my conduct of the hearing on the *26th March 2020*, and the refusal to adjourn show bias; see 15th WS. Mr. Wilson contends that my response "was peremptory, unmeasured and pre-emptive by affirming the decision for a telephone hearing and dismissing the application to adjourn without any due consideration of impact of the pandemic," see 15th WS para 16.

[15] That my erroneous decisions have damaged the Claimant financially; see 13th WS e.g paras 13.14; 13.19;

24. While adopting the written submissions of Mr. Beaumont, Mr. Dalby focused on the following matters (in the following order):-

[1] The hearing of the 26th March 2020 and the dismissal of the recusal application;

[2] Dismissal of the additional evidence application on 22nd May 2019;

[3] The *Sinclair Case*;

[4] The 17th December 2018 decision refusing to add Kazphosphate Ltd as a party to the proceedings;

[5] The 2nd August 2013 order setting aside the Third Party Debt Order against the Third Party.

25. I now turn to consider what a fair-minded and informed observer would conclude in relation to these matters.

The Sinclair Case

26. As far as the *Sinclair* case is concerned, I must mention at the outset that I do not consider that any fair-minded reader of the judgment of Whipple J., could or would conclude that she merely followed my judgment rather than exercised her own judgment. Mr. Wilson's slight against the learned Judge is unnecessary and just plain wrong.

27. Of course, it is right to state that the Court of Appeal (McCombe LJ and Briggs LJ) allowed the appeal against the order of Whipple J and lifted the stay imposed by

me. However, a fair-minded reader of the Court of Appeal judgment in *Sinclair* would readily see that the issues raised in that case were far from straightforward.

28. It is worth setting out what McCombe LJ and Briggs LJ said in the course of allowing the appeal (in a reserved judgment).

McCombe LJ said:

> 37. At the conclusion of the hearing, I was hesitant as to whether or not the judge had erred in principle in her conclusion that a stay of execution should be ordered.
>
> 43. All these features have brought me to the conclusion, *in a landscape rather different from that in which the judge found herself*, that this appeal should be allowed and that the stay of execution ordered by Master Yoxall should now be lifted. (My emphasis).

Briggs LJ said:

> 44. I agree. Like my Lord, I came away from the hearing of this matter in real doubt whether the judge was wrong in her decision to grant a stay, in the alternative, on the 'special circumstances' ground set out in Part 83.7(4)(a), which is the applicable ground for the reasons which my Lord gives….

29. Mr. Wilson and counsel for the Claimant did not make any reference to these paragraphs.[7]

30. No fair-minded and informed observer could or would conclude that the judgment of the Court of Appeal caused me, or might have caused me, any embarrassment or resentment or bias against the Claimant. Why should it? Contrary to Mr. Beaumont's written submission, it did not involve overruling me on an elementary point of law. Like me, a fair-minded and informed observer would wonder what the relevance of the *Sinclair* case is to these proceedings.

31. A fair-minded and informed reader of the Court of Appeal judgment would not understand Mr. Wilson's assertion that by this Court of Appeal judgment the Claimant had exposed me for what I really am. (See para. 23.[4] above).

32. Reference is made to a passage in my judgment in the *Sinclair* case in which I refer to the hearing before Flaux J; see above and paragraph 22 of Mr. Beaumont's skeleton argument and paragraph 14 of Mr. Wilson's 14th witness statement. It is

[7] Mr. Dalby mentioned para 43 in referring me in general terms to paras 41-43 of the judgment.

submitted that a fair minded and informed observer would ask himself if my use of language reveals an antagonism towards Appeal Court Judges and towards the Claimant. This is an absurd proposition. A fair-minded and informed observer, reading the extract in question as a whole, in particular my concluding words, could not possibly conclude that they indicated any resentment on my part against Appeal Court judges or the Claimant – any more than he or she would conclude that Flaux J had a resentment against Queen's Bench Masters.

33. In contrast to the Claimant's present submission, I note that before Whipple J, the Claimant's submission had a different emphasis. At that point the Claimant submitted that I had been wrongly influenced by the comments made by Flaux J. Whipple J, rejected that submission.

34. The fair-minded and informed observer would not conclude that there was a real possibility of bias from a previous ruling in an unrelated case.

The Judgment handed down on the 2nd August 2013 and the setting aside of the Interim Third Party Debt Order.

35. The Claimant asserts that here I was subject to unconscious bias. It is submitted that my findings of fact were imperfect and that I should have directed a trial. It is further submitted that I did not give sufficient weight to the fact that the Claimant had a valid judgment in its favour.[8]

36. No fair-minded and informed reader of my judgment of the 2nd August 2013 (and of the transcript of the hearing) would conclude that there was a real possibility that I was biased in reaching my conclusions. Such a reader would note that I found the evidence of Mr. Wilson on the LLP/LLC issue to be impressive[9].

37. As far as the contention that I did not give sufficient weight to the fact that the Claimant had a valid judgment is concerned, this is what I said in my (ex tempore) judgment of the 2nd August 2013:

> 19. I now move on to the next aspect of the application, which is the third party's submission that in the circumstances of this case they are at risk of having to pay this debt twice over. Firstly, it is said that the contract that they have with Kazphosphate LLC is one that is governed by Dutch law and there is no dispute

[8] This is also part of a general submission that as well as being biased against the Claimant I am biased against Judgment Creditors.
[9] There was much about the LLP/LLC issue in the August hearing. However, it was not the decisive issue.

about that. And there is no dispute that that contract provides that the resolution of disputes between the third party and Kazphosphate LLC is to be dealt with by way of arbitration.

20. Now, the third party relies heavily on the evidence of a Dutch lawyer, whose name I have noted as Joachim Staub. His evidence is that in his opinion the third party is at a real risk of having to pay this debt twice and that if the third party were to make a payment under a third party debt order that would not be recognised in Dutch law given that the underlying judgment of 4th August 2004 may not be recognised and that, therefore, payment under the third party debt order following on from it might not be a valid discharge of the third party's debt to LLC.

21. Two arguments seem to be put forward by Mr Staub. Firstly -- and I am putting this crudely – firstly, on the basis that the judgment of 4th August 2004 is in the nature of a default judgment and there is a danger in Dutch law under the Regulation that it would not be recognised because it is a default judgment and also, that the Defendant did not have notice of the proceedings. Now, I have said it seems to me that the Defendant probably did have notice of the proceedings, but it seems to me that it remains an open question whether or not the judgment would be recognised, bearing in mind that there is no evidence of the Defendant being served with the application notice leading to the order of 23rd June 2004 and no evidence of the Defendant being served with the application notice leading to the order of 4th August 2004. This question of service is significant, bearing in mind it is a point that has been taken by the Defendant in the courts in Kazakhstan and, it seems to me, is likely to be taken by LLC in the future if required to do so. So, there is that notice question.

22. Secondly, there are arguments put forward on the basis that the Dutch court, or under Dutch law, that as a matter of public policy the 4th August 2004 judgment might not be recognised and a discharge under a third party debt order would not be recognised where the underlying judgment is not effective. Furthermore, the New York Convention, which governs the arbitration agreement between the third party and Kazphosphate LLC, may not regard the 4th August 2004 judgment as enforceable (and recognise payment made under a third party debt order) where issues of public policy arise.

23. So I do find that the third party is likely to be exposed to a real risk of having to pay this judgment debt twice. It seems to me that if the third party sought to rely on the third party debt order – Kazphosphate LLC would sue/proceed under the contract under the arbitration clause. Issues of public policy in Dutch law can arise and, as I say, I believe there will be a serious risk. Conversely, if the third party was obliged to take arbitration proceedings similar problems will arise.

> 24. Now, it is not for me to decide what the actual outcome of the dispute between the parties (the third party and LLC) would be when arguments about public policy, questions of notice and adequacy of service and so on are fully rehearsed between the parties. I do not have to decide that definitively. What I have to ask myself, in my judgment is: "Is there a real risk of this third party having to pay the debt twice?" I find on the material before me that there is. I bear in mind all this, that the Claimants have adduced evidence from a Dutch lawyer who has a different opinion to Mr Staub, but that does not divert me from finding that there is such a real risk. So accordingly, I will grant the application to set aside the interim third party order.

38. Of course, the mere fact of deciding an application against the Claimant does not mean that I was biased in reaching that conclusion.

39. The Claimant was unhappy with my conclusions and my order. The Claimant appealed. On the 7th November 2013, permission to appeal was refused by Jay J. at an oral hearing.

The 17th December 2018 hearing and ruling

40. Paragraph 8 of my judgment of the 2nd October 2019 summarises the position relating to the 17th December 2018 hearing and order.

> 8. By an application dated the 8th November 2018, the Claimant sought to add Kazphosphate Limited – the parent company of Kazphospahte LLP, incorporated in England - as a party to the claim and to the interim third party debt order which had been made against Solvay. At a hearing on the 17th December 2018, I dismissed that application. I gave a brief judgment. In short, I took the view that with the underlying proceedings having been issued in 2003, with judgment against the First Defendant in May 2004 and against Kazphosphate LLP on 4th August 2004, it was not now possible or practicable to join Kazphosphate Limited, a separate legal entity, as a Defendant to the claim. I regarded that application as hopeless. Likewise, I took the view that it was not possible simply to add Kazphosphate Limited as a party to the interim third party debt order.

41. It is to be noted that this ruling did not prevent the Claimant from seeking a Third Party Debt order against Kazphosphate Ltd – it just prevented the Claimant from seeking a Third Party Debt order against it by adding it to the 2018 interim Third Party Debt Order which had been made against Solvay. Indeed, on 7th May 2019 I granted

the Claimant's discrete application for an Interim Third Party Debt Order against Kazphosphate Limited.

42. A fair-mined and informed observer would not conclude from my ruling that there was a real possibility that I was biased.

43. Of course, if the Claimant thought that my decision was wrong it could appeal. It has done so. In the course of argument, I asked what the status of the appeal was. Mr. Dalby told me that the appeal was still outstanding (it may have been stayed) but could not give me any more details.[10]

44. In my judgment I described the application as hopeless, misconceived and a recipe for a mess. Mr. Wilson states that he found the words "hopeless" and "mess" to be gratuitously offensive and hostile.

45. The use of these words in this context and taking matters as a whole would not cause a fair-minded and informed observer to conclude that there was a real possibility that I was biased or hostile. A judge is entitled to express a view in blunt language where appropriate.

46. I should add that by an application dated 8th October 2018, the Claimant applied for an order that Kazphosphate LLP and the Third Party do give disclosure and inspection of all contractual documents relating "to all and/or any of dealings with and the marketing and sale, and whether directly or indirectly, of its products to the Third Party Debtor and its affiliates" in 14 days. On the 23rd October 2018 that application was adjourned generally with permission to restore.

The 22nd May 2019 hearing; the refusal to permit new evidence; the 2nd October 2019 order

47. The hearing of the 22nd May 2019 and the refusal to permit new evidence is dealt with in my judgment of the 2nd October 2019. The Claimant, taking a different view of the evidence, does not like my conclusions. The Claimant asserted misconduct and fraud which I could not see made out on the evidence. In paragraph 21 of my judgment dated 2nd October 2019, I said:

> 21. There is much material before me and there is the Claimant's application dated 21st December 2018 to rely on additional evidence. In my view, the evidence and

[10] Taking instructions is awkward with a hearing proceeding remotely. The last order I have in relation to this appeal is that of Popplewell J (as he then was) dated 21st May 2019; he extended the time for the filing and service of the appeal bundle to 30th June 2019.

proposed evidence upon which the Claimant wishes to rely upon to set aside my order does not assist the Claimant. First, as indicated above, it comes far too late. Second, much of the evidence goes to the nature of the trading relationship between Kazphosphate and Solvay and *may or may not* be more relevant to the Claimant's 2018 application for a third party debt order against Solvay where there will be issues as to whether Solvay owes anything to Kazphosphate LLP.

48. Mr. Dalby submits on behalf of the Claimant that I should have ordered – or at least I should have considered directing that there be a trial to determine the issue of fraud. The problem with that submission is that before giving such a direction one must see cogent evidence of fraud which would justify such a trial. Merely to assert fraud or misconduct is not sufficient.

49. Again, if the Claimant thinks that my reasoning is wrong in what I make of the evidence, it can appeal the 2nd October 2019 order which it has done.

50. A fair-minded and informed observer reading my judgment and order of the 2nd October 2019 and reading the transcript of the hearing of the 22nd May 2019 as a whole and in context could not and would not conclude that there was a real possibility that I was biased.

Excessive costs order under the 2nd October 2019 order

51. My order was that the Claimant pay the Third Party's costs of the application to set aside and of the application to admit further evidence; such costs to be assessed if not agreed. The Third Party produced a schedule and sought costs of over £98,000. I ordered that the Claimant pay £55,000 on account of those costs. I would be the first to agree that these costs are very substantial. However, my view was that these high costs had been substantially generated by the long winded, heavy handed and often misdirected way in which the Claimant has conducted the applications. If I am wrong in this, matters will be corrected on the detailed assessment.[11]

52. Looking at the course of the applications as a whole, with the evidence and documentation they generated, a fair-minded and informed observer would not conclude that there was a real possibility that I was biased in making that costs order.

[11] I am not aware of the status of the assessment proceedings. I understand that the Claimant has not paid any of the Third Party's costs.

The Hearing of the 13th January 2020

53. No fair-minded and informed observer reading the transcript of the hearing on the 13th January 2020 *as a whole, and in context*, could or would conclude that there was a real possibility that I was biased. He or she might conclude that there was frustration on my part. This was the hearing in which I was provided with the hearing bundle at 2.45pm (for a 2,00pm start). Mr. Wilson's skeleton argument was only available that day. Counsel was not instructed. On any fair reading, I did not call Mr. Wilson a liar in relation to his knowledge of the CPR. I did say that his assertion that that the Claimant was only told by the court that the hearing was going ahead in early January was fallacious. Indeed, it was. I had personally informed the parties of the hearing date by email on 22nd October 2019. It is right to say Mr. Wilson did go on to acknowledge that he did receive my email.

The hearing on the 26th March 2020 and the refusal to adjourn.

54. I have set out the history above. I refer to my order of the 26th March 2020 and my extensive Note attached to it. I cannot think of another case in which it has been necessary for me to set out such an extensive note to an order.

55. Any fair-minded and informed reader of my Note (and the emails rehearsed therein) would see that [1] I was completely alive to the problems caused by the pandemic and [2] *that I was willing to adjourn* the hearing if counsel or his or her clerk could confirm that he or she was unable to make submissions by telephone (or Skype).

56. No fair-minded and informed observer reading the transcript of the hearing as a whole and *in context* could or would conclude that I was biased. He or she would bear in mind that this was a second application to adjourn after the first such application was made in the most unsatisfactory circumstances. He or she would take into account the yet further opportunity given to the Claimant to make its recusal application. He or she might detect judicial frustration but that is another matter.

Conclusion

57. In conclusion, for the reasons stated above, I do not consider that all the circumstances relied on by the Claimant would lead a fair-minded and informed observer to conclude that that there was a real possibility that I was biased (consciously or otherwise) at any stage – or that I am biased against the Claimant. Accordingly, I dismiss the application to set aside my order of 26th March 2020. The application is totally without merit. It follows that the application that I recuse myself remains dismissed.

58. The irony of hearing an application that I recuse myself so soon before I retire has not escaped me. There is a first and last time for everything.

59. A draft of this judgment was sent to the parties on 28th August 2020.

Dated the 12th November 2020

ANNEX 1

IN THE HIGH COURT OF JUSTICE **Claim No. QB-2003-000001**
(formerly: HQ03X03979)

QUEEN'S BENCH DIVISION

MASTER YOXALL

26th March 2020

BETWEEN:

MICHAEL WILSON & PARTNERS LIMITED

Claimant/Judgment Creditor

-and-

KAZPHOSPHATE LLP

Defendant/Judgment Debtor

-and-

SOLVAY SOLUTIONS UK LIMITED

Third Party

AMENDED ORDER
Amended under CPR r.40.12

UPON the Claimant's application issued on 2nd October 2019 (that the Master recuse himself)

AND UPON hearing (by telephone) Mr Michael Wilson solicitor for the Claimant and Mr. Craig Morrison of counsel for the Third Party

AND UPON reading the witness statement of Mr. Wilson dated 13th January 2020

IT IS ORDERED that

1. The Claimant's application to adjourn the hearing until such time that it could be heard in person is refused.

2. The Claimant's application that the Master recuse himself is dismissed.

3. The Claimant may apply, by application notice, to set aside or vary this order. Any such application is to be made by 4.00pm **27th April 2020** and is to be supported by a skeleton argument by counsel setting out the facts and matters relied upon in support of the contention that the Master should recuse himself.

4. The Claimant do pay the Third Party's costs of the application including the hearing of the 13th January 2020 and of today. Such costs are to be summarily assessed if not agreed. The parties have permission to restore for such summary assessment.

Dated the 26th March 2020
Amended the 22nd April 2020

Master's Note

1. The first point of controversy at this hearing was whether or not the hearing should be heard by telephone or adjourned to an unknown date to allow for a hearing in person which Mr. Wilson of the Claimant and counsel for the Claimant could attend.

2. There is no doubt that in normal circumstances a hearing in person would be preferable to a telephone hearing. However, given the Covid-19 crisis and the Government Guidelines I am conducting all hearings by telephone.

3. I refused Claimant's application to adjourn for a number of reasons: [1] the application could proceed by telephone – Mr Wilson attended and it was plain that his counsel could have attended; [2] there are no grounds that I should recuse myself; the application is misconceived; [3] there have been 2 half day hearings set aside for the Claimant's application: on the 13th January 2020 and on the 26th March 2020. On each occasion the Claimant has had ample opportunity to instruct counsel but counsel has not appeared on either occasion. In the circumstances, I am not willing to adjourn this application to be listed for yet another half day hearing.

4. In the course of submissions on the application to adjourn, Mr. Wilson misrepresented what I had stated (and when) in email correspondence before the hearing. So that there is no further misunderstanding, I set out, very much in summary, the sequence of correspondence. I do not set out every email. I should add that the parties copied each other into the correspondence.

5. On the 17th March 2020, Addleshaw Goddard ["AG"] who act for the Third Party ["Solvay"] emailed me requesting a telephone hearing given the Covid-19 crisis.

6. On the 18th March 2020, I replied to the parties:

> Dear Ms Nelson, *[who is of AG]*
> Thank you.
> I was about to write to the parties.

As a result of Government Guidance, I am working from home. I am monitoring my emails regularly.

The hearing will have to proceed by telephone. My direct line (this occasion only, please) is [number redacted here]. I would be grateful if you could set up the call.

I will have the hearing bundle from the last hearing. Any additional relevant documents must be sent to me by email by 4.00pm 23rd March 2020. Likewise, any additional skeleton argument must be provided to me by email by 4.00pm 23rd March 2020.

7. On the 20th March 2020 (11.33), Mr. Wilson sent me a long email objecting to a telephone hearing and stating that in addition his counsel had to self-isolate and was therefore not available. (That meant that counsel on both sides and I were self-isolating).

8. On the 20th March 2020 (12.21) I replied:

Dear Mr. Wilson,
Thank you.
My email addressed to Ms Nelson was intended to inform you that the hearing was to proceed by telephone. I had assumed that your counsel would be able to attend and make his submissions by telephone - with a skeleton argument.
Bearing in mind the contents of your email, I am minded to adjourn the hearing on 26th March 2020 generally with permission to restore. However, I would be grateful for the (brief) comments of those acting for Solvay before doing so.

9. On the 20th March 2020 (18.46) AG wrote to me at some length submitting that the hearing could proceed by telephone and that there was nothing to indicate that the Claimant's counsel was not able to attend the hearing by telephone.

10. On the 21st March 2020 (12.00) I wrote:

I thank both sides.
Mr. Wilson, please ask your counsel to email me to confirm that s/he is unable to make submissions by telephone.
Please also ask counsel to provide me with the his/her skeleton argument in support of the application. I assume that counsel was instructed some time ago.
For the moment, the hearing is to proceed by telephone.

11. On the 21st March 2020 (12.47) Mr. Wilson wrote objecting to a telephone hearing.

12. On the 21st March 2020 (13.38) I wrote to Mr. Wilson repeating what I had stated in my 12.00 email.

13. On 21st March 2020 (14.04) Mr. Wilson wrote again objecting to the telephone hearing.

14. On the 21st March 2020 (14.49) I wrote:

Dear Mr. Wilson,
There is something of a crisis here in the UK. Its duration is uncertain.
All hearings before me are to be by telephone (or possibly Skype) until further notice.

I assume that you have instructed counsel for the hearing of your application. You have had at least since the last adjourned hearing of 13th January 2020.

I repeat, please ask your counsel to email me to confirm that s/he is unable to make submissions by telephone.
For the moment, the hearing is to proceed by telephone.

15. On the 23rd March 2020 (13.42) Mr. Wilson wrote to me at great length again objecting to a telephone hearing. In relation to Claimant's counsel he said "counsel is in isolation and is not able to attend the hearing by telephone, or in person."

16. On the 23rd March 2020 (14.15) I replied:

Dear Mr. Wilson,
As I thought I had already made plain, I will consider vacating the hearing when I have email confirmation from counsel (or his or her clerk) that s/he is unable to attend the hearing by telephone and make submissions. I have the hearing bundle.

17. On the 23rd March 2020 (14.25) Mr. Wilson wrote against objecting to a telephone hearing and asserting the Claimant's right to a hearing in person. (I am not sure that this was in reply to my 14.15 email).

18. On the 25th March 2020 (10.45) Mr. Wilson wrote at length objecting to a telephone hearing and asking for confirmation by return that the telephone hearing would not proceed.

19. On the 25th March 2020 (10.57) I replied:

Dear Mr. Wilson,
I expect the hearing to proceed by telephone.
As I have already indicated, if your counsel (or indeed his clerk on his/her behalf) were to confirm that s/he is unable to attend by telephone I will vacate the hearing. If your counsel if able to attend please provide his/her telephone contact details to Addleshaw Goddard who are setting up the telephone arrangements.

20. On the 25th March 2020 (11.27), Mr. Wilson wrote stating that there was no proper legal basis upon which the hearing may proceed merely by telephone.

21. On the 25th March 2020 (11.49), I replied:

Dear Mr. Wilson,
Thank you.
Some context is necessary here. This is the second half day hearing which has been set aside for the Claimant's recusal application. At the moment there is no material before me by witnesss statement or skeleton argument which (in my view and subject to argument) would justify recusal. I am now being asked to vacate the hearing and set aside yet another half day for the application. I agree that in normal circumstances, the hearing would be in person. However, these are not normal times.
Nowithstanding what I have stated, I repeat yet again - if your counsel (or clerk) were to email me to confirm that he or she is unable to attend by telephone I will vacate the hearing.

22. On 26th March 2020 (12.12); Stuart Ritchie, clerk to Mr. Gabriel Buttimore of counsel wrote to me as follows: (I should add that I read this email about half an hour before the hearing was due to start at 2.00pm):

> Dear Sirs,
>
> I write in relation to the above matter which is listed for hearing at 2pm today by telephone. I have been asked to contact you direct by Michael Wilson & Partners, Limited who instruct Gabriel Buttimore.
>
> MWP had listed the hearing with regard to Mr Buttimore's diary, however based on your e-mail of late Friday, 20th March 2020, MWP had understood that you accepted the need for an in-person hearing of MWP's application, and were minded to relist. *MWP have told us that they became aware yesterday* after various correspondence that you still wished to proceed with a telephone hearing this afternoon, and that they had still to receive the revised Bundle from the Respondent. At that stage it did not leave Counsel with enough time to prepare for this substantive hearing and he is therefore unable to attend and represent MWP at this afternoon's hearing. (My emphasis).

23. This email is unsatisfactory in several respects. It arrived late. It does not state that Mr. Buttimore was unable to attend as a result of his being in isolation. The Claimant knew that the hearing was to proceed well before the 25th March 2020. The Claimant knew on the 21st March 2020 that the hearing was to proceed by telephone. It seems to me that counsel could have attended by telephone if so instructed.

24. Having set out this tedious history, I appreciate that the application that I recuse myself is an important application as far as the Claimant is concerned. Such an application should be heard after argument if at all possible. Mr. Wilson does not regard himself as sufficiently qualified to argue such an application – the Claimant needs counsel. Indeed that was the basis of his application to adjourn the hearing on the 13th January 2020. I also understand that in normal circumstances a hearing in person would be preferable. In the circumstances, whilst I have dismissed the application, I am willing to afford the Claimant the opportunity to apply to set aside or vary this order – provided that the application is supported by a skeleton argument from counsel which sets out the facts and matters relied upon in support of the contention that I recuse myself.

ANNEX 2

IN THE HIGH COURT OF JUSTICE **Claim No. QB-2003-000001**
(formerly HQ03X03979)

QUEEN'S BENCH DIVISION

MASTER YOXALL

BETWEEN

MICHAEL WILSON & PARTNERS LIMITED

Claimant/Judgment Creditor

-and-

[1] CJSC KAZSUBTON
[2] KAZPHOSPHATE LLP

Defendant/Judgment Debtor

-and-

SOLVAY SOLUTIONS UK LIMITED

Third Party

JUDGMENT

My judgment will not be electronically recorded. Accordingly, this may be treated as authentic.

1. On the 12th July 2013, I made an interim third party debt order in favour of the Claimant/Judgment Creditor against the Third Party, Solvay Solutions UK Limited ["Solvay"] then known as Rhodia UK Limited. Solvay applied to set aside that order. On the 2nd August 2013, after a contested hearing, I granted Solvay's application and set aside the interim third party debt order. I ordered the Claimant to pay Solvay's costs which I summarily assessed in the sum of £18,141.94. Those costs have not been paid.

2. I am now concerned with two applications by the Claimant:

[1] An application dated 31st July 2018 to set aside or vary my 2013 order. That application was heard by me on the 23rd October 2018 and 13th November 2018. I reserved judgment. At those hearings the Claimant was represented by Mr. Paul Joseph, of counsel on a direct access basis. Mr. Craig Morrison, of counsel, appeared on behalf of Solvay. I am grateful for their submissions.

[2] An application dated 21st December 2018 for permission to adduce new evidence on the set aside application. I heard this application on 22nd May 2019.[12] At this hearing Mr. Wilson appeared in person on behalf of the Claimant and Mr. Morrison returned on behalf of Solvay. At the conclusion of that hearing, Mr. Wilson asked about providing yet further evidence. I stated that any further application to rely on additional evidence would have to be made by application notice.

Some Background

3. Before I deal with these applications, I need to set out other matters in order to put the set aside application in context.

4. On the 11th May 2018, the Claimant obtained a fresh interim third party debt order against Solvay. A short hearing to determine whether the interim order should be made final was listed on the 18th July 2018. On the 12th July 2018, Solvay issued an application for an order that unless the Claimant paid the £18,141.94 in costs which it had been ordered to pay in 2013, the application for the new final third party debt order be struck out and that the interim third party debt order be set aside.

5. The hearing listed on the 18th July 2018 turned into a directions hearing. Inter alia, I listed Solvay's unless order application for hearing on the 23rd October 2018 with the hearing of the Claimant's application for a final third party debt order to follow on 13th November 2018.

6. It appears that Solvay's application for an unless order relating to the payment of its costs prompted the Claimant to issue its application dated 31st July 2018 to set aside my 2013 order. The hearing dates of the 23rd October 2018 and 13th November 2018 ended up being used to hear the Claimant's set aside application.

7. By an application dated 8th October 2018, the Claimant applied for an order that Kazphosphate LLP and Solvay do give disclosure and inspection of all contractual documents relating "to all and/or any of dealings with and the marketing and sale, and whether directly or indirectly, of its products to the Third Party Debtor and its affiliates" in 14 days. On the 23rd October 2018 that application was adjourned generally with permission to restore.

[12] A hearing was listed on the 15th March 2019. I vacated that hearing at the Claimant's request given the sudden unavailability of the Claimant's counsel.

8. By an application dated the 8th November 2018, the Claimant sought to add Kazphosphate Limited – the parent company of Kazphospahte LLP, incorporated in England - as a party to the claim and to the interim third party debt order which had been made against Solvay. At a hearing on the 17th December 2018, I dismissed that application. I gave a brief judgment. In short, I took the view that with the underlying proceedings having been issued in 2003, with judgment against the First Defendant in May 2004 and against Kazphosphate LLP on 4th August 2004, it was not now possible or practicable to join Kazphosphate Limited, a separate legal entity, as a Defendant to the claim. I regarded that application as hopeless. Likewise, I took the view that it was not possible simply to add Kazphosphate Limited as a party to the interim third party debt order.

9. On the 7th May 2019, I granted the Claimant's application for an interim Third Party Debt Order against Kazphosphate Limited. The short hearing listed on the 12th June 2019 for a final Third Party Debt Order was adjourned to be re-listed with a time estimate of 2 hours.

10. Both Solvay and Kazphosphate Limited deny that they are indebted to Kazphosphate LLP. The applications relating to the final third party debt orders remain to be dealt with. Solvay's application for an unless order in relation to its costs remains outstanding.

The 2nd August 2013 Order

11. The transcript of the judgment leading to the 2nd August 2013 order is available and must be read with this judgment. I do not propose to rehearse the judgment in full. In short, in contrast with Solvay's current position – in which it denies any indebtedness to Kazphosphate LLP – Solvay then accepted that it did owe monies to Kazphosphate – although it was unclear whether that was to Kazphosphate LLP or to LLC. In evidence for the 2013 hearing, Mr. Wilson stated that he was responsible for setting up Kazphosphate LLP in Kazakhstan in October 1999 and that there was no such entity as Kazphosphate LLC. The Claimant's case was that LLC and LLP had the same registration number. Against this, there was a financial statement and independent auditors report relating to Kazphosphate Limited. That report referred to trading activities carried out mainly through Kazphosphate LLP. Notes to financial statements dated 30th December 2011 had separate references to Kazphosphate LLP and LLC. There were other discrete references to LLP and LLC. The LLP website referred to LLC. On one interpretation of the papers LLC was regarded as responsible for mining and chemical production and LLP was more concerned with trading activities.

12. Apart from this blurred distinction between LLP and LLC, Solvay put forward a matter of greater concern. Solvay contended that its contract, be it truly with LLP or LLC (Solvay said LLC), was governed by Dutch Law and that there was a risk -- a substantial risk -- that it would not be discharged by payment under the third party debt order, but would have to pay the debt twice over; i.e., once to the Claimant and once to Kazphosphate because the underlying judgment was not enforceable. Solvay produced

expert evidence from Dutch lawyers to that effect. There were concerns about the status, for the purposes of enforcement abroad, of the order of Master Leslie of 4th August 2004. If it was regarded as a default judgment, it might not be recognised. There were issues about service of applications on Kazphosphate LLP. I refer to my 2013 judgment for more detail.

13. Against this outline background, I set aside or discharged the 2013 interim third party debt order against Solvay. The Claimant applied for permission to appeal which was refused by Jay J. at an oral hearing on 7th November 2013.

The 2018 Application to Set Aside or Vary

14. I have a substantial volume of documents and witness statements before me. I do not propose to rehearse them.

15. It is surely now trite law that any application to set aside or vary an order must be made promptly. Mr. Joseph accepted that 5 years delay was a long time. However, he submitted that delay in itself was not decisive. He submitted that CPR r.3.1(7) could be used where there had been a material change in circumstances and where the court had been misled.

16. In my view, it is important to keep in mind the nature of the application before me in 2013. The rules relating to third party debt orders provide for a judgment creditor to obtain an order for the payment to him of money which a third party *owes to the judgment debtor;* see CPR r.71.1(1). It is self-evident that an application made for a third party debt order in about June 2013 is concerned with the state of the third party's indebtedness at that time. Timing is very important given that those in a trading relationship move in and out of indebtedness with one another. A third party debt order cannot be imposed when there is no debt so as to operate as a general charge for such future debts as may arise from time to time. It is all the more essential, therefore, that an application to set aside an order setting aside an interim third party debt order - or an order refusing to make a third party debt order final - is made promptly.

17. In my view, the granting or refusal to make a final third party debt order (or setting aside an interim third party debt order) is in the nature of a "final" order as opposed to an "interim" order. Accordingly, it seems to me that it is *Roult v North West Strategic Health Authority* [2010] EWCA Civ 444, which applies rather than *Tibbles v. SIG plc [2012] EWCA Civ 518* which is referred to in the application notice and which was relied upon by Mr. Joseph in argument. In *BCS Corporate Acceptances Ltd v Terry [2018] EWCA Civ 2422*, *Roult* and other cases were reviewed. Hamblen LJ, giving the judgment of the court, referred to the considerations applicable to the varying or revoking of an interim order (erroneous information and subsequent events) and stated:

> "General considerations such as these will not, however, justify varying or revoking a final order. The circumstances in which that will be done are likely to be very rare given *the importance of finality*." [75]. (My emphasis).

In that case it was held that no proper or sufficient grounds had been identified for taking "the *wholly exceptional* course of setting aside the court's final judgment under r.3.1(7)"; see [78]. (My emphasis).

18. There has been no explanation for the 5 year delay in making the application to set aside. As stated above, it seems to me that the application was prompted by Solvay's application for the unless order.

19. On behalf of the Claimant it was submitted that the concerns about the enforceability of the 4th August 2004 order of Master Leslie where met when the order was amended by me on the 21st August 2013. This, of course, post dated the hearing and my order. Mr. Wilson states in evidence that on the 24th October 2013, the Dutch courts recognised the judgment order against the judgment debtor. I ask here, why the application to set aside – if it had to be made – was not made in August or October 2013?

20. The Claimant's case is that I was deliberately misled by Solvay. I do not accept that. Mr. Wilson states that the judgment debtor is and always was an LLP under Kazakh law. His submissions on this point are substantially the same now as they were before me in 2013. Certainly, the confusion relating to LLP and LLC point arose from the judgment debtor's own documentation. The main point, however, was not the LLP and LLC distinction but Solvay's submission that it was at *risk* of having to pay the debt twice given the status of the judgment against the judgment debtor. It may well be that steps taken after the hearing before me removed that risk – in which case, if there was to be an application to set aside, it should have been made back then in 2013.

21. There is much material before me and there is the Claimant's application dated 21st December 2018 to rely on additional evidence. In my view, the evidence and proposed evidence upon which the Claimant wishes to rely upon to set aside my order does not assist the Claimant. First, as indicated above, it comes far too late. Second, much of the evidence goes to the nature of the trading relationship between Kazphosphate and Solvay and *may or may not* be more relevant to the Claimant's 2018 application for a third party debt order against Solvay where there will be issues as to whether Solvay owes anything to Kazphosphate LLP.

22. For, example the Claimant challenges the evidence of Mr. Ellis of Solvay, in his witness statement of 5th February 2019, that Solvay stopped taking a supply of P4 yellow phosphate from Kazphosphate in 2014. This issue is not relevant on an application to set aside my 2013 order. As stated above, in 2013 Solvay accepted that they were taking supplies from Kazphosphate be it LLP or LLC.

23. At the hearing on the 22nd May 2019, Mr. Wilson provided me with spreadsheets of export data relating to trade in yellow phosphorous from 2012 to 2018. I am at a loss as to how this evidence, if one may call it that, is supportive of the application to set aside my 2013 order.

24. Mr. Wilson submits that in 2013 Solvay were saying that they *only* purchased yellow phosphate directly from Kazphosphate under a contract which was subject to Dutch law – whereas Solvay's current position as set out in Mr. Ellis' witness statement and exhibited spreadsheet showing Solvay's purchases from January 2010 to September 2013, is that they obtained yellow phosphate from a number of other suppliers - buying not only directly but by other means. The evidence before me, and my finding, at the 2nd August 2013 hearing was that Kazphosphate was a *key* supplier of phosphate. It was not Solvay's evidence that Kazphosphate LLC was the *only* source of supply. Mr. Wilson is not right on this point. At the hearing in 2013, we did not descend to examining sales figures as that was not necessary given that Solvay admitted the debt owed to Kazphosphate (be it LLP or LLC) and indeed referred to the relevant contractual documentation, with Kazphosphate LLC, relating to the supply of phosphate.

25. The Claimant relied on a letter by Mr. Elder Suleimanov dated 22nd October 2018 and sent to me (out of the blue) by email. Mr. Suleimanov is described as the Director of Law Department, Kazphosphate LLC (sic). He states that Kazphosphate LLC do not have and have never had "any direct contract relations on supply of our products" to Solvay. This statement is contrary to the contractual documents produced at the 2013 hearing. The statement is also contradicted by the evidence of Mr. Burdett of Clyde & Co, who acts for Kazphosphate Limited and Kazphosphate LLP, who states, on instructions, that Mr. Suleimanvov is honestly mistaken. There have been changes in the management personnel of Kazphosphate LLP over the years and the current management were unaware that Solvay had contracted when it was named Rhodia UK Limited and the contractual documentation had not been updated. In the circumstances, I do not think Mr. Suleimanov's letter takes matters much further. Indeed, the letter is a two edged sword for the Claimant. Leaving aside the continuing reference to LLC, if Solvay had no contractual relationship with Kazphosphate LLP, the Claimant would not be entitled to a third party debt order at all.

26. Mr. Wilson's fundamental point is that I should not have made the order of 2nd August 2013. I do not agree and remind myself that, in any event, I am not the appeal court against my own orders.

Conclusion

27. As far as the Claimant's application for permission to rely on further evidence is concerned, there has been no explanation for the delay in providing the evidence. I have considered the evidence and the submissions relating to it. In my judgment, the additional evidence does not take matters any further in relation to the set aside application.

28. I should add that by an application notice dated 30th June 2019, the Claimant applied for permission to adduce new evidence. However, it is plain that the application is for permission to rely on additional evidence in relation to the fresh application for a third party debt order against Solvay. I will consider that application after this judgment is handed down and after I have considered Solvay's unless order application. If, and in so far as, the Claimant wishes to rely on the additional evidence in the present set aside application – I refuse permission to rely on the additional evidence as it comes far too late.

29. In my judgment, my order of 2nd August 2013 must stand both as to setting aside the interim third party debt order and as to costs. Solvay was undoubtedly the successful party and was entitled to its costs. There is no evidence of misconduct by Solvay in the 2013 application which would justify a variation to the costs order.[13] The application to set aside or vary my 2013 order comes far too late. There must be finality in this kind of dispute and Solvay were entitled to expect that the 2nd August 2013 order concluded matters on the 2013 application for a third party debt order. Furthermore, it is not practicable to set aside my order – and resurrect an interim third party debt order made in 2013. Finally, the evidence does not justify the setting aside or variation of my order.

30. In the circumstances, I shall dismiss both the Claimant's application to set aside or vary my order of 2nd August 2013 and its application dated 21st December 2018 to rely on further evidence.

Dated the 2nd October 2019.

[13] At the hearing on the 13th November 2018, Mr. Joseph accepted that the application was limited to setting aside the costs order. At the hearing on the 22nd May 2019 (to adduce fresh evidence) Mr. Wilson reverted to the position that the application to vary extended to both the setting aside of the interim third party debt order and to the costs order.