THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal P094 of 2019
CV 2015-04374

BETWEEN

SUPER INDUSTRIAL SERVICES LIMITED
RAIN FOREST RESORTS LIMITED

APPELLANT

AND

THE NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED

RESPONDENT

Civil Appeal P124 of 2019
CV 2015-04374

BETWEEN

SUPER INDUSTRIAL SERVICES LIMITED
RAIN FOREST RESORTS LIMITED

APPELLANT

AND

THE NATIONAL GAS COMPANY OF TRINIDAD AND TOBAGO LIMITED

RESPONDENT

PANEL: **Jones, J.A.**
Rajkumar, J.A.

APPEARANCES: **Mr. N. Bisnath Instructed by Ms. L. Mendonca for the First-Named Appellant**

Mr. R. L. Maharaj SC and Mr. N. Bisnath holding for Mr. N. Ramnanan for the Second-Named Appellant
Mrs. D. Peake SC and Mr. J. Mootoo for the Respondent

DATE OF DELIVERY: Thursday 16th May, 2019

I have read the judgment of Jones J.A. and I agree.

Rajkumar J.A.
Justice of Appeal

JUDGMENT

Delivered by J Jones, J.A.

1. Before us are two appeals jointly filed by the Appellants, Super Industrial Services Limited (SIS) and Rain Forest Resorts Limited (Rain Forest) against the decisions of the Trial Judge whereby she dismissed two oral applications made by the Appellants. The appeals are both supported by joint submissions filed and signed by Attorneys for both SIS and Rain Forest.

2. These appeals arose in proceedings in which the Respondent, The National Gas Company of Trinidad and Tobago, sought from the Appellants, among other things, declarations that 3 deeds of mortgage and a deed of Debenture (the securities) all made between SIS as the mortgagor and Rain Forest as the mortgagee and were made by SIS to delay, hinder and defraud the Respondent and orders that: (i) the securities each be set aside pursuant to section 78(1) of the Conveyancing and Law of Property Act Chap 56:01; (ii) directing the Registrar General to expunge the said securities from the Index of Deeds pursuant to section 4 of the Registrar General Act Chap 19:03; and (iii) directing the Registrar of Companies to expunge from the Companies Registry all Statements of Charge filed in respect of the said securities.

3. By way of a preliminary point, in both appeals, the Respondent submits that the appeals are incompetent and/or embarrassing, contrary to a rule of practice and should be stayed or struck out on the basis that the

Appellants, represented by two separate legal teams, have purported to file a single appeal without leave of the court where there are no rare or exceptional circumstances which would allow them to be separately represented on the appeal. They rely on two cases in support of this submission: **Lewis v Daily Telegraph (No. 2) 2 QB 601** and **Elphick v Westfield Shopping Centre Management Company Limited [2011] NSWCA 356** and commentary in **Blackstone's Civil Practice 2014 paragraph 21.4**.

4. The issue raised here is not whether the Respondents can file a joint appeal but whether they can on a joint appeal have separate representation. In **Lewis v Daily Telegraph (No.2)** there had been orders consolidating what was originally four actions into one consolidated action. There was separate representation of the plaintiffs. Upon an application for the deconsolidation of the actions into the four separate actions the Court held that "deconsolidation was not appropriate in the instant case where, there being no conflict of interest between the plaintiffs, it was manifestly more convenient to resolve all the issues in dispute (which were similar) in a single trial by a single tribunal".

5. The Court, however, was of the opinion that, the order for consolidation notwithstanding, leave ought not to be granted for the plaintiffs to have separate representation. In the circumstances it determined that the action as it existed was not properly constituted and, since there was no reason for granting such leave, the action could not proceed until a single solicitor was placed on record for the plaintiffs.

6. In treating with the submission that by acquiescing in the position the defendants had waived their right to object to separate representation Pearson LJ stated at page 620:

> "However, that could not be the final answer in the present case, because there is the interest of the court itself in having actions properly constituted, so that regular trials may be had; and here is an irregular situation. I am not saying that it would be impossible ever in any case to have separate representation, wholly or partially, in a consolidated action. It is not very easy to envisage such cases; but they can arise….."

7. In arriving at the decision against separate representation Pearson LJ considered the note in the **Annual Practice (1964) (UK)** under the heading "Change by some of several plaintiffs" and decision in the case of **Wedderburn v Wedderburn (1853) 17 Beav. 158**. Essentially the

position taken in **Wedderburn** was that co-plaintiffs must act together and cannot take inconsistent positions. In that case two of the six co-plaintiffs were determined to act for themselves. In coming to this decision the Court by the judgment of the Master of the Rolls at page 158 stated:

> "Mr. and Mrs. Hawkins may, in concurrence with the other four co-plaintiffs, remove their solicitor, and the other four may allow him to conduct the proceedings for all. But if the plaintiffs do not all concur, Mr. Hawkins cannot take a course of proceeding different and apart from the other plaintiffs, for the consequence would be, that their proceedings might be totally inconsistent. When persons undertake the prosecution of a suit, they must make up their minds whether they will become co-plaintiffs; for if they do, they must act together. I cannot allow one of several plaintiffs to act separately from and inconsistently with the others."

8. **Elphick**, a decision of the Court of Appeal of New South Wales, followed Lewis' case. The Respondent submits that the Elphick decision is useful as it confirms that the principle is also applicable on appeal. The decision however does not examine the rule in the context of appeals but simply applies Lewis. It is of some limited assistance, however, on the question of the grant of leave. In his judgment at paragraph 6 Young JA suggests:

> "The Court will give leave if it considers that balancing questions of costs and the problem that might arise with a lawyer acting for conflicting interest's justice requires one set of lawyers or more than one."

9. In this regard **Blackstone** states:

> "Before the introduction of the CPR, the usual rule where there were joint claimants was that they were not allowed to take inconsistent steps (such as by just one of them making an interim application within the proceedings), they had to act by a common firm of solicitors, and be represented at trial and other hearings by the same counsel (*Re Wright [1895]2 Ch 747; Re Mathews [1905] 2 Ch 460; Lewis v Daily Telegraph Ltd (No. 2) [1964] 2 QB 601).* Pearson LJ in *Lewis v Daily Telegraph Ltd (No. 2)* said that there may be scope for making a special order for separate representation of joint claimants, but indicated a distinct reluctance to do this. The disinclination against separate representation of joint claimants must be stronger under the CPR, given the elements of the overriding objective relating to saving expense and ensuring that

cases are dealt with expeditiously. A defendant faced with separately represented claimants should consider applying for a stay."

10. We accept that the position stated in Blackstone accords with a rule of practice that certainly operated in this jurisdiction prior to the CPR. The commentary in Blackstone does not add to the discussion except to suggest that the position under the CPR may be even stronger given the overriding objective.

11. It is clear however that the rule of practice is not absolute and there may be circumstances in which a court may allow appellants separate representation. In **Lewis** the Court was concerned with the unworkability of separate representation at trial giving as examples problems in the conduct of opening and closing statements, cross-examination of witnesses and the like. In Lewis' case the actions had been consolidated. In those circumstances both plaintiffs would have been entitled to lead evidence. A major concern of the Court was the manner in which the cross-examination of each of the plaintiffs' witnesses would be conducted. In **Wedderburn** the focus was on the inconsistency in the positions taken by the co-plaintiffs.

12. These are not difficulties posed by these appeals. In this jurisdiction a hearing by way of procedural appeal proceeds by way of submissions. There is generally no need for the court to receive evidence and there was certainly none in this case. Neither were the cases of the Appellants inconsistent with each other. Joint submissions were filed and oral submissions made by one Attorney on behalf of both Appellants. The procedure adopted by the Appellants was in these circumstances more efficient with respect to costs and time than filing separate appeals and making separate submissions.

13. There seems to be only two practical difficulties to allowing the Appellants separate representation in these appeals. In response to a question from the Court the Respondent referred to the difficulty posed by rule 64.9 (14) of the CPR. The rule permits each Appellant in a procedural appeal 20 minutes speaking time, inclusive of rejoinder, unless the court permits otherwise. The concern voiced by the Respondent was that, in accordance with the rule, the Appellants would be entitled to twice the speaking time allotted to the Respondent. To treat with that concern we gave directions that ensured equal speaking time to both sides.

14. The remaining difficulty is the need to ensure that the parties are on an equal footing with respect to costs. In these circumstances it will be incumbent on us in making an order for costs on these appeals to ensure that the Respondent is not disadvantaged in costs by the fact of the separate representation of the Appellants.

15. While we accept that it is in the interest of the court itself in having actions properly constituted it would seem to us that on appeal a court is in a much better position to put arrangements in place to accommodate the separate representation of the parties to the appeal. Although strictly speaking this not an occasion in which we are called upon to exercise a discretion given to us by the Rules, in keeping with the spirit and intent of the CPR, consideration ought to be given to the overriding objective in determining whether or not to allow separate representation.

16. Accordingly in considering the question, to treat with the case justly, we ought to consider saving expense, dealing with the appeals expeditiously and bear in mind the need to allot to each case an appropriate share of the court's resources. It is clear that the outcome of these appeals are important to the Appellants and the likelihood is that an order staying or dismissing them without a determination on the merits will result in further steps being taken by the Appellants to hear the appeals on its merits. These steps, whatever form they take, will result in further court time having to be allocated to these appeals. It seems to us that expedition favours hearing the appeal on its merits.

17. In the particular circumstances of this case therefore it is appropriate to allow the appeals to proceed with separate representation by Attorneys for the Appellants. These circumstances are: (a) it accords with the overriding objective; (b) the consistency of the positions taken by the Appellants; (c) that doing so presents no insurmountable procedural difficulties and (d) that there is no obvious prejudice to the other side. In these circumstances the appeal ought not to be stayed or dismissed as a result of the separate representation of the Appellants. Accordingly, if permission is necessary, we grant the permission for such representation.

Procedural Background

18. To fully understand the appeals it is necessary to briefly recite some of the procedural history of this matter. On 23 December 2015 the Respondents commenced the claim against the Appellants. In addition to the declarations and orders the claim sought a freezing order against SIS. On the same date a freezing order was obtained without notice freezing SIS'

assets up to a limit of $180,000,000.00. The Respondents sought to continue this order until the determination of an arbitration to be held in accordance with the terms of the contract between the Respondent and SIS. At the same time the SIS sought to have the order discharged.

19. During the hearing on the continuation/discharge of the freezing order on 31 May 2016 Rain Forest executed releases of the securities. During the course of that hearing the Appellants contended that the claim had been automatically struck out pursuant to rule 27.3 (4) of the CPR. On 10 June 2016 by way of a written judgment (the 2016 judgment) the Judge ruled that the claim had not been automatically struck out and ordered that the freezing order be continued until the determination of the arbitration. The Judge also ordered that the releases be expunged from the records of the Registrar- General.

20. The Appellants appealed the decision of the Judge. The appeal went all the way to the Privy Council who upheld the appeal. By an application filed on 27 March 2017 the Respondent applied to the Judge to have the action reinstated. At the hearing of that application, by way of an oral application, the Appellants sought to have the Judge recuse herself on the grounds of apparent bias on the basis of statements made by her in the 2016 judgment.

21. By a written decision given on the 8 February 2019 (the 2019 judgment) the Judge reinstated the claim, restored the freezing order continued on the 10 June 2016 and dismissed the Appellants' application for her to recuse herself. The Appellants have not appealed this decision. The first Case Management Conference was held on 28 February 2019. On that date the Appellants made the submissions the dismissal of which is the subject of the appeal in P094 of 2019. On 15 March 2019 the Appellants orally made a second submission for the Judge to recuse herself on the ground of apparent bias. On 1st April 2019 the Judge dismissed the application. This dismissal is the subject of the appeal in P124 of 2019.

Appeal No. P 094 of 2019

22. This is an appeal from the decision by the Judge dismissing the oral application of the Appellants made at the first Case Management Conference. It is from the decision of the Judge made pursuant to her case management powers. As was said in an earlier appeal in this action a court of appeal is always loath to interfere with the decisions of a judge made in the exercise of the case management functions given under the CPR: **Rain Forest Resorts Limited and Super Industrial Services Limited v The**

National Gas Company of Trinidad and Tobago Limited Civil Appeal P186 of 2016 at paragraph 2.

23. The position was succinctly stated by Lewinsky LJ in the case of **Broughton v Kop Football Ltd [2012] EWCA Civ. 1743** to be as follows:

> "Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained."

The Appellants must therefore satisfy us that the decision arrived at by the Judge while exercising her case management powers is plainly wrong.

24. By their notice of appeal the Appellants contend that the judge was wrong when she dismissed their oral application that:

> "(i) The Mortgages identified at items (i),(ii),(iii) and (iv) of the relief sought in the Claim Form and referred to as the First, Second, Third and Fourth mortgages respectively and the Debenture identified at item(v) of the relief sought in the Claim Form stood released and/or alternatively;
>
> (ii) The Appellants were willing to consent and/or submit to summary judgment in terms of an Order that the said Mortgages and Debenture be set aside and struck out from the Records of the Registrar General and that the injunction continue until hearing and determine of the arbitration;
>
> (iii) That the Honourable Court dispense with the need for a trial since the matters at (i) or (ii) above gave the Claimant/Respondent (hereinafter referred to as the "Respondent") the substantive relief sought and to proceed to trial solely for the purpose of obtaining the declarations sought at items (i),(ii),(iii),(iv) and (v) in the Claim Form,

> would necessarily involve the Court allocating Court resources and time in an academic and hypothetical exercise which was contrary to the overriding objective and the Court's Case Management powers under the Civil Proceedings Rules 1998."

25. The sole issue for our determination on this appeal is whether the Judge was plainly wrong in the exercise of her case management powers when she refused to grant the application and determined that there be an early hearing of the trial.

26. The Judge found that the offer by the Appellants that they were willing to consent to judgment in terms of the orders sought by the Respondent did not amount to an admission pursuant to Part 14 of the CPR since that rule required the admission be in writing, relevant and relate to facts relied on by the Claimant. According to the Judge at paragraph 21 of the judgment:

> "In light of the Defendants' refusal to give a clear, unequivocal acceptance of the material facts of the Claimant's case which form the basis of their claim that the deeds be set aside – that said mortgage and debentures amounted to sham or fraudulent transactions entered into to delay, hinder, defraud the Claimants, I hold that SIS's and RFRL's concession that the mortgages and debentures are void ab initio [does] not amount to an admission pursuant to CPR 14. In the circumstances, I will not enter a judgment on admission on this concession."

27. The Judge was also of the opinion that the Respondent was entitled to refuse the Appellants' partial admission and insist that the matter proceed to judgment. She concluded that "the overriding objective in this case requires that this claim be dealt with expeditiously, that there are serious issues, including fraud which should properly be determined at trial."

28. The Appellants make two submissions. They submit that the Judge was wrong to refuse to accept its offer to submit to summary judgment since a judgment in those terms would give the Respondent the substantive relief it sought and pursuing the declaratory relief in these circumstances would be academic and hypothetical. According to the Appellants an acceptance of their offer would result in there being no live issue to go to trial.

29. Secondly they submit that in finding that there was no compliance with Part 14 of the CPR the Judge adopted an unduly restrictive approach to their application and failed to appreciate her case management obligations. According to the submission once the real controversy between the parties

had been resolved the Judge was under an express duty under part 26.1(k) "to exclude an issue from determination if it can do substantial justice between the parties on the other issues and determining that issue would serve no useful purpose." They submit that to pursue a trial in these circumstances would be contrary to the spirit and intent of the CPR.

30. The position taken by the Respondent on the other hand is simply that it was not open to the Judge to make the order sought by the Appellant without a determination of that part of the claim that sought declarations that the mortgages and debenture were made to delay, hinder and/or defraud the Respondent. According to the submission a court ought, not readily declaim jurisdiction to make such declarations by summarily bringing the claim to an end and thereby permitting its process to be abused in order to conceal fraudulent conduct. Further, it submits, neither part 14, nor part 15 of the Rules permit the Judge to make the order sought.

31. The questions for our determination therefore are whether the Rules permit the Judge to make the order sought by the Appellants and, if so, ought the Judge to have made such an order.

32. The declarations sought by the Respondent required a determination by the Judge that the securities were made to delay, hinder and or/defraud the Respondent. Pursuant to those declarations the Respondent sought orders setting aside the securities pursuant to **section 78(1) of the Conveyancing and Law of Property Act Ch. 56:01** and expunging them from the record. The declarations therefore formed the basis for the orders sought by the Respondent and of the case against the Appellants.

33. **Section 78 (1) of the Conveyancing and Law of Property Act** states:

> "(1) Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced."

34. We think that the Judge was correct in her determination. The case presented by the Respondent was essentially one of fraud for which one of the reliefs sought was the setting aside of the securities. The parties had joined issue on the question of fraud. The concessions made by the Appellants did not treat with that issue. Nor did the Rules permit the entry of a judgment on admissions or summary judgment in favor of the Respondent in these circumstances. Once the case is looked at in terms of issues rather than the relief sought it is clear that, in the absence of consent

by the parties, the concession made by the Appellants could not result in a determination of the sole issue raised in the case. In the absence of a consent order by the parties therefore there was nothing that permitted the Judge to enter the order requested by the Appellants.

35. The Appellants submit that the Judge adopted an unduly restrictive approach to the application when she determined that it could not be granted on the basis that there was no compliance with Part 14 of the CPR. Before the Judge the case presented by the Appellants was that the Judge ought to accept their concessions with respect to the securities as admissions made by them. The Judge was of the opinion that the Appellants' position was that it was prepared to consent to a judgment on admissions. She cannot be faulted on her conclusion in this regard. From the transcripts it is clear that the Judge struggled to understand the application before her restating it on more than one occasion in terms of admissions to be made by the Appellants. This is understandable as the application seemed to be developing as the arguments were being presented.

36. The following interchange between the Judge and attorney for SIS towards the end of the hearing aptly summarizes the Judge's position as follows:

> "Madam Justice Charles: Thank you, Mr. Bisnath. Ms. Peake – well before I go to Ms. Peake, one question please, Mr. Bisnath. Now, you say that the Defendants, including the Second Defendant, would be willing to admit – judgment on admission that the mortgages be set aside and so on.
> Mr. Bisnath: Yes, M'Lady."

37. Part 14 of the CPR deals with judgments on admissions. Insofar as the Judge determined that the Part required the admission to relate to facts she was correct. The Part requires that there be an admission of facts rather than an admission to an entitlement to a relief sought. Rule 14.1 identifies the scope of an admission entitling a claimant to judgment. It states:

> "(1) A party may admit the truth of the whole or any part of any other party's case.
> (2) He may do this by giving notice in writing (such as in a statement of case) before or after the issue of proceedings.
> (3) A defendant may admit the whole or part of a claim for money by entering an appearance containing the admission."

38. This was not a claim for money. It was a claim that alleged that the securities were made with the intention to defraud the Respondent and that this entitled the Respondents to the relief claimed. To be entitled to a judgment under the rule there must have been an admission of the truth of the whole or part of the other party's case. The admission therefore could only relate to facts pleaded by the other party.

39. Insofar as the Judge determined that the absence of any acceptance by the Appellants of the material facts giving rise to the relief prevented them from relying on Part 14 of the CPR she was correct. The requirement by the rule that there be an admission of truth clearly refers to a pleaded fact not the relief sought as a result of those facts.

40. Insofar as the submissions of the Appellants before us suggest that the application is based on their obtaining a summary judgment it is equally unmeritorious. Part 15 of the CPR deals with summary judgment. **Rules 15.1 and 15.2** deal with the scope of the rule and states:

> "15.1 This Part sets out a procedure by which the court may decide a claim or part of a claim without a trial.
>
> 15.2 The court may give summary judgment on the whole or part of a claim or on a particular issue if it considers that –
>
> (a) on an application by the claimant, the defendant has no realistic prospect of success on his defence to the claim, part of claim or issue; or
>
> (b) on an application by the defendant, the claimant has no realistic prospect of success on the claim, part of claim or issue."

With respect to a defendant Rule 15 applies only where the defendant alleges that the claimant has no realistic prospect of success. This is not the position here.

41. Further the powers of the court under the rule are identified in rule 15.6

> "(1) The court may give summary judgment on any issue of fact or law whether or not such judgment will bring the proceedings to an end.
>
> (2) Where the proceedings are not brought to an end the court must also treat the hearing as a case management conference."

Part 15 of the CPR clearly does not apply in the circumstances of a concession by a defendant with respect to the relief sought by a claimant.

42. The Appellants' case is more firmly founded on the exercise by the Judge of her case management powers pursuant to Part 26 of the CPR. Relying on the statements made by Jamadar JA in the case of **EMBD v Saiscon Civil Appeal S104 of 2016** the Appellants submit that the Judge lost sight of her fundamental case management obligations. The Appellants submit that their application made it clear that the real controversy between the parties had been resolved and that the matter could be disposed of summarily at the case management stage without a full investigation of a trial. According to the Appellants this accords with the Judge's express duty under Part 26.1(k). In any event, they submit, if the Judge felt that the requirements of Part 14.1 were necessary then the Judge was under an obligation to give directions pursuant to Rule 26.1(w) for compliance with Part 14 or to secure an undertaking from the Appellants in respect of compliance with Part 14.

43. The reference to Part 26.1(k) of the rule is clearly a mistake. The rule referred to by the Appellants is **Rule 26:1 (l)**. The rule states that a judge may:

> "exclude an issue from determination if it can do substantive justice between the parties on the other issues and determining it would therefore serve no worthwhile purpose."

44. In the instant case there was only one issue for the Court's determination: whether the securities were made for a fraudulent purpose. There were no other issues for the Court to determine. This was the real controversy between the parties. The transcripts reveal a clear refusal by the Appellants to admit that issue. The real controversy between the parties therefore had not been resolved. For this a trial was necessary. Part 26.1 (l) clearly did not apply.

45. The Appellants also rely on Part 26.1(w) submitting that the Judge ought to have used this rule to give directions pursuant to Part 14. **Part 26.1 (w)** permits the court to:

> "take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective."

46. In accordance with our determination that Part 14 does not apply in the absence of a factual admission directions for compliance with Part 14 or to secure an undertaking from the Appellant with respect of compliance with Part 14 does not arise. The rule however allowed the Judge to make the order for an expeditious hearing and for directions to be given for the trial. This accorded with the overriding objective.

47. We find therefore that the Rules did not permit the Judge to accept the concessions made by the Appellants and on the basis of that concession enter judgment for the Respondent. For the Judge to do so the Respondent needed to consent to the position taken by the Appellants. There was no such consent. Given this position the question of the validity of a trial seeking the declaratory relief sought by the Respondent does not arise.

48. This accords with the observations by the Privy Council in the earlier appeal to it in this action:

> "this was by no means a case in which the only relief being sought by NGC was interim relief, although that was true of the freezing order sought in aid of the arbitration. Relief was also sought in relation to the mortgages and debenture by way of declaration, and setting aside. Those plainly required a trial, unless dealt with by admission or summary judgment. Furthermore, the interim injunction against RFRL was specifically sought and granted over until trial. This was therefore a case in which, barring settlement or summary determination, a trial was going to be a necessity."

Per Lord Briggs in SIS and Another v NGC [2018] UKPC 17 at paragraph 38

49. In these circumstances the Judge was not wrong in refusing the Appellants' application and in concluding that the overriding objective required that directions be given for trial and that a date be set as soon as possible for the said trial. Accordingly the appeal in 094 of 2019 is dismissed and the decision of the Judge affirmed.

Appeal 124 of 2019

50. This is an appeal from the decision of the Judge dismissing the Appellants' oral application made on 15 March 2019 for her to recuse herself on the basis of her apparent bias. The Appellants' case is that this bias is evidenced by statements made by the Judge in her 2016 judgment in which she continued the freezing order until the determination of the Arbitration.

51. The Appellants identify the issue on the appeal as being whether the Judge ought to have recused herself on the ground of apparent bias on the basis that she made final and/or conclusive findings of fact on the very issues which she reserved to be dealt with as substantive issues at the trial, that is, whether the deeds were calculated to delay hinder or defraud the Respondents.

52. They submit that a fair minded and informed observer would conclude that the Judge having made conclusive findings of fact in relation to the declarations sought, being the only issue for determination, has pre-determined and/or pre-judged the matter and has closed her mind in relation to the issues for trial and that her expressed findings at the interlocutory stage has crossed the permissible bounds of provisional findings. In this regard they rely on the statements made by the Judge at paragraphs 67, 68 and 69 of the 2016 judgment.

53. The Respondent, on the other hand, submits that the appeal must fail because:

(i) by their conduct the Appellants have waived their right to object to the Judge continuing to preside over the matter;

(ii) of delay by the Appellants in making the application; and

(iii) the Appellants are estopped from raising the issue as it had already been determined by the judge in her 2019 judgment from which there has been no appeal.

In any event the Respondent submits that there is no proper basis upon which it may be said that a fair- minded observer would conclude that there was a real possibility that the Judge was biased.

54. The Appellants' response to the submissions at (i) (ii) and (iii) is simply that they do not apply. They submit that waiver does not apply because at the time when the first application for her recusal was made it concerned an interlocutory application, that is, whether the Judge should recuse herself from determining whether she should deal with the application for an extension of time and relief from sanctions. They submit that delay would not apply because the only time that it would have become relevant to make the application was when the Court gave directions for the trial since it was only if the case was tried by the Judge that a case for apparent bias would arise. Finally they submit that estoppel would not arise because the earlier determination was on an interlocutory application.

55. The factual position relied upon by the Respondents in support of their submissions has not been denied by the Appellants. These facts are:

"(i) subsequent to the delivery of the 2016 judgment the Appellants appeared before the Judge on a number of occasions without making objection to the Judge hearing the case;

(ii) despite filing four earlier notices of appeal alleging actual bias on the part of the Judge no submissions were ever made to the Court of Appeal on the point;

(iii) the first time that objection was raised by the Appellants to the Judge hearing the case was in their joint written submissions filed by them on 22nd October 2018;

(iv) their application for the Judge's recusal (the first application) was in respect of the same statements made in the 2016 judgment which are the subject of the application before us on this appeal; and

(v) in the 2019 judgment the Judge dealt with the allegations of apparent bias raised in the first application and refused the Appellants application for her recusal. The Appellants have not appealed this judgment."

56. In support of its waiver point the Respondent relies on the position as stated in **De Smith's Judicial Review 8th Ed**. and the cases of **Locabail (UK) Ltd v Bayfield Properties Ltd. [2000] QB 451** and **JSC BTA Bank v Ablyazov and Ors [2013] 1 WLR 1845** as authority for the submission that any right to seek the recusal of the Judge on the basis of apparent bias was waived by the Appellants.

57. The passage in **De Smith** relied on by the Respondent is found at **paragraph 10-066** and states:

> "A party may waive his objections to a decision-maker who would otherwise be disqualified on the ground of bias. Objection is generally deemed to have been waived if the party or his legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. But there is no presumption of waiver if the disqualified adjudicator failed to make a complete disclosure of his interest, or if the party affected was prevented by surprise from taking the objection at the appropriate time or if he was unrepresented by counsel and did not know of his right to object at the time. …….. In order for waiver to arise, there must be both awareness of the right to challenge the adjudicator's decision and a

clear and unequivocal act, which, with the required knowledge, amounts to waiver of the right."

58. The position as stated in De Smith accords with the positions taken in the cases relied on by the Respondent. In **Locabail,** treating with the question of waiver, in a joint judgment the Court comprising Lord Bingham CJ; Lord Woolf MR and Sir Richard Scott VC at **page 475 letters C-D** stated:

> "…..a party with an irresistible right to object to a judge hearing or continuing to hear a case may, as in other cases to which we refer below, waive his right to object. It is however clear that any waiver must be clear and unequivocal and made with full knowledge of all the facts relevant to the decision whether to waive or not."

59. And later in the judgment at page **481 letter B**:

> "If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so."

60. **Locabail** dealt with permission to appeal in five cases where the issue raised was bias on the part of the judicial officer. In two of the cases[1] appropriate disclosure had been made by the judicial officer. No objection was taken, the hearing continued and judgment reserved. The judgment, which was delivered subsequently, was not in the applicant's favor. In all some 5 months had passed from the time that the applicant was first made aware of the grounds for the recusal and her application. Leave to appeal was refused. The Court determined that it was not open to the applicant to wait and see how her claims would turn out before pursuing her complaint of bias. She "wanted to have the best of both worlds. The law will not allow her to so do."

61. The **JSC BTA Bank** case is based on similar facts. Here the first instance judge found the defendant to be in contempt of court and of lying while being cross-examined. The judge's decision was upheld on appeal. Eight months afterwards and two weeks after engaging in a pre-trial review

[1] Locabail(UK) ltd v Bayfeild Properties Ltd and another and Locobail(UK) Ltd and another v Waldorf Investment Corporation and others.

before the judge the defendant applied to the judge for him to recuse himself on the basis of apparent bias.

62. On the issue of waiver the Court held:

> "given that the first defendant was an intelligent man and an experienced litigant with access to the best of legal advice, and in the absence of any explanation of the lateness of his application for recusal, the court was entitled to infer that he had known at all relevant times of his right to object to the judge on the grounds of apparent bias; that, therefore, the first defendant's failure to object to the judge as the judge of trial, at all times from the delivery of the committal judgments, and in any event at the pre-trial hearing, was an unequivocal, informed and voluntary waiver of any right he had to do so; that such a waiver was a form of election and so binding from the moment at which it was made; and that, accordingly, the first defendant had no right to apply for the judge to recuse himself."

63. According to Rix LJ at paragraphs 91 and 92:

> "91. Mr Bear submits that there is no evidence that Mr Ablyazov knew of his right to object to the judge continuing as the judge of trial. In my judgment, however, the court is entitled to infer, as I do, that he did. Mr Ablyazov has given no explanation of the lateness of his application to the judge to recuse himself. Although there is of course no obligation on Mr Ablyazov to disclose privileged information, the court is entitled, and obliged, to form its own view on the question of knowledge. Otherwise no case of waiver of apparent bias could ever arise for recusal of a judge, or for setting aside judgment, on the ground of apparent bias, without an express concession of knowledge on the part of the applicant of the right to object. An inference of knowledge may not be made where the ground of objection is obscure or uncertain (*Millar v Dickson [2002] I WLR 1615),* or where the applicant is without legal advice and under other disabilities: McGowan v B [2011] I WLR 3121. However, Mr Ablyazov is an intelligent man, an experienced litigant, and has always had access to the best of legal advice; and it is Mr Ablyazov's own case that the unsuitability of the judge on the ground of apparent bias was known to him at latest at the time of the February judgments. In these circumstances, and in the absence of any explanation of the lateness of the application (other than Mr Matthews's submission to the judge that the September judgment on the July applications was a form of straw that broke the camel's

back, an explanation that was not foreshadowed in the evidence or skeleton argument before the judge and was rightly rejected by him), I would infer that Mr Ablyazov knew at all relevant times of his right to object to a judge who on his own case had demonstrated the appearance of bias, and that the actual timing of the application to recuse was a tactical decision, designed to derail the trial.

92. I would therefore hold that the failure of Mr Ablyazov to object, on the basis of his own grounds for alleging apparent bias, to the judge as the judge of trial, at all times from the delivery of the February judgments, and in any event at the pre-trial hearing of 2 October, was an unequivocal, informed and voluntary waiver of any right be had to do so. As such it is sanctioned by domestic, Strasbourg and international jurisprudence."

64. The basis of the Respondent's submission is that despite the written judgment which was delivered on the 10 June 2016 the Appellants (i) failed on 21 June 2016 to raise the issue before the Judge;(ii) despite it being a ground of appeal on the 2016 judgment failed to argue the ground of appeal; (iii) failed to raise the issue in their written submissions filed on 24 June 2016 before the Judge but rather on that date made extensive submissions and participated in settling directions which were incorporated into the Judge's order for the filing of written submissions by them; (iii) failed to appeal against the finding of the Judge refusing their application for her to recuse herself in the 2019 judgment; and (iv) on 28 February 2019 and 11 March 2019 orally made applications before the judge for orders the refusal of which are the subject of the appeal in 094 of 2019.

65. The statement in De Smith and the cases referred to above accurately reflects the law on this issue. According to De Smith objection is generally deemed to be waived if the party or its legal representative knew of the disqualification and acquiesced in the proceedings by failing to take objection at the earliest practicable opportunity. It cannot be said that the Appellants were not aware of the contents of the 2016 judgment or the alleged impact of the statements since 2016. Neither can they be said to have been taken by surprise by the statements so as not to be in a position to make an application for the Judge to recuse herself. In addition the Appellants were both represented by extremely competent counsel.

66. By not pursuing an appeal in the earlier application, participating in further hearings and bringing this application almost 3 years after the statements were made by the Judge the Appellants have acquiesced in the proceedings

and have waived the right to make objection. The position taken by the Appellants that the earlier application for the judge's recusal was on an interlocutory application does not answer the waiver point. The nature of the application engaging the court's attention at the time makes no difference to the determination of recusal by a judge and, once made, is not limited to a specific application.

67. Further to make this application only after the decision the subject matter of their appeal in 094 of 2019 was made against them certainly suggests that the application for the judge's recusal may have been a tactical decision much in the vein of the JSC BTA case. To allow the Appellants to do so in these circumstances is unjust to the Respondent in terms of wasted time and costs and, to adopt the words used in Locabail, would "undermine both the reality and appearance of justice."

68. With respect to delay the Respondent submits that the principle to be extracted from the cases is that a party who wishes to take objection on the ground of apparent bias must do so promptly and its ability to do so may be lost by reason of excessive delay. In support of this submission the Respondent relies on the case of **Baker v Quantum Clothing Group and others[2009] EWCA Civ. 566** and the statement made by Jacob LJ in delivering the joint judgment of the Court at **paragraph 36** as follows:

> "Finally, we think that this objection simply comes too late. It is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable."

69. No proper reason has been adduced by the Appellants accounting for the delay in making this application. They submit that the only time it became relevant to make the application was when the Judge gave directions for trial. We do not agree. Bias, apparent or actual, does not only affect the trial of the action but infects every order, direction and determination made by a judge. The time to make the application was at the earliest practicable opportunity after the delivery of the 2016 judgment. The Appellants in this case were clearly guilty of delay. In this regard we agree with the statement in Locabail at paragraph 25 that:

> "The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

70. Almost three years had passed from making of the statements. Even if the statements made by the judge would have had the effect of a fair-minded observer concluding that there was a real possibility that the Judge was biased too much time had passed between the making of the statements
71. to recuse viable.

72. Finally the Respondent submits that the Appellants are estopped from embarking on a rehearing of their application for the Judge's recusal since that issue had been determined by the 2019 decision from which there has been no appeal. They submit that the issue having been finally determined the Appellants are precluded from raising it again.

73. **Halsbury's Laws of England 5th Edition Vol 12A** states at **paragraph 1623:**

> "Issue estoppel means that a party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second claims or actions are different, the finding on a matter which came directly in issue in the first claim or action, provided it is embodied in a judicial decision that is final, is conclusive in a second claim or action between the same parties and their privies. Issue estoppel will only arise where it is the same issue which a party is seeking to re-litigate. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law."

74. The issue for determination before the Judge on the recusal application was the same issue raised in the earlier application. In both applications the Appellants submitted that the statements of the Judge made at paragraphs 67, 68 and 69 to the effect that the mortgages and debentures were sham transactions made with the intent to defraud the Respondent would lead the fair –minded and informed observer, having considered the facts, to conclude that there was a real possibility that the Judge was biased. The Judge dismissed the earlier application. The issue therefore had already been litigated and "solemnly and with certainty determined" against the Appellants. The only way to challenge the decision was to appeal it and the Appellants failed to do so. The decision, not having been appealed, was final. In the circumstances the Appellants are estopped from raising this issue.

75. The Appellants submit that the fact that the earlier application arose on an interlocutory application made a difference. We do not agree. "Issue estoppel will apply to the determination of preliminary issues, or even interlocutory matters, decided earlier in the same action between the parties": per Coulson J. in **Seele Austria Gmbri Co. v Tolio Marine Europe Insurance Ltd. [2009] EWHC 255.** In any event although the issue may have been raised on an interlocutory application it was a final decision which, once determined affected the whole action. In these circumstances the issue having been finally determined between the parties it cannot be reopened unless special circumstances are adduced. The Appellants has not adduced any special circumstances.

76. We find therefore that on the basis of waiver, delay and issue estoppel it is not competent for the Appellants to pursue their application for the Judge to recuse herself.

77. Accordingly the appeals are dismissed and the decisions of the Judge dismissing the Appellants' the applications affirmed.

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Judith Jones
Justice of Appeal