Judgments

JSC BTA Bank v Ablyazov (Recusal)

Practice – Pre-trial or post-judgment relief – Bank bringing claim against various defendants, including applicant (A) for fraud – Trial of claim being imminent – Trial judge also being involved in previous interlocutory applications concerning case – A applying for order that trial judge recuse himself – Whether application to be granted

Natural justice – Judge – Bias – Apparent bias – Bank bringing claim against various defendants, including applicant (A) for fraud – Trial of claim being imminent – Trial judge also being involved in previous interlocutory applications concerning case – A applying for order that trial judge recuse himself – Whether application to be granted

[2012] EWCA Civ 1551, (Transcript: Wordwave International Ltd (A Merrill Communications Company))

CA, CIVIL DIVISION

MAURICE KAY V-P, RIX, TOULSON LJJ

6, 12, 28 NOVEMBER 2012

28 NOVEMBER 2012

C Béar QC and J Sheehan for the Appellant

S Smith QC, T Akkouh and E Gillett for the Respondent

Addleshaw Goddard LLP; Hogan Lovells International LLP

RIX LJ:

[1] This appeal (See para 94 below.) is about the refusal of a judge to recuse himself as the nominated judge of trial in circumstances where he has had to hear, prior to trial, an application to commit one of the parties for contempt of court, and has found a number of contempts proven, leading to a sentence of 22 months' imprisonment. The question raised is whether in doing so the judge put himself out of the running, so to speak, as the judge of trial on the basis that, by reason of what is called pre-judgment, there would appear to the fair-minded and informed observer a real possibility of bias. This is the doctrine of apparent bias: see *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465. No one is suggesting that the judge is actually biased.

[2] The litigant and Appellant is Mr Mukhtar **Ablyazov** who until early in 2009 had been the chairman of the Respondent bank, JSC BTA Bank (the "bank"), a major bank in Kazakhstan but now supported by its creditors. The bank has alleged that Mr **Ablyazov** has defrauded the bank of almost US$5 billion, and that he has done so by entering into specious but fraudulent transactions, such as loan transactions, with companies in which it is said that he was ultimately interested. Mr **Ablyazov** for his part asserts that the claims are an unjustified attempt by the President of Kazakhstan to destroy him as a political opponent and as a leading figure in Kazakhstan's democratic opposition.

[3] The bank commenced its litigation by obtaining a worldwide freezing order against Mr **Ablyazov** and others. Since then the judge of the commercial court who has had the predominant role in the conduct of this litigation has been Teare J. The judge has had unrivalled experience of this litigation and has been called upon to produce many judgments in it (Mr **Ablyazov**'s solicitor has counted 26 such judgments). Pursuant to the original freezing order Mr **Ablyazov** has been required to make disclosure of all his assets and to refrain from dealing with them. Mr **Ablyazov** has made partial disclosure of assets, but the value of that disclosure is not very great in comparison with the value of the allegedly purloined billions. To assist in the uncovering of Mr **Ablyazov**'s assets the judge has appointed receivers on the basis that Mr **Ablyazov** could not be trusted to comply with the court's orders: [2010] EWHC 1779 (Comm), [2010] EWCA Civ 1141.

[4] In March 2011 the judge dealt with a lengthy case management conference. As a result three of the eight cases proceeding in the commercial court were selected for trial and shortly thereafter a date for trial before the judge was fixed to commence in November 2012. It is the practice in complex cases in the commercial court for there to be continuity of a designated judge for both interlocutory matters and final trial: see para D4 ("Designated judge") of the Admiralty and Commercial Courts Guide at p 319 of volume 2 of Civil Procedure 2012.

THE CONTEMPT PROCEEDINGS

[5] On 16 May 2011 the bank applied to commit Mr **Ablyazov** for contempt of court. A series of 35 contempts were alleged but as a matter of case management the judge limited the application to three allegations, one each under the separate headings of (a) non-disclosure of assets, (b) lying during cross-examination, and (c) dealing with assets: see [2011] EWHC 1522 (Comm), [2011] EWCA Civ 1386. The non-disclosure allegation concerned Bubris Investments Ltd ("Bubris", a BVI company); the lying allegation concerned companies which owned a number of English properties, and also the so-called "Sch C" companies, viz FM Co Ltd (a Marshall Islands company) and Bergtrans Contracts Corp and Carsonway Ltd (both BVI companies); the dealing allegation concerned assets held by Stantis Ltd (a Cypriot company) which were assigned to Nitnelav Holdings Ltd. The judge found these allegations proven, on the criminal standard of proof, so that he was sure of them. In effect he found that all these companies were owned by Mr **Ablyazov**. He found, however, that one of the English properties concerned, 79 Elizabeth Court, and the company which owned its shares, were not proven to be Mr **Ablyazov**'s.

[6] The judge gave three judgments in the committal application: one dealing with the alleged contempts of court, one dealing with sentence, and one dealing with the further consequences for the litigation as a whole, the so-called "unless" judgment. The contempt judgment was handed down on 16 February 2012 ([2012]

EWHC 237 (Comm)) and sentence was dealt with by a further extempore judgment given that same day. The unless judgment was given on 29 February 2012 ([2012] EWHC 455 (Comm)).

[7] In his contempt judgment the judge concluded that over the relatively narrow range of matters investigated, Mr **Ablyazov** had failed to disclose assets, had lied to the court, and had dealt with his assets in breach of the freezing order: and that in defending the committal application had relied on false witnesses and forged documents. The judge said (at para 80):

> ". . . notwithstanding the clarity and firmness with which Mr **Ablyazov** gave much, though not all, of his evidence I concluded that I could place little weight on his denials and could only accept what he said if it was supported by reliable contemporary evidence."

[8] In his unless judgment the judge debarred Mr **Ablyazov** from defending the claims made against him in eight associated commercial court actions and struck out his defences in them *unless* within a stated period he both surrendered to custody and made proper disclosure of all his assets and dealings with them. The order that Mr **Ablyazov** surrender to custody had been made necessary by his failure to turn up for judgment on 16 February 2012 (although he had said through his counsel that he would). He became a fugitive and had disappeared. The stated period for surrender was until 9 March 2012, and for disclosure until 14 March 2012, save that the sanctions for non-compliance would not take effect until seven days after any dismissal of any appeal.

[9] Mr **Ablyazov** did appeal, from all three judgments, and his appeal came before us in July 2012. On 25 July 2012 we informed the parties that the appeals had failed, for reasons to be reserved, save that it had not yet been decided whether the order for surrender to custody should also have been made the subject of an unless order. Our formal order was also reserved.

[10] On 6 November 2012 our judgments were handed down, having been previously sent out in draft to the parties about a week earlier: [2012] EWCA Civ 1411. We dismissed all appeals (the appeal against the attachment of an "unless order" to the order that Mr **Ablyazov** surrender himself to custody was decided by a majority, otherwise we ruled unanimously). In dismissing the committal appeal, I had occasion to say this:

> "100 As this series of coincidences, misfortunes, errors, misunderstandings and inexplicable developments multiply, the court is entitled to stand back and ask whether there is in truth a defence or defences as alleged [to the committal allegations], even if no burden rests on Mr **Ablyazov**, and the burden remains on the bank, or whether there is at any rate the realistic possibility of such, or on the other hand whether the court is being deceived. The trial judge decided that it was being deceived by witnesses without credibility. It is not for this court to say that he was wrong without strong grounds for doing so, grounds which have simply not been formulated."

[11] In dealing with the appeal against sentence, I went on to say:

> "106 . . . Moreover, Mr **Ablyazov**'s contempts have been multiple, persistent and protracted, have embraced the offences of non-disclosure, lying in cross-examination, and dealing with assets, and have been supported by the suborning of false testimony and the forging of documents."

[12] Finally, in dealing with the appeal against the judge's "unless" order, I said this:

> “189 . . . It cannot be just, fair, or proportionate, to permit a contemnor to avoid the consequences of his contempt by the expedient of disappearing from sight (but not from the ability to communicate with his lawyers). As the judge said, it is a matter of choice for Mr **Ablyazov**. He may have his trial on the merits, if he complies with the court's orders. The court has denied him nothing except his ability to ignore the court's orders indefinitely. On the contrary, the order was made in an attempt to persuade Mr **Ablyazov** to comply with the freezing order 'and so ensure a fair trial in the full sense of that phrase' (at 76).”

[13] It was an essential part of Mr **Ablyazov**'s appeal to this court that, even if, contrary to his primary contention, any findings of contempt survived, nevertheless the unless orders should be abrogated so that he could be permitted to continue to defend the proceedings against him at trial, if necessary from the unknown location to which he had taken refuge and assisted by means of a video link. A similar dispensation had been accorded to his brother-in-law, Mr Syrym Shalabayev, who had also become a fugitive from a committal sentence for contempt of court in proceedings against him, but who had been allowed by the judge to give evidence in support of Mr **Ablyazov** in the latter's contempt proceedings, and to be cross-examined, by video link, from an unknown hiding place. It was therefore inherent in Mr **Ablyazov**'s contempt of court appeals that he wished the trial, then fixed to commence before the judge in November 2012, to take place with his participation as a Defendant.

[14] Whether, however, Mr **Ablyazov** intended to seek to maintain his participation if he lost his appeals totally, so that he could only continue to defend the claims against him if he surrendered to custody, made proper disclosure, and sought such relief against sanctions as he might be able to obtain, remained unrevealed; but must be highly unlikely.

THE RECUSAL APPLICATION

[15] Following the judge's judgments on the committal application in February 2012 and again in the interim between disclosure of the result of Mr **Ablyazov**'s appeal against those judgments and the publication of this court's full reasons for its decision, Mr **Ablyazov** continued to participate in proceedings in the commercial court. In particular a pre-trial review fixed originally for 13 June 2012 was adjourned with his consent and refixed for 2 October 2012. On 26-30 July 2012 the judge heard applications made by both the bank and Mr **Ablyazov**. The bank sought a declaration that Mr **Ablyazov** had acted in further default of the freezing order by dealing with his assets, and also sought an order that he reverse certain pledges he had made over valuable properties. Mr **Ablyazov** requested the court to grant permission retrospectively for such pledges, on the basis that even if made in breach of the letter of the freezing order, they were within its spirit. The judge remarked in his judgment currently under appeal (at para 21):

> “Although the Long Vacation was about to start with much pre-trial work to be done and it was known that a pre-trial review had been fixed for 2 October 2012 no suggestion was then made that Mr **Ablyazov** intended to make an application that I should recuse myself.”

To which I would add: no application was made by Mr **Ablyazov** that the judge should recuse himself.

[16] On 2 and 3 October 2012 the pre-trial review took place. (In the meantime the judge had given judgment on 21 September 2012 on the applications heard at the end of July.) A detailed timetable was discussed. For part of that hearing Mr Charles Béar QC attended on behalf of Mr **Ablyazov**. He provided the judge with a skeleton argument dated 28 September 2012 in which he stated that Mr **Ablyazov** would not be participating in the pre-trial process because he would not be participating in the trial. This was because, subject to any appeal to the Supreme Court from this court's decision on the contempt of court appeals, “It follows that MA's defence will be struck out, subject to any potential further appeal” (para 2 of Mr Béar's skeleton argument). If there were any such appeal, however, Mr **Ablyazov** would seek an adjournment of the

trial. There was again no suggestion that Mr **Ablyazov** intended to make an application that the judge should recuse himself. No such application was in fact made. The judge was due to begin his pre-trial reading on 29 October.

[17] The recusal application was made only on 19 October 2012. Mr **Ablyazov**'s solicitor made a witness statement, but it contained no evidence in explanation of the lateness of the application. The judge heard the application on 25 and 26 October. He asked Mr Duncan Matthews QC, who was appearing for Mr **Ablyazov**, if he wished to say anything in explanation of the delay. He submitted that a decision to ask a judge to recuse himself was made with extreme caution, that the last piece of the jigsaw was the judge's decision of 21 September 2012, and that Mr **Ablyazov** required a reasonable time to make up his mind. The judge recorded in his judgment that there was nothing about his rulings on 21 September that could have affected the matter and that the submission that the application depended on the outcome of those rulings lacked realism.

THE JUDGE'S JUDGMENT

[18] The judge gave two reasons for refusing to recuse himself. First, there had been a waiver of any right to apply for his recusal. Secondly, there was in any event no real possibility of any bias. Although the question of waiver was considered first, and the judge introduced the question of apparent bias by saying that it was strictly unnecessary to deal with it, he did deal with it fully, rejected it in terms, and concluded by making it clear that he rejected the application on both limbs. He said:

> "55 In the result, having considered Mr Matthews' submissions, I am not persuaded that the fair-minded observer would conclude that there was a real possibility that I would be biased when deciding the issues at trial in the sense of being influenced against Mr **Ablyazov** for reasons extraneous to the legal or factual merits of the case. I naturally accept Mummery LJ's wise advice (In *AWG Group v Morrison* [2006] 1 WLR 1163 at 9: 'prudence naturally leans on the side of being safe rather than sorry'.) that it is better to be safe than sorry but I have not been persuaded that there is even a real doubt about as to whether the fair-minded observer would conclude that there is a real possibility that I would be biased when deciding the issues at trial.
>
> 56 In any event, had I concluded that there was either a real possibility that I would be biased, or a real doubt as to whether I might be biased, I would have been compelled to dismiss the application that I should recuse myself on the grounds that Mr **Ablyazov** had waived his right to make such an application."

[19] As for the question of apparent bias, the judge expressly considered the following authorities: *Livesey v New South Wales Bar Association* (1983) 151 CLR 288; *Bahai v Rashidian* [1985] 3 All ER 385, [1985] 1 WLR 1337, [1985] NLJ Rep 1033; *Symphony Group v Hodgson* [1994] QB 179, [1993] 4 All ER 143, [1993] 3 WLR 830; *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, [2000] 1 All ER 65, [2000] IRLR 96; *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700, [2001] ICR 564; *Sengupta v Holmes* [2002] EWCA Civ 1104; *Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357, [2002] 1 All ER 465; *Lawal v Northern Spirit* [2003] HRLR 29; *Phillips v Symes (No 3)* [2005] EWCA Civ 533, [2005] 1 WLR 2986; *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163; *Helow v Secretary of State for the Home Department* [2008] UKHL 62, [2009] 2 All ER 1031, [2008] 1 WLR 2416, and *Secretary of State for the Home Department v AF (No 2)* [2008] EWCA Civ 117, [2008] 1 WLR 2528. He also considered three authorities in the European Court of Human Rights, namely *Hauschildt v Denmark* (1989) 12 EHRR 266; *Thomann v Switzerland* [1996] ECHR 17602/91, and *Morel v France* (2000) 33 EHRR 47. He referred to what has been said in the authorities about the tension between the principles that justice must be seen to be done and that litigants must not be allowed to pick their own judges or disrupt proceedings unfairly; and about the role of the fair-minded and informed observer. He found assistance in the considerations that findings against a litigant do not by themselves give rise to an appearance of bias, but that the influence

of matters “extraneous to the legal or factual merits of the case” (see *AF (No 2)* at para 53) might do. He asked himself by reference to the possibility of an “overlap” between issues previously considered and issues yet to be considered (cf *Hauschildt* and *Sengupta)* to what if any extent there was an overlap between matters that he had already considered in the interlocutory and in particular in the committal proceedings and matters that he would have to decide at trial: and he concluded that the overlap was a narrow one.

[20] On this appeal, it has not been submitted that the judge applied the wrong principles or overlooked any relevant principle, but rather that his application of the principles to the facts of the case led to erroneous conclusions. Thus Mr **Ablyazov**'s grounds of appeal on the subject of apparent bias read as follows:

> “2 The Judge was wrong to find that there was no lack of (apparent) impartiality. In particular:
>
> (a) Having correctly found that the issues at committal and at trial overlapped, the Judge was wrong in principle to rely on the potential for differences in the evidence arising on those issues . . . .
>
> (b) The Judge was wrong in principle to consider that the greater range of issues to be determined at trial, compared with the issues determined on committal, was a factor negativing apparent prejudgment . . . .
>
> (c) The Judge was wrong to place any or any significant reliance on the absence of any allegation of unfairness affecting the Judge's determination of previous applications and on the fact that MA had given no indication of a complaint up to and including the Pre-Trial Review on 2 October 2012 . . .
>
> (d) The Judge was wrong to find that the possibility of pre-judgment in respect of MA's credibility was academic in circumstances where he is not giving evidence at trial . . . .”

The grounds referred in this passage to only three paragraphs of the judge's judgment, viz 37, 38 and 45.

[21] As for the material in grounds 2(a) and (b), the judge said this:

> “37 It is likely that the reasoning that I followed to reach decisions as to Mr **Ablyazov**'s ownership of certain companies on the contempt application will be urged upon me by the Bank with regard to other companies which feature in the actions but which did not feature in the contempt application. However, the fair-minded observer would also bear in mind the following matters. First, whether or not a particular company was owned by Mr **Ablyazov** pre-2009 will depend upon whether an inference to that effect can be drawn from the circumstantial evidence available in relation to that company. The evidence in relation to each company may not be the same; cf the evidence in relation to Bubris, the English real estate and the Schedule C companies which I had to consider in the contempt application . . . Indeed, it was because the evidence differed in relation to each asset that I was not persuaded that Mr **Ablyazov** owned Rocklane Properties Ltd, the owner of the flat in Elizabeth Court. Second, the issues which I determined on the contempt application were much narrower than the matters which will have to be proved by the Bank to establish its cause of action against Mr **Ablyazov**. Ownership of a company is part of what must be proved at trial but is not the entirety of what muct be proved. The other matters which must be proved (eg the provisions of Kazakh law which governed Mr **Ablyazov**'s conduct and Mr **Ablyazov**'s conduct pre-2009 with regard to the disputed transactions) have not been considered by me at all.”

[22] The judge also said this at paras 38 and 45 (complained about in ground 2(c) and ground 2(d) respectively):

> "38 The fair-minded observer, noting the above matters and also noting that (a) no allegation had been made that I have unfairly determined any of the previous applications and that (b) up to and beyond the pre-trial review on 2 October 2012 Mr **Ablyazov** gave no indication that he feared that I had or would pre-judge the case against him, would conclude, in my judgment, that there was no real possibility that I would be biased against him at the trial by reason of pre-judgment. That the fair-minded observer might be influenced by the absence of a complaint by the person seeking recusal when deciding whether there was a real possibility of bias is suggested in *Locabail . . . a*t paragraph 57.
>
> 45 In any event the question of Mr **Ablyazov**'s credibility seems to me to be academic in circumstances where he has said that he will take no part in the trial and where, therefore, there will be no evidence from him. The fair-minded observer, on being told that, would surely conclude that any views I had expressed on the contempt application as to Mr **Ablyazov**'s credibility were irrelevant to his assessment of the possibility of bias because I will not be called upon at trial to assess any evidence of his."

[23] On the issue of waiver, the judge referred to *Locabail*, *Baker v Quantum Clothing Group* [2009] EWCA Civ 566, and *AF (No 2)*. It is not in dispute on this appeal that a right to object to a judge on the ground of the appearance of bias can be waived, if done with full knowledge of the relevant facts and the right to object, and if done clearly and unequivocally. In this respect the judge reasoned as follows:

> "27 By not seeking an order that I recuse myself at the pre-trial review on 2 October 2012 Mr **Ablyazov** represented that he had no objection to my trying the case. By that time he had full knowledge of my findings on the contempt application since February 2012. If ever there was a time when he would be expected to give notice of an application that I should recuse myself from the trial if that were his intention then the pre-trial review was it. (Indeed, I consider that he should have given notice of his intention at the time he agreed to vacate the pre-trial review fixed for June 2012 but it is unnecessary to base myself on that in the light of the pre-trial review on 2 October 2012.) By failing to do so he represented that he had no such intention and must be regarded as having waived his right to apply for my recusal on the basis of those findings (and on the basis of such decisions and comments as I had made before February 2012). Since he also had full knowledge of my findings on the applications heard at the end of July 2012, by 21 September 2012 he must also be regarded as having waived his right to apply for my recusal on the basis of those findings on 2 October 2012 when he appeared by counsel at the pre-trial review and gave notice of an intention to seek an adjournment but no notice of any intention to seek my recusal."

[24] In this respect, Mr **Ablyazov**'s grounds of appeal similarly complain only about the application of the familiar principles of waiver, not of any doctrinal error. It is submitted that the judge was wrong to find an unequivocal representation out of mere silence. It is also submitted that any waiver could be retracted.

THE TRIAL

[25] The trial commenced on 7 November 2012. The bank is the Claimant, and there are three Defendants who are represented: Mr Zharimbetov, Mr Khazhaev, and Usarel Investments Ltd. Mr **Ablyazov**, who had made it clear at the pre-trial review that he would not be represented, has given instructions for a limited representation:

> "for the purpose of considering, and if appropriate seeking to make representations in relation to, any applications or matters arising, other than in relation to Mr **Ablyazov**'s substantive defence of the claims against him . . . The decision to attend trial on the above basis has respectively been taken under protest" (his solicitor's letter of 6 November 2012).

Those instructions may have been given because he had been advised that under CPR 39.3 a failure to attend trial may be visited with the striking out of a defence.

[26] The trial is due to last fourteen weeks.

SUBMISSIONS

[27] On behalf of Mr **Ablyazov**, Mr Béar has submitted, essentially by reference to the main judgment in the contempt proceedings, that the judge has been involved in such pre-judgment of issues overlapping with issues which would arise at trial that apparent bias has been established. He focuses in particular on three aspects of that pre-judgment: first, on the judge's acceptance that the bank had proved Mr **Ablyazov**'s ownership of certain companies, an issue of ownership which would arise again at trial, albeit in connection with other assets. Secondly, he submits that the methodology, the reasoning process by which the judge reached his conclusions, including the judge's rejection of the credibility of Mr **Ablyazov** and his witnesses, will be repeated. Thirdly, he submits, in general, that the fair-minded observer will not be able to conclude that a judge who has already found a Defendant guilty of concealment of his assets, lying and forgery, can avoid giving the appearance of bias in a subsequent trial. It needs, however, to be repeated that he does not say that the judge is actually biased, or that he has ever, in the numerous hearings which he has conducted or judgments which he has written, given to Mr **Ablyazov** anything other than fair and impartial treatment (even if his conclusions remain disputed). Nor does he complain about the language in which the judge has expressed himself, with a single exception, when the judge, during the July hearing, said that he would have to proceed "with a certain degree of caution" in relation to Mr **Ablyazov**'s evidence, since "When Mr **Ablyazov** says 'Black is black', the court has got to consider whether black truly is black".

[28] In connection with these submissions, Mr Béar relies in particular on the following authorities. In terms of Strasbourg jurisprudence, he refers to *Hauschildt v Denmark* where, in a criminal case, it was held that a judge who had been party to numerous pre-trial hearings where detention on remand was confirmed on the basis of a law which required a "particularly confirmed suspicion" of guilt ought to have recused himself from sitting on the trial. He also referred to *Morel v France*, in a civil case where the European Court of Human Rights (ECtHR) found no breach of art 6(1), for the dictum that bias would have been displayed "if the matters dealt with by the insolvency judge during the observation stage were analogous to those on which he ruled as a member of the trial court" (at para 47). Thirdly, he referred to *Depiets v France* (2006) 43 EHRR 55 where, in a criminal case, two of the judges in the Cour de Cassation who had earlier sat on an appeal from a decision to commit the Defendant to stand trial sat again on an appeal from the court which had convicted him. The Cour de Cassation, in rejecting a submission of apparent bias by reason of pre-judgment, pointed out that the questions of law which had arisen on each occasion had been different and added (at para 41): "In other words, the issues they were called upon to consider in the second appeal were not analogous to those they had been required to deal with in the first appeal".

[29] However, Mr Béar was not able to point to a single Strasbourg authority, in a civil case, in which the Strasbourg court had found a judge to have been required to recuse himself for apparent bias on the ground of pre-judgment by reason of his being involved in preliminary hearings prior to trial.

[30] As for English authority, Mr Béar relies principally on *Sengupta v Holmes*, where this court had to consider its own procedure whereby a judge of this court might have refused permission to appeal on paper and later found himself listed to hear an appeal which had been granted by another member of the court on re-

newal of the application. This court there rejected the submission that there was a problem of apparent bias in such a situation. In his judgment, Laws LJ considered the Strasbourg authorities at length, including *Hauschildt*. He reasoned that a trial judge could not sit on appeal from his own judgment, at any rate where "he has committed himself to a view of the facts which he himself had the responsibility to decide", stating that such a state of affairs was comparable to the situation in *Hauschildt* (at para 32). Mr Béar relies on that observation. Laws LJ went on to conclude, however, that such a situation did not apply to an appeal court judge who merely had to express a provisional view – provisional because of the procedure for renewal of the application at an oral hearing – as to the possible merits of an appeal. Mr Béar also relied on a passage in Keene LJ's judgment where he said (at para 44): "What cases like *Hauschildt* do bring out is the need to see whether a judge is in reality having to decide the same question on which he previously reached a determination: see para 52 thereof".

[31] Mr Béar also relied on the Australian case of *Livesey*, which was concerned with professional misconduct, and thus was of a quasi-criminal status. It appears that the charge of misconduct went to the New South Wales court of appeal. The High Court of Australia held that a decision to disbar a barrister could not stand where the court of appeal hearing the barrister's case included two judges who had previously, in other proceedings arising out of the same subject-matter, criticised the conduct of all involved, including the barrister (albeit he was not involved as a party or a witness in those earlier proceedings). The earlier case had concerned the conduct of a law student in obtaining bail for an accused. The later case concerned (in part) the barrister's own role in those events. The two judges as members of the earlier court had each criticised the barrister as being an active and knowing participant in the law student's misconduct. The barrister wished to call the law student as a witness. The two judges in the earlier proceedings had expressed themselves in strong terms that the law student's evidence should be rejected. The barrister's counsel objected to the presence of the two judges concerned on the court of appeal, but the court had ruled that there was no need for them to recuse themselves.

[32] The High Court disagreed. Its judgment included the following passage (at 299-300):

> "Necessity and the extraordinary case (see, eg, *ex parte Lewin; Re Ward* [1964] NSWR 446, at p 447) make it impossible to lay down an inflexible rule; each case must be determined by reference to its own particular circumstances. It is, however, apparent that, in a case such as the present where it is not suggested that there is any overriding consideration of necessity, special circumstances or consent of the parties, a fair-minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case, expressed clear views either about a question of fact or about the credit of a witness whose evidence is of significance on such a question of fact."

[33] On the question of waiver, Mr Béar submitted that no unequivocal waiver could be derived from the equivocal condition of silence. In this respect he referred to *The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925, [1985] 2 Lloyd's Rep 18, a case concerned with the question of whether delay had created an agreement to abandon an arbitration, where Robert Goff LJ had said (at 937):

> "We should add that we see the same difficulty in invoking the principle of equitable estoppel in such circumstances. It is well settled that that principle requires that one party should have made an unequivocal representation that he does not intend to enforce his strict legal rights against the other; yet it is difficult to imagine how silence and inaction can be anything but equivocal."

[34] Mr Béar also relied on two decisions, one from Strasbourg, and one in our Supreme Court, to illustrate the inadequacy of silence in this context. In *Bulut v Austria* (1997) 24 EHRR 84 a lawyer's failure to respond to a written question from the court as to whether there was any objection to the presence of a judge who may have been technically excluded by operation of law was held not to amount to a waiver: but the silence

of the lawyer in the presence of the client and in the face of the court was recorded in the trial record as an agreement to waive the technical difficulty. That was another criminal case. In *McGowan v B* [2011] UKSC 54, [2011] 1 WLR 3121, 2012 SC (UKSC) 182 the issue was whether there had been waiver by silence of a suspect's right to be attended by a lawyer when interviewed by the police. The Supreme Court considered the comparative jurisprudence in both the ECtHR, and in America arising from the famous decision of the US Supreme Court in *Miranda v Arizona* (1966) US 436. In doing so it cited the following observation from the American jurisprudence "But a valid waiver will not be presumed simply from the silence of the accused after warnings are given . . . Presuming waiver from a silent record is impermissible . . ." (*Miranda* at 475).

[35] In this connection Mr Béar also referred to *Millar v Dickson* [2001] UKPC D4, [2002] 1 WLR 1615, [2002] 3 All ER 1041, where the Privy Council held that Scottish accused had not tacitly waived their right to trial by an independent and impartial tribunal by mere participation without objection in their hearings before temporary sheriffs (who as a class had been held not to be sufficiently independent of the executive). Lord Bingham examined the uncertainties of the development of the issue as to whether temporary sheriffs were independent, and concluded that in such a state of the law the accused and their agents were not to be presumed to have appreciated their right to object, with the result that an inference of tacit waiver could be made (at para [38]). Similarly, Mr Béar submitted, this is not an "undoubted right to object" case in which a mere failure to object may be much more significant.

[36] In any event, Mr Béar resisted the idea that there was any obligation on Mr **Ablyazov** to make an application for the judge to recuse himself in advance of the opening day of the trial itself. In his submission, the moment of truth for such an application, or what Mr Béar described as the "watershed moment", did not arrive until that time. It would only have been different if the judge had expressly raised the question of whether or not the parties had any objection to him continuing as the designated judge of trial. Only that express raising of the issue, or the arrival of the day of trial, could require Mr **Ablyazov** to make his election. For the rest, it must be assumed, for that was a natural explanation for his silence, that Mr **Ablyazov** was still in the process of making up his mind whether to object or not.

[37] Alternatively, the law, guided by Strasbourg jurisprudence relating to the fundamental and particularly sensitive nature of the right to an impartial tribunal guaranteed by art 6, should require, as a prerequisite to the possibility of waiver, that a judge raises the issue of recusal himself. That would ensure that the litigant was fully informed of his rights, and would also provide assurance, through complete transparency, that there was what Mr Béar described as no subjective problem.

[38] In any event, Mr Béar submitted, Mr **Ablyazov** lacked the knowledge of the right to object which was critical to any concept of waiver. No inference could be drawn as to what, if any, advice Mr **Ablyazov** had received. Moreover –

> "There is a considerable difference between lawyers' advice that a party has an objection and a judicial acknowledgment of its existence, particularly in an area such as this where there is no simple bright-line test and therefore matters of judgment and degree are inevitably involved."

[39] Finally, any waiver should not be considered to be permanently binding. In effect, it could be recalled, or the effect of the representation should not be regarded as automatically binding, but should be subject to a test of whether it is reasonable in all the circumstances to hold the party to his waiver. In this connection it was submitted, at any rate in Mr Béar's skeleton argument, that the question of waiver was still somewhat of an open question in Strasbourg jurisprudence (even if entrenched, as he accepted, in English law, see *Locabail*, a decision, however, arrived at in the era before the coming into force of the Human Rights Act 1998). In any event, any waiver, to be effective for ECHR purposes "requires minimum guarantees commensurate to its importance" (*Suovaniemi v Finland* (application no 31737/96, decided 23 February 1999), cited in *Stretford v Football Association Ltd* [2007] EWCA Civ 238, [2007] 2 All ER (Comm) 1, [2007] Bus LR 1052 at paras [56]ff). Such minimum guarantees require a concept of reasonable proportionality, given the public

interest involved. In the present case it should be borne in mind that a risk of pre-judgment strikes at the heart of a judge's ability to arrive at a proper judicial determination; that the point was not expressly considered at the time of the pre-trial review on 2 October 2012; that the impact of Mr **Ablyazov**'s failure to take the point on that occasion was limited, especially in circumstances where the judge had not yet begun his pre-reading, even as of 25-26 October, when he heard the recusal application; and that enquiries recently made of the commercial court's listing officer suggested that a new judge might be available, if necessary, to begin his pre-reading by the end of November or early December.

[40] On behalf of the bank, Mr Stephen Smith QC submitted that the judge was right for the reasons which he had given. He emphasised however the following considerations. Mr **Ablyazov** had made no objection to the judge's involvement in the proceedings despite numerous significant hearings which have taken place before and since his confirmation as judge of the trial as long ago as March 2011. No objection had been made to the judge's conduct of the proceedings, despite several visits to this court on appeal from the judge's rulings. In the circumstances the obvious inference to be derived from Mr **Ablyazov**'s late application was that he was simply attempting to derail the trial. For that reason, and because Mr **Ablyazov** had made it clear at the pre-trial review that he would not be participating in the trial, Mr **Ablyazov** had clearly waived any possible issue of apparent bias, and even lacked any proper standing to complain. In any event, several authorities had made the point that earlier adverse findings or observations in pre-trial proceedings would not readily raise a real possibility of bias: see for instance *Arab Monetary Fund v Hashim* (unreported, 28 April 1993) at p 10 of the transcript, or *Locabail* at para 25. In any event, any overlap between the issues and findings of the contempt judgment and the issues at trial was narrow and speculative: in particular the judge had not there considered at all the circumstances which needed to be established to found the bank's causes of action for fraudulent transactions; and of the two dozen or so companies whose ownership was in issue at trial, only two, the Sch C companies Bergtrans and Carsonway (see 5 above), had been previously considered.

[41] Furthermore, to the extent that previous findings created issue estoppels, such as the findings as to the ownership of Bergtrans and Carsonway, the judge, like any judge, would be bound in any event. As for credibility, that would not be in issue at a trial in which Mr **Ablyazov** did not participate. Moreover, under CPR 39.3, a Defendant who does not attend trial may have his defence struck out.

[42] As for waiver, Mr Smith submitted that Mr **Ablyazov**'s situation in the proceedings was not one of mere silence: he had participated in the proceedings, and in the pre-trial review, knowing of the judge's prior judgments and that he would conduct the trial, and undoubtedly in possession of knowledge and advice that he was entitled to object to a judge on the ground of bias or apparent bias, and under an obligation “to help the court to further the overriding objective” (CPR 1.1 and 1.3).

[43] As for the consequences of waiver, it was an election which concluded the matter. The Strasbourg court, like the English court, recognised the concept of waiver of even the fundamental art 6(1) right: and that this was so had been recognised by the Privy Council in *Millar v Dickson* at paras 53ff, citing, for instance, *Bulut v Austria* (1996) 24 EHRR 84. In the present case, the consequences of permitting the withdrawal of Mr **Ablyazov**'s waiver would be extremely serious: the trial, which had already started, would be lost, even though all the other parties to it, including the other Defendants, wished it to go ahead, and even though one of those Defendants had stated that he would be unable to support the financial consequences of a second preparation for trial. At the very least, the trial would have to be postponed to 2013, with unknown consequences for the availability of counsel. The unfairness to all the other parties, and the waste of resources of both the parties and the court, would be huge. The cost of the adjournment could in theory be visited on Mr **Ablyazov**, but he had given up paying his costs liabilities since February 2012.

JURISPRUDENCE OF APPARENT BIAS

[44] There is a large jurisprudence concerning apparent bias, but there was no issue in the present case, or below, as to the applicable principles, to be found in the cases cited by the judge. Nor, as may sometimes occur, was there any issue as to the nature or knowledge of the fair-minded and informed observer (*cf Belize Bank Ltd v A-G of Belize* [2011] UKPC 36, [2012] 3 LRC 273 and *Case Comment* [2012] 71 CLJ 247; and see also *Southern Equities Corp Ltd v Bond* [2000] SASC 450). In the circumstances the relevant jurisprudence is to be found in authorities which either specifically discuss the problem of pre-judgment or else make useful general observations as to the circumstances in which objection to a judge is or is not likely to be justified.

[45] Among the latter are the following, to be found collected in *Locabail*. Although prepared just before the coming into effect of the Human Rights Act 1998 (but see 463E/G for the wealth of Strasbourg jurisprudence which was cited), or the ultimate distillation of the apparent bias test in *Porter v Magill*, the judgment of this court in *Locabail*, prepared by Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C, covering five separate cases which had been listed and heard together so that the issues concerning disqualification of judges on the ground of bias could be thoroughly examined, and considered with the assistance of an amicus curiae (see para 1), remains a tour de force of helpful learning.

[46] Thus the observations of foreign courts which this court in *Locabail* found particularly apposite and which are relevant to the current problem before us include the following:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial" (*President of the Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147 at 177, cited at para 21).

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour" (*per* Mason J, *In re JRL, ex parte CJL* (1986) 161 CLR 342 at 352 (HCA, cited at para 22).

[47] As for the general observations of the *Locabail* court itself, I would refer for present purposes to the following:

> "19 . . . Nor will the reviewing court pay any attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision."

[48] The *Locabail* court, as have many other authorities, cautioned about the fact-specific nature of the problems which arise in this area of the law. Lord Bingham said:

> "25 It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided."

[49] As for observations specifically directed towards the problem of pre-judgment, the *Locabail* court said this:

> "25 . . . By contrast, a real danger of bias might well be thought to arise . . . if in a case where the credibility of any individual were in issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (*Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same or a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every case must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."

[50] It was the third case considered in *Locabail*, namely *Timmins v Gormley* (see at 491 – 497), which concerned the problem of pre-judgment. There the trial judge, a recorder otherwise in practice at the personal injury bar, had not previously been concerned with the issues of that litigation, but he had shown himself, particularly by his published writings, to be predisposed to favour the interests of Claimants in personal injury cases over the interests of Defendants and in particular Defendants supported by insurers. The recorder had disclosed certain matters at the start of the trial, but not his writings (see at para 82). No complaint was made as to the conduct of the trial, and so the Defendant's case on bias turned on the articles in question. In particular attention was focussed on what was said to be the intemperate tone of the language used. The court said: "It is always inappropriate for a judge to use intemperate language about subjects on which he has adjudicated or will have to adjudicate" (at para 85). The court found assistance in the High Court of Australia case of *Vakauta v Kelly* (1989) 167 CLR 568 at 570-1, where the majority (Brennan, Deane and Gaudron JJ) said that there was an ill-defined line beyond which the expression of preconceived views about the reliability of medical experts come across by a judge in the course of his work could threaten the appearance of impartial justice. The *Locabail* court found the case of *Timmins v Gormley* a difficult and anxious one to resolve, but ultimately concluded (at para 89):

> "We have, however, to ask, taking a broad common sense approach, whether a person holding the pronounced pro-Claimant anti-insurer views expressed by the recorder in the articles might not have unconsciously leaned in favour of the Claimant and against the Defendant in resolving factual issues between them. Not without misgivings we conclude that there was on the facts here a real danger of such a result."

[51] In *Sengupta v Holmes* this court had to consider a very particular problem of pre-judgment arising out of the procedure whereby applications for permission to appeal to this court are conducted. One (Lord Justice for convenience, I will use that term as including a lady justice) considers the application on paper. If the application is refused, the Applicant has a right to renew his application orally (it may be to one or more lords justice). The court before whom the Applicant renews his application may comprise the same as Lord Justice

had already dealt with the application on paper, or the court may include that and Lord Justice another, or the original may Lord Justice not be present upon renewal. If permission is granted on renewal, as may well occur, the original who Lord Justice had refused permission may be listed to sit on the appeal. The test for granting an application is that there is a real prospect of success on appeal, or some other compelling reason for permitting an appeal. So, in theory, a who Lord Justice has decided, when considering the application on paper, that there is *no* real prospect on appeal, may be called upon to reconsider that decision either on oral renewal of the application or at an actual appeal permitted by another lord justice. In *Sengupta v Holmes* it was that last possibility which had occurred. Laws LJ had refused the application on paper, the application had been granted on renewal by Simon Brown and Tuckey LJJ, and the appeal was listed to be heard before Laws, Jonathan Parker and Keene LJJ. There was an objection to Laws LJ sitting on the appeal. The case concerned a claim to judicial review of a decision at a preliminary stage of medical disciplinary proceedings. The issue was treated as a matter raising a general principle, with no relevant special considerations. The court was assisted by submissions by an amicus curiae and by further submissions made on behalf of the Lord Chancellor, who was permitted to intervene.

[52] The leading judgment was given by Laws LJ himself. He considered three relevant English cases concerned with the procedure for obtaining permission to proceed. He also considered a fair number of Strasbourg authorities, including *Hauschildt*.

[53] In his conclusions (at paras 26ff), Laws LJ stated the problem of pre-judgment as "an apprehension that the judge will approach the case with a closed mind" (at para 30) or that "it is reasonably feared that he cannot or will not revisit the issue with an open mind" (at para 31). He described the *Hauschildt* or *Livesey* situation as one where the judge "has committed himself to a view of the facts which he himself had the responsibility to decide" in the sense of a judge who had decided the factual merits of a case at trial and then sought to sit on the appeal. He continued:

> "33 In some such cases the judge's inability to open his mind on the appeal would not be just apparent, but real: if after a careful and professional review of all the evidence, given by witnesses whom, so to speak, he has looked in the face, he has arrived at the conviction that the party in question is a crook or a rogue, guilty as charged (whether the case is criminal or civil), he might not *conscientiously* be able to put himself back into a state of mind where he has no preconceptions about the merits of the case.
>
> 34 There may also be cases, though one hopes there will not be, in which a judge called on to make a preliminary decision expresses himself in such vituperative language that any reasonable person will regard him as disqualified from taking a fair view of the case if he is called upon to revisit it."

[54] However, Laws LJ contrasted those sorts of cases with the application to appeal procedure, where the appeal court judge merely had to take a provisional view on a decision made in the court below, knowing that, if he refused permission, the question could well be revisited in an oral hearing, in a situation where, upon the provision of fresh information or argument, there would be an opportunity for further reflection. In this connection he also referred to "the central place accorded to oral argument in our common law adversarial system" (at para 38). In agreeing, Keene LJ also spoke of the decision made on paper as "a potentially provisional decision" (at para 45). He contrasted the situation in "cases like *Hauschildt*" saying that they brought out "the need to see whether a judge is in reality having to decide the same decision on which he has previously reached a determination . . ." (at para 44).

[55] A case closer to the situation of our case was that of *Arab Monetary Fund v Hashim* (CA, unreported, 28 April 1993) where the judgment of the court was given by Sir Thomas Bingham MR. The Plaintiff Fund was seeking to recover $50 million which it alleged that its former director-general, Dr Hashim, had misappropriated from it. That action also began, as such actions generally do, with a world-wide freezing order.

Hoffmann J became the designated judge. Dr Hashim complained to the Vice-Chancellor that in the course of interlocutory applications the judge had made up his mind against him. The Vice-Chancellor considered that there was no ground for that complaint at all, but as a matter of indulgence directed that while Hoffmann J should continue to hear interlocutory applications, a different judge would conduct the trial. Hoffmann J was then appointed to the court of appeal and Chadwick J took his place as designated judge. He conducted the pre-trial review and was subsequently seven days into the trial when Dr Hashim drafted a letter to the Lord Chancellor to have him removed on the ground of apparent bias. However, the letter (which in being directed to the Lord Chancellor was misconceived) was never sent, apparently on legal advice. The trial continued for several more weeks, and then Dr Hashim applied to the judge to recuse himself on the ground of apparent bias. The opening weeks of the trial had been dogged by numerous further interlocutory applications, and Dr Hashim was concerned with the result of them. But he was also concerned with a remark which the judge had made in another case and which had been reported to him. Chadwick J refused to recuse himself, and his judgment was appealed.

[56] This court refused to give permission to appeal, but considered the application in a full judgment. In the course of that judgment, Bingham MR said this:

> "In accordance with the practice now adopted in cases of this magnitude, a judge was assigned to deal with the string of interlocutory applications which were expected before trial. Such an arrangement has the obvious benefit of avoiding the wasteful duplication of time and effort necessarily involved if a series of different judges has to master the pleadings, issues and previous history of a complex case. But such an arrangement is intended to have an additional benefit: that the judge, being familiar with the case as it develops, will play a creative and directional role, concentrating attention on the issues which matter, discouraging unnecessary interlocutory diversions and highlighting the apparent strengths and weaknesses of the parties' respective cases."

Bingham MR went on to say:

> "Would a reasonable and fair minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the Applicant was not possible? Most, if not all, of the cases in which this test has been discussed have been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in *Vakauta v Kelly* (1988) 13 NSWLR 502 at 513A:
>
> '. . . In considering the content of the apprehended bias principle the court must look to, inter alia, two things: what are the norms or standards relevant to the kind of case before it; and whether, on the facts, the requirements have been fulfilled.'"

[57] Bingham MR also said this:

> "In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the other. There are a number of possible explanations for this, the most obvious being that the successful party has shown greater judgment, determination and knowledge of the rules than its opponent. Mr Ross-Munro accepted, as we understood, that no inference of apparent bias could be drawn from the fact that most, or all, interlocutory applications had been decided against Dr Hashim. We agree. He also disclaimed any attack on the correctness of Chadwick J's interlocutory deci-

sions. This we find puzzling. It must, we think, be hard to show consistent unfairness in the absence of consistent error."

[58] Yet another aspect of the problem of pre-judgment can in theory arise in circumstances where, following an appeal, a matter is remitted to a court or tribunal for reconsideration. This can happen not infrequently, either where a retrial is necessary, or where an arbitration award may have to be remitted to the arbitrators, or where the appeal court has to remit a matter to an expert tribunal. On occasions the appeal court is asked to say whether the matter should return to the same judge or tribunal, and sometimes the appeal court says that it should not. It often does so on no articulated principle, but guided by a sense that, if the judge or tribunal has erred sufficiently, the matter should be revisited afresh by a new judge or tribunal. One case in which the question was debated by reference to the principles of apparent bias and led to a developed judgment was *Secretary of State for the Home Department v AF (No 2)* [2008] 1 WLR 2528, see at paras 52ff. Sir Anthony Clarke MR referred to *Sengupta v Holmes* and other authorities mentioned herein and said:

"53 The general principle is not in dispute . . . . The court must first ascertain all the circumstances which bear on the suggestion that the judge was (or would be) biased. It must then ask itself whether those circumstances would lead a fair-minded and informed observer to conclude that there was (or would be) a real possibility that the judge was (or would be) subject to bias; that is that the judge might have been (or be) influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case . . . .

55 However, as I read the authorities, it all depends on the facts. I do not think that the mere circumstance that the judge has reached conclusions which are adverse to a party of itself leads to the conclusion that there is an appearance of bias . . . .

56 However there are many cases in which issues of fact are remitted to the trial judge to consider or reconsider in the light of, say, a decision of an appellate court. It is a matter for judgment in each case whether the test identified above is satisfied. It seems to me to be very unlikely that the circumstances of successive hearings under section 3(10) of the PTA [Protection of Terrorism Act 2005] in respect of successive control orders would be such that a fair-minded observer would think that a judge who considered the first one might not be able fairly to consider the second one. On the contrary, it seems to me that justice is likely to be best served by having the same judge. I see no reason in principle why, in the ordinary case, a judge should not be able to consider the evidence available at the second hearing afresh entirely fairly, whether or not he had previously reached a conclusion in respect of an earlier control order where some of the evidence was the same.

57 That is not to say that there might not be particular circumstances which might lead to the conclusion that that was not so. Whether there are or not will depend on the circumstances of the case concerned."

[59] In *Davidson v Scottish Ministers* [2004] UKHL 34, 2004 SLT 895, [2004] HRLR 34, Lord Bingham addressed this subject again. He emphasised the importance of the "objective judgment":

"6 . . . Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment.

> 7 . . . it has however been accepted that justice must not only be done but must also be seen to be done. In maintaining the confidence of the parties and the public in the integrity of the judicial process it is necessary that judicial tribunals should be independent and impartial and also that they should appear to be so. The judge must be free of any influence which could prevent the bringing of an objective judgment to bear or which could distort the judge's judgment, and must appear to be so."

[60] I turn to the Strasbourg authorities. In *Hauschildt v Denmark*, the particular problem was that, in a criminal case, one of the trial judges had on a number of separate pre-trial occasions invoked a provision of Danish law, for the purposes of keeping the Defendant on remand, which required the judge to be satisfied that there is a "particularly confirmed suspicion" that the Defendant had committed the crimes of which he had been accused. Thus, in concluding that there was an objectively justified fear of apparent bias, the ECtHR reasoned:

> "50 . . . In the court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the Danish, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.
>
> 51 Nevertheless, special circumstances may in a given case be such as to warrant a different conclusion. In the instant case, the court cannot but attach particular importance to the fact that in nine of the decisions concerning Mr Hauschildt's detention on remand, Judge Larsen relied specifically on section 762(2) of the Act . . . .
>
> 52 The application of section 762(2) of the Act requires, *inter alia*, that the judge be satisfied that there is a 'particularly confirmed suspicion' that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is 'a very high degree of clarity' as to the question of guilt. Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgment at the trial becomes tenuous."

[61] In general, however, the Strasbourg cases illustrate the normal principle enunciated in *Hauschildt* that previous involvement in interlocutory aspects of a criminal prosecution does not justify a concern of apparent bias. Reflective perhaps of such cases is *Thomann v Switzerland* where the accused was tried in absentia and then, upon his being apprehended and granted a retrial, was tried again by the same judges. The ECtHR rejected a claim of apparent bias. It said:

> "35 The court does not find these arguments persuasive. As the Federal Court explained (see para 13 above), judges who retry in the Defendant's presence a case that they have first had to try *in absentia* on the basis of the evidence that they had available to them at the time are in no way bound by their first decision. They undertake a fresh consideration of the whole case; all the issues raised by the case remain open and this time are examined in adversarial proceedings with the benefit of the more comprehensive information that may be obtained from the appearance of the Defendant in person . . .
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> 36 Furthermore, if a court had to alter its composition each time it accepted an application for a retrial from a person who had been convicted in his absence, such persons would be placed at an advantage in relation to Defendants who appeared at the opening of their trial, because this would enable the former to obtain a second hearing of their case by different judges at the same level of jurisdiction. In addition, it would contribute to slowing down the work of the courts

> as it would force a larger number of judges to examine the same file, and that would scarcely be compatible with conducting proceedings within a 'reasonable time'."

[62] *Morel v France* is the only Strasbourg authority relied on in this connection by Mr Béar in the civil sphere. The objection of the appearance of bias failed. The ECtHR said:

> "45 In that regard, the court reiterates that the answer to that question varies according to the circumstances of the case; it is for that reason that it is not bound by the decisions cited by the Applicant and delivered in other circumstances, one in a different sphere, and the other on another aspect of multi-stage proceedings distinct from the present one.
>
> Furthermore, the mere fact that a judge had taken decisions before the trial cannot in itself be regarded as justifying anxieties about his impartiality. What matters is the scope of the measures taken by the judge before the trial. The fact that a judge has detailed knowledge of the case likewise does not mean that he is prejudiced in such a way that he cannot be regarded as impartial when the case comes to trial. Nor, lastly, does the fact that a judge makes a preliminary assessment of the available data mean that he is pre-judging the final assessment. The final assessment must be made with the judgment and be based on the evidence adduced and discussed at the hearing . . . ."

The court went on to say that bias would be shown "if the matters dealt with by the insolvency judge during the observation stage mere [*sc* were] analogous to those on which he ruled as member of the trial court" (at para 47), but that the judge in question was at the two stages "faced with two quite separate questions" (at para 48). The concept of "analogous" issues was also deployed in the criminal case of *Depiets v France.*

[63] Finally, I return to *Livesey*, the case in the High Court of Australia which has been influential in English jurisprudence (although more for its general observations than for its decision), and on which Mr Béar has placed particular reliance. I refer to paras 31-32 above where its facts and the passage relied on by Mr Béar are set out. I would make five observations about that case. First, it involved disciplinary proceedings which are quasi-criminal. Secondly, the criticisms that had been made of the accused barrister had been made in his absence (although that is a matter which could cut either way). Thirdly, the case involved the special circumstances where the subject matter was the same in both sets of proceedings but the accused were different, and the barrister was in a very real sense pre-judged in the first set of proceedings in which he was not a witness. Fourthly, there was no need for the appeal court to have on it judges who had sat in the first appeal. Fifthly, the High Court of Australia expressly mentioned with approval but distinguished *ex parte Lewin; Re Ward* [1964] NSWR 446 (see para 32 above) as a case where considerations of necessity supported a different result. There, a landlord had sought possession from numerous tenants of an arcade, and the claims for possession came before a magistrate one by one. In an earlier hearing in which a tenant had made a strong attack on the landlord's bona fides, the magistrate, albeit in moderate language, had rejected that attack.

[64] A second tenant complained of his case coming before the same magistrate. The magistrate refused to recuse himself and the matter went to McClemens J in the Supreme Court of New South Wales. He also rejected the objection based on apparent bias and pre-judgment. His judgment concluded that any suspicion that the magistrate would not act judicially on the evidence as it was placed before him "would be merely flimsy and capricious" and then continued as follows (at 455):

> "No judicial officer has a vested interest in any one of his decisions and if the circumstances arise where it is proper that he has to reconsider it he should do so and if he thinks it wrong say so. If there had been anything to indicate that the magistrate [had] adopted an attitude which was not completely judicial prohibition would unhesitatingly have gone. On the other hand, sometimes consideration of common sense requires that judges and magistrates do have be-

> fore them litigation of the same type. This can make for efficiency and can make for greater justice because the judge or magistrate can become familiar with the particular field in which he has to work; for instance, it would be almost impossible for a judge on the common law side quickly and efficiently to take over from one of the land and valuation judges. Similarly circumstances may arise in which it would be intensely desirable that all of a particular bracket of cases should be heard by one judicial officer, but in relation to these matters no rules can be laid down except ordinary rules of justice and fairness directed to the efficient discharge of judicial business."

DISCUSSION: APPARENT BIAS

[65] The authorities suggest the following conclusions. First, although the principles of apparent bias are now well established and have not been in dispute in this case, the application of them is wholly fact sensitive. Secondly, a finding of pre-judgment has been rare. *Livesey* and *Timmins v Gormley* (one of the *Locabail* cases) are examples, but their circumstances bear no relationship to the circumstances of this case. Thirdly, although discussion of pre-judgment issues are not uncommon in Strasbourg jurisprudence, they tend to fall within the criminal sphere where special problems arise in civil law countries through the use of examining magistrates at earlier stages of the criminal process, and the use of judges to decide guilt at both trial and appeal levels (the appeal is a complete rehearing of guilt and innocence). Mr Béar has told us that he has as yet found no Strasbourg authority in which a doctrine of pre-judgment has been used to disqualify a judge in civil proceedings. Fourthly, although no doubt matters of mere convenience cannot palliate the appearance of bias, and the application of the doctrine of apparent bias is not a matter of discretion (See *AWG Group Ltd v Morrison* [2006] EWCA Civ 6, [2006] 1 All ER 967, [2006] 1 WLR 1163 at 6, 20. That was not a case of pre-judgment, but arose out of the judge's long family acquaintanceship with a board director of one of the parties, who was going to be called as a witness.) (as distinct from assessment on all the facts of the case), it is relevant to consider, through the eyes of the fair-minded and informed observer, that there is not only convenience but also justice to be found in the efficient conduct of complex civil claims with the help of the designated judge. Fifthly, no example of a designated judge being required to recuse himself or herself has been found. In *Arab Monetary Fund v Hashim* Bingham MR said that the replacement of Hoffmann J by a different judge for trial was an "indulgence to Dr Hashim", where he had shown "no grounds whatsoever for a change of judge". Sixthly, a case for recusal may always arise, however, where a judge has previously expressed himself in vituperative or intemperate terms. That, however, has not been alleged in this case.

[66] That is not to say, however, that special problems may not arise in civil cases, where, for instance, a judge has had to be exposed during pre-trial applications to such things as significant privileged documentation. That, however, is not in question here. But there must also have been cases where a judge has given summary judgment, has been reversed on appeal, and has continued to try the case, without objection, as occurred in *Equitable Life Assurance Society v Ernst & Young* [2003] EWCA Civ 1114, [2005] EWHC 722 (Comm), [2003] 2 BCLC 603 (Langley J). Moreover, in family matters, it is common practice for the same judge to try both fact-finding hearings and the determinative care assessment: see *In re B (Children) (Care Proceedings) (CAFCASS intervening)* [2008] UKHL 35, [2009] AC 11 at paras 74 – 76, [2008] 4 All ER 1 *per* Baroness Hale of Richmond.

[67] One significant development, however, which has been noticeable in recent times in very large and strongly fought civil litigation is the application for committal. As in this case, such an application can become a substantial "trial within a trial" all of its own. Moreover, even short of such an application, there may be need for pre-trial cross-examination of a deponent on his affidavit, as may occur in litigation which commences with a freezing order, and as has also occurred in this case. Therefore, for either or both of those reasons, a principal litigant, or an important potential witness, may be cross-examined even in advance of trial. No case brought to our attention has previously considered whether the situation of a judge who has heard such pre-trial evidence and may have had to come to conclusions about it has raised a problem of pre-judgment apparent bias.

[68] Special considerations may arise in such cases. Where a judge has had to form and express a view as to the credibility of a party or an important witness as a result of such cross-examination, should that require the recusal of that judge from further involvement in the litigation, even where he does so, as in this case, in moderate terms? Committal applications have to be judged on the criminal standard of proof, so that, where such an application has resulted in a finding of contempt of court, the judge has applied a standard of proof higher than that of a civil trial.

[69] On the other hand, in any event the findings of the judge are part of the *res gestae* of the proceedings. They are, as it were, writings on the wall, and would need to be considered (subject to appeal of course), for any relevance, in any subsequent proceedings and at trial, by the same judge or by any other judge. They may not even be appealed, or, as in this case, they may be appealed and upheld, so that in either event it is not possible to say that the judge was in error. In this connection, certain findings might give rise to issue estoppels, which would not only have to be taken into consideration by any judge at trial but would be binding on him, as Mr Béar accepts. What then is the difference between the judge who bears in mind his own findings and observations, and another judge who reads what the first judge has written, as he must be entitled to do? Mr Béar submits that in the case of the first judge who has heard and written, the impact of what he has learned is the more direct, immediate and powerful, and that that is a critical distinction. However, it seems to me that, unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge – other than that he is more experienced in the litigation.

[70] In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in *ex parte Lewin*, approved in *Livesey)*. He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being "influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case" (*AF (No 2)* at para 53). I have also found assistance in this context in Lord Bingham's concept of the "objective judgment". The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments.

[71] Mr Béar has relied on the language used by the ECtHR in *Morel v France* about "analogous" issues, or by Teare J's consideration of the concept of an "overlap". He submits that the issues at trial will be "analogous" and that they will overlap the issues considered in the committal proceedings. In my judgment, however, concepts of analogy or overlap are too general and amorphous to give definitive shape to the doctrine of pre-judgment in what must always be a fact-sensitive enquiry. In *Sengupta* Keene LJ spoke, by reference to *Hauschildt*, of a judge having to decide "the same question". Identity of issue is a test easier to apply than analogy or overlap: but at any rate in civil matters, absolute identity will lead in the direction of issue estoppel and will not matter. As Mr Béar accepted, *Hauschildt* was of course a criminal case, and there is understandably a real difficulty in a judge deciding in effect the *ultimate issue of guilt or innocence* at a merely pre-trial hearing and then going on to judge that same issue at trial. In England that particular difficulty is avoided by introducing the jury only at the trial stage and being cautious as to what evidence may be placed before it. In sum, I find such concepts of analogy, overlap, and even identity, difficult theoretical concepts with which to work in this necessarily fact-sensitive area.

[72] However, even if I do seek to apply the concept of overlap, in my judgment the judge was right to say and Mr Smith was right to submit that the overlap between the issues at the committal proceedings and at trial will be small. First, the judge has not considered at all the allegations that Mr **Ablyazov** fraudulently pillaged the bank by manipulating cash into the hands of companies which he controlled by means of loans and

other such transactions: in other words he has not considered the essential causes of action on which the bank has based its claims. Secondly, although it will be necessary to consider in this connection whether Mr **Ablyazov** did own or control the companies which were the recipient of payments from the bank, of the two dozen or more such companies whose ownership will have to be considered at trial, only two were considered at the committal proceedings, namely Bergtrans and Carsonway. Thirdly, when the judge comes to consider all such questions of alleged fraud and ownership as a whole, in the light of all the documentary and other evidence in the case, any issues decided in the committal proceedings, whatever role they might play will inevitably be a relatively small one.

[73] It follows that the gravamen of Mr Béar's submissions comes back to the question of the significance of the judge's expressed view that the credibility of Mr **Ablyazov** and the witnesses who supported him at the committal hearing was found wanting. However, for whatever that counts against the much more extensive tapestry of all that will be investigated at trial, Teare J will be in essentially the same position as any other judge who will be referred to the judgments of Teare J and of this court on the contempt of court question. It is ultimately not unlike a jury being entitled to know, under appropriate legal safeguards, that a Defendant whom they are trying has been disbelieved by another jury in some previous and different trial.

[74] It is also relevant for the fair-minded and informed observer to know that, for all the prior involvement of Teare J as the designated judge, there is no suggestion of unfairness against him. Mr Béar's sole complaint has been of the judge's single remark in July of this year, in the course of argument, about wanting to be cautious about Mr **Ablyazov**'s description of black as black. That is a colourful way of putting an obvious point which will arise for any judge. The fair-minded and informed observer will however know that over years of familiarisation with this case the judge has proceeded cautiously and judicially. With his two dozen and more interlocutory judgments there can be few judges whose scrupulousness and conscientiousness and fairness have been more put to the test and not found wanting than this judge. In my judgment, the fair-minded and informed observer would not consider that there was any real possibility of bias in this case on the part of the judge. He or she would rather conclude that this late objection to the judge hearing the trial, made some eight months after the judge's judgments in the committal proceedings, was made not so much from a fear of bias but in a desire to put off the trial at, so to speak, close to expiry of the twelfth hour. As Lord Bingham CJ said in *Locabail* at para 25 “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.” And as he also said at para 26 “It is, however, generally undesirable that hearings should be aborted unless the reality or the appearance of justice requires that they should.”

[75] Those considerations, as well as the more general matters referred to at para 65 above, have to be borne in mind as well as the precautionary principle that it is better to be safe than sorry. As it is, in the present case I am satisfied that it would be safe to proceed with Teare J as the trial judge, and there is in my mind about that question no doubt the benefit of which needs to be given to Mr **Ablyazov**.

[76] In sum, I have formed my own view, independently of the judge's conclusion, that, irrespective of waiver, the fair-minded and informed observer would consider that there was in this case no real possibility of bias.

JURISPRUDENCE OF WAIVER OF APPARENT BIAS

[77] The leading case is again *Locabail*. There Lord Bingham CJ said:

> “26 We do not consider that waiver, in this context, raises special problems: see *Shrager v Basil Dighton Ltd* [1924] 1 KB 274, 293; *R v Essex Justices, ex parte Perkins* [1927] 2 KB 475, 489; *ex parte Pinochet (No 2)* [2000] 1 AC 119, 136-137; the *Auckland Casino* case [1995] 1 NZLR 142, 150, 151; *Vakauta v Kelly*, 167 CLR 568, 572, 577. If, appropriate disclosure having been made by the judge, a party raises no objection to the judge hearing or continuing to hear a case, that party cannot thereafter complain of the matter disclosed as giving rise to a real

> danger of bias. It would be unjust to the other party and undermine both the reality and the appearance of justice to allow him to do so."

[78] The issue of waiver arose in the first two cases heard under the name of *Locabail* (the two *Locabail* cases themselves). The deputy judge, who was a senior partner in a large firm of solicitors, learned in the course of proceedings that his firm was acting in ancillary litigation. He disclosed this to the parties before him. Mrs Emmanuel, one of those parties, raised no objection until judgment was given against her. Lord Bingham CJ said this:

> "68 In our judgment, Mrs Emmanuel and her lawyers had to decide on 28 October what they wanted to do. They could have asked for time to consider the position. They could have asked the deputy judge to recuse himself and order the proceedings to be started again before another judge. They could have told the judge they had no objection to him continuing with the hearing. *In the event they did nothing.* In doing nothing they were treating the disclosure as being of no importance . . . . [*emphasis added*]
>
> 69 . . . It was not open to Mrs Emmanuel to wait and see how her claims in the Locabail litigation turned out before pursuing her allegation of bias. Miss Williamson protests that on 28 October not enough was disclosed to put Mrs Emmanuel to her election. We disagree. The essentials of the conflict of interest case that is now relied on were to be found in the press cutting. Mrs Emmanuel wanted to have the best of both worlds. The law will not allow her to do so."

In that case, therefore, silence in the face of disclosure was a waiver. Perhaps I should emphasise that that was silence added to participation in the proceedings.

[79] In *Millar v Dickson* the plea of waiver failed. However, that was a case where the right to object (to the use of temporary sheriffs) was obscure and uncertain. Therefore it could not be said that there was such disclosure as put the party to his election. Lord Bingham said:

> "31 In most litigious situations the expression 'waiver' is used to describe a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it is open to that party to claim or raise. In the context of entitlement to a fair hearing by an independent and impartial tribunal, such is in my opinion the meaning to be given to the expression . . . .
>
> 36 . . . But it is in my opinion impossible to accept that the qualification of temporary sheriffs was generally known to be open to serious question and that the agents were subject to no misapprehension attributable to some established view of what the law was . . . I doubt very much if the outcome of *Starrs* was widely foreseen . . . .
>
> 38 . . . But the point is whether the agents on behalf of the accused made a voluntary, informed and unequivocal election not to claim trial before an independent and impartial tribunal and not to object to the respective temporary sheriffs as a tribunal not meeting the requirements of article 6(1). They could only have done this if they had appreciated, or must be taken to have appreciated, the effect of the decision in *Starrs* or the real possibility of a decision to that or similar effect. In my regretful conclusion there is no evidence, and nothing in the judicial decisions before the Board, which would entitle us to find that the accused or their agents appreciated this nor is the Board entitled to infer that they must have done. A finding or inference to the opposite effect is in my view much more compelling."

[80] Lord Hope of Craighead, with whose reasons the other members of the Board also agreed, dealt with the submission that Strasbourg jurisprudence did not allow for the waiver of the art 6(1) right to an independent and impartial tribunal. He held that it did: see at paras 53ff.

[81] *Jones v DAS Legal Expenses Insurance Co Ltd* [2003] EWCA Civ 1071, [2004] IRLR 218 (unreported, 24 July 2003) is an example of waiver by tacit continuation in proceedings. Although the waiver decision was obiter, for no apparent bias was found, it was fully reasoned. The judgment of the court (Ward, Waller and Hale LJJ) contained this:

> "36 . . . Waiver would never operate if 'full facts' meant each and every detail of factual information which diligent digging can produce. Full facts relevant to the decision to be taken must be confined to the essential facts. What is important is that the litigant should understand the nature of the case rather than the detail. It is sufficient if there is disclosed to him all he *needs* to know which is invariably different from all he *wants* to know."

[82] In *McGowan v B* the issue of waiver was considered in the context of a suspect being interviewed at a police station. He was told of his rights to legal assistance prior to and at interview, but he declined the opportunity, and thus was interviewed without legal advice. Could his answers at interview be relied on at trial? This issue led to a reference in which the question asked was whether there was necessarily a breach of art 6(1) because, without legal advice, the accused was not in a position to know whether he wished to waive legal advice. Strasbourg jurisprudence was specifically considered, as was the *Miranda v Arizona* jurisprudence from the United States. The Supreme Court held that legal advice was not necessary to a waiver, and remitted the question of whether there was a waiver to be decided by the sheriff at trial. The particular difficulties of suspects at a police station were adverted to in this passage in Lord Hope's judgment:

> "47 . . . The court must be alive to the possibility that the words of the caution, and advice that the detainee has the right to a private consultation with a solicitor before any questioning begins . . . may not be understood by everyone . . . . [I]t should not be taken for granted that everyone understands the rights that are being referred to. People who are of low intelligence or are vulnerable for other reasons or who are under the influence of drugs or alcohol may need to be given more than standard formulae if their right to a fair trial is not to be compromised."

The judgments also confirm that Strasbourg jurisprudence allows for the express or tacit waiver of art 6(1) rights (other than to a fair trial) provided that such waiver is informed, voluntary and unequivocal and is attended by minimum safeguards commensurate with the importance of the right being waived (see headnote 2).

[83] In my judgment, save for this further confirmation that Strasbourg jurisprudence does allow for the waiver of rights under art 6(1), and that such waiver may be done tacitly as well as expressly, *McGowan v B* is not of direct assistance to the present case. There is no analogy between the categories of suspects at a police station referred to by Lord Hope and Mr **Ablyazov** in the present case. Mr **Ablyazov** is an educated, extremely able, and experienced businessman and litigant. He has been advised throughout this litigation by cohorts of experienced solicitors and counsel.

[84] As for *Suovaniemi v Finland* to which Mr Béar has referred, that confirms (i) that the right to court proceedings may be waived in favour of arbitration; (ii) that the independence and impartiality of an arbitrator may be waived by continuing with the arbitration with knowledge of the grounds of complaint; and (iii) that the formula of "sufficient guarantees commensurate with the importance" of the waived right is satisfied where "throughout the arbitration the Applicants were represented by counsel" (at p 6).

DISCUSSION: WAIVER

[85] The essence of Mr **Ablyazov**'s case of apparent bias involved focus on the judge's contempt judgment and its consequences in the committal proceedings. Thus in his skeleton argument dated 23 October 2012 in support of Mr **Ablyazov**'s recusal application Mr Duncan Matthews QC wrote this:

> "2 The application is made against the background of the Judge's detailed involvement in these proceedings to date, from his initial grant of a freezing order in the Drey Proceedings in August 2009 to his committal of Mr **Ablyazov** for contempt in February 2012, and the consequential issues to which that has given rise. Mr **Ablyazov**'s position is that, for the reasons set out in this skeleton argument and in Leedham 6, it would be inappropriate for the Judge to proceed to hear the trial of the Main Actions due to startin November 2012, and instead that the trial should be re-listed to take place before a different Judge of the Commercial Court.
>
> 3 The application is made in reliance on basic principles of natural justice, so that:
>
> (1) It is inappropriate for a judge who has heard and determined a committal application against a Defendant, which involved a detailed inquiry into matters relating to that Defendant and relevant to a later trial, to hear that later trial, at the risk of justice not being seen to be done; and
>
> (2) The doctrine of apparent bias . . . .
>
> 4 There is considerable overlap between these two principles. To some extent, the first may be considered as a subset of the second arising in a particular context."

[86] The skeleton continued on the theme of the committal proceedings from para 5 through to para 29. From para 30 to para 41 the skeleton cited the jurisprudence of apparent bias, and from para 42 to para 45 the skeleton applied those principles to the facts of this case, again concentrating on the judge's view of Mr **Ablyazov**'s credibility and what was described as:

> "a material overlap, in a broad sense, between certain of the issues in the Main Actions and the issues which the Judge has already considered in these proceedings, principally in the context of the Receivership Application (Which preceded the committal application) and the Committal Application . . .".

From paras 46ff the skeleton turned to the judge's involvement in "post-committal proceedings", but these paragraphs concentrated attention on the surrender, disclosure and unless orders of 29 February 2012 (at para 47) and concluded with the submission that –

> "48 . . . this course of events would give rise to a legitimate apprehension on the part of a fair-minded and informed observer that the Judge may unconsciously be predisposed against Mr **Ablyazov**. In other words, such an observer would conclude that the reaction of the Judge to the fact that Mr **Ablyazov** has gone into hiding risked being more strongly adverse that the reaction to be expected of a different judge, by reason of the Judge's own personal involvement in making the orders designed to secure Mr **Ablyazov**'s apprehension."

[87] Despite this focus on the events of the judge's three judgments of February 2012 in the committal proceedings, it was not until 19 October 2012 that Mr **Ablyazov** applied to the judge to recuse himself. In the meantime Mr **Ablyazov** had continued to participate in the proceedings and had participated in the pre-trial review of 2 October 2012, even if only for the purpose of explaining that since he would not be participating

in the trial, he would not be actively participating in the immediate pre-trial process. It was said that it was "anticipated that MA will seek to appeal to the Supreme Court, and also that he will seek an adjournment of the trial pending the appeal . . .". However, there was no application to recuse on that occasion.

[88] It is not clear to me that a litigant who was saying that he would not be participating in the trial was in a position to request the judge to recuse himself. However, be that as it may, the question arises whether Mr **Ablyazov**'s failure to request recusal at all times from the February judgments down to 19 October 2012, and in particular as late as the pre-trial review of 2 October 2012, while still participating in the proceedings, is consistent with a subsequent request for recusal based in essence on the February judgments.

[89] Mr Béar submits that the failure to apply for recusal was mere silence and thus equivocal. In my judgment, however, the situation was totally unlike the position in *The Leonidas D*, where one party sought to construct an agreement to abandon an ongoing, if stalled, arbitration out of mere silence. That was the familiar scenario of "letting sleeping dogs lie". In the present case, there was no mere silence, but participation in proceedings before a judge whom it was known, on Mr **Ablyazov**'s own case, had conducted himself in such a way as to give rise to the appearance of bias. Moreover, there was a duty to speak, arising out of Mr **Ablyazov**'s duty to help the court to further the overriding objective (CPR 1.3). It was contrary to that duty to allow the court and the other parties to waste time and resources in preparing for a trial which, if the judge of trial had to be replaced, could not start on the fixed date, but would have to be adjourned, in all probability into the following year with uncertainty as to when it could be refixed. The situation was similar to the familiar case where some disclosure is made to the parties by the judge, and there is no request to the judge to recuse himself. In the present case the disclosure, on Mr **Ablyazov**'s own analysis, came at latest with the judge's three judgments of February 2012 in the committal proceedings. It may be asked, what more was required of the judge, by way of disclosure, in the light of Mr **Ablyazov**'s own grounds for alleging apparent bias? It is unrealistic to suggest that the judge had to go on to ask whether there was any objection to him remaining the judge of trial.

[90] Mr Béar submits that the watershed moment had not yet arrived, before the start of the trial itself. There is no authority to that effect. It may often happen, of course, that some disclosure is made at the start of a trial. But equally often, some disclosure is made in advance of trial, as soon as the judge realises from reading the papers that there is something which he considers needs to be disclosed. In the present case, however, the relevant disclosure, on Mr **Ablyazov**'s own case, came at latest in the judge's February judgments. It was then for Mr **Ablyazov** to state his position.

[91] Mr Béar 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*), or where the Applicant is without legal advice and under other disabilities (*McGowan v B*). 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' 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 he had to do so. As such it is sanctioned by domestic, Strasbourg and international jurisprudence.

[93] There remains Mr Béar's submission that such a waiver should not be regarded as binding, or may be withdrawn, when account is taken of what in *Suovaniemi v Finland* (and elsewhere) is described as "sufficient guarantees commensurate to its importance". I understand that as a reference to the importance of the right waived. However, it would be inconsistent with a view of waiver in this context as a form of election (see Lord Bingham in *Millar v Dickson*, above) to allow for a retraction of its effect. An election is binding from the moment it is made. Even if, however, out of consideration for the special context in which waiver of bias may occur, I assume that the court retains the need for some power of assessment over its effectiveness, or continued effectiveness, I cannot find in the facts of this case any good reason for permitting Mr **Ablyazov** the benefit of such a dispensation. The context of the reference in *Suovaniemi* to "sufficient guarantees" was to the availability to the Claimant in that case of legal representation ("considering that throughout the arbitration the Applicants were represented by counsel, the waiver was accompanied by sufficient guarantees commensurate to its importance"). I have already observed how well Mr **Ablyazov** has been served by legal support. In any event, the effect of dispensing with Mr **Ablyazov**'s waiver in this case would be to override the interests of the other litigants, including other Defendants, in the actions currently being tried by the judge, as well as the interests of justice as reflected in the considerations which make up the overriding objective in CPR 1.1. It would do this in the face of the conclusion that I have drawn that the timing of the recusal application is connected with Mr **Ablyazov**'s strategy of derailing the trial. I would therefore reject the submission that any considerations of what might be meant by "sufficient guarantees" in Strasbourg jurisprudence require the court to overlook or allow the retraction of Mr **Ablyazov**'s waiver.

CONCLUSION

[94] In sum, it was for these reasons that I joined in the decision of the court, announced at the hearing of Mr **Ablyazov**'s adjourned application for permission to appeal, that it had failed. At that time, the court did not state whether the application was refused, or that an appeal was granted but dismissed. It is not unusual in this context, even after full argument, for a failure in this court to be dealt with as a failure to obtain permission to appeal (see *Locabail*). In the present case, having heard extensive argument, we have decided to grant an appeal, but to dismiss it. In doing so, however, we do not mean to suggest that we have had any doubt about the result.

TOULSON LJ:

[95] I agree.

MAURICE KAY LJ:

[96] I also agree.

Appeal dismissed.