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[2019] EWHC 2176 (QB)

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ON APPEAL FROM DISTRICT JUDGE JENKINSON

AT CIVIL LIVERPOOL JUSTICE CENTRE

Before MR JUSTICE WAKSMAN

IN THE MATTER OF

AKERS & ORS

Claimant/Appellant

-v-

KIRKLAND LTD & ORS

Defendants/Respondents

APPROVED JUDGMENT

13th JUNE 2019

Reissue 1

David Pilling (instructed by E Rex Makin & Co., Solicitors) for the Claimant/Appellant
Vikram Sachdeva QC and Jonathan Robinshaw (instructed by DWF LLP, Solicitors) for the Defendants/Respondents

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MR JUSTICE WAKSMAN:

Introduction.

1. This is an appeal against a decision of District Judge Jenkinson, dated 6 February 2019, whereby he recused himself from dealing with part of an ongoing substantive, detailed costs assessment, but not all of it. The appellant says that he should have recused himself from all of it, including the judgments he had already given on some aspects, so that they should be set aside. The respondent says, by way of cross-appeal, that not only should the district judge not have recused himself from the other parts of the assessment; he should not have recused himself at all. And he should continue to deal with all aspects of the assessment going forwards, or in the alternative, the recusal should be limited to the one matter identified by the district judge. The respondent also contends in the alternative, that the appellant had, in any event, waived any right to seek any recusal.

Background.

2. On 6 July 2009, a crane collapsed onto a block of flats in Liverpool known as Chandlers Wharf. This led to damages claims made by 41 individuals who owned or lived in flats in the block, for personal injuries and/or damage to property and/or loss of rental income etc. Those claims were issued in 2010 and 2011. By October 2015, some 37 claimants had succeeded by way of settlements which were made with the defendant, following a two-day trial of preliminary issues. Overall, the claimants recovered about £395,000 in total. The terms of the settlement included payment by the various defendants of the claimant's costs, to be assessed on the standard basis, if not agreed.

3. The claims for costs included recovery of ATE premiums paid by them or on their, and success fees for both solicitors and counsel in respect of work done for individual claimants and, in the case of counsel only, a success fee for the generic work done for the claims as a whole. Those fees were obviously in addition to the solicitors and counsel's base fees. Apart from the question of the court having to assess the correct percentage of success fee, in the case of the success fee for counsel's generic work, there was and remains, an issue as to whether the terms of that fee were themselves, void for uncertainty. That latter question is of course, a pure question of law, not discretion. The single counsel instructed by the claimant throughout the litigation was Ms Shirley Hennessy. Her total

fees claimed, inclusive of the success fee element, is about £103,000. Her base fees, i.e. net of the claimed success fees were around £50,000.

4. In December 2016, the appointment of Ms Hennessy as a full time district judge was announced and she took up her position at Birkenhead County Court, where she still sits, in 2017. The regional costs judge allocated to assess the costs here was District Judge Jenkinson. Because of the number of diverse issues of principle surrounding the claimants' costs claim, and where the total sum claimed was some £1.7 million, he held an initial directions hearing on 9 July 2018, at which he ordered the trial of some 10 preliminary issues. These would deal with the following matters of principle after which, in the absence of agreement, the usual line-by-line assessment of costs on the basis of what was reasonable and proportionate would follow in accordance with the rulings on the preliminary issues.

(1) funding, including questions about joint and several liability;
(2) proportionality and bases of assessments;
(3) hourly rates
(4) ATE premiums;
(5) success fees;
(6) liability for costs on the discontinued claims;
(7) costs of medical reports;
(8) costs of supervision time for solicitors;
(9) interest on the costs; and
(10) the correct rate of VAT to be applied to the costs in the bill.

5. The trial of those issues was fixed to take place over three days, commencing on 15 October 2018. In fact, that trial did not deal with all of the preliminary issues. In particular, it did not deal with the question of success fees for solicitors or counsel. And apart from the question of uncertainty, the dispute over the relevant percentage for success fees was as wide as it could be. The claimants contended for the stated 100 per cent uplift, while the defendants said it should be 0 per cent.

6. Of the 10 listed issues, the ones dealt with were numbers 1 to 4, and 10. While some of the issues were dealt with in the October hearings by way of extemporary

judgments in the course of the hearing, others were not, in particular, the recovery of the ATE insurance premiums. This was dealt with in a written judgment, sent out in draft, dated 23 October 2018. The written judgment reached the claimants' legal team through their counsel, on or about 13 November, and the defendants' on about 20 November. So far as the ATE premiums were concerned, the district judge found that the amounts claimed were disproportionate. This was a significant finding, because of the total costs claimed of £1.7 million, the claims in respect of ATE premiums was some £470,000, plus insurance premium tax.

7. However, at the end of that written judgment, the district judge added these paragraphs:

> "36. As I understand it, one of the issues to be addressed at the next preliminary issues, is the recoverability of counsel's fees. I take the opportunity of communication with the parties afforded by the delivery of this written judgment to identify an issue that I have reflected upon following the hearing last week, and which I consider, necessitates some consideration and possibly, submissions, whether at the convened hearing or before then. Counsel's fees are considerable, in the region of £110,000, and as the parties are aware, counsel concern Ms Hennessy is now full time district judge. She sits in close geographical proximity to me at Birkenhead. The reality is that in terms of professional and social conduct, she is in the same position as if she were a colleague at this court, Liverpool. I am concerned that on the specific issues of the recoverability of counsel's fees of such extent, both as to their recoverability and their extent to include success fees, involving such a close colleague, there is a realistic possibility that "a fair minded and informed observer, having considered the facts, would conclude there was a real possibility of bias."

8. That was, of course, a reference to the well-known judgment of Lord Hope in Porter v Magill.

9. And then in paragraph 37:

> "While I appreciate the matter of possible recusal is one for me, the parties should consider this, and if need be, make representations. One possibility may be that this distinct issue was dealt with elsewhere, perhaps at the Senior Courts Office, where District Judge Hennessy as unlikely to be known."

10. On 28 November, solicitors acting for the claimants emailed the defendants' solicitors as follows:

> "With regard to the recusal of District Judge Jenkinson, we are considering the position but anticipate we will be making representations to the effect that the learned district judge recuse himself from the entirety of the matter." In fact, nothing more was heard from the claimants' solicitors on this point, until they made their application to the district judge, sometime later, on 28 January 2019, to recuse himself entirely. But in the meantime, by email of 29 November 2018, the defendants' solicitors wrote to the court and to the claimants' solicitors to say that they had no objection to the district judge dealing with counsel's fees. The solicitors for the claimants did not respond to comment on that email one way or the other at the time.

11. The order made by the district judge at the end of the preliminary issues hearing, on or around 17 October, apart from recalling the determinations made extemporary, directed that the assessment was now to be adjourned part-heard to the next available date after 28 days from then with a time estimate of two days. It is accepted that the intention was that he would deal with all the remaining five preliminary issues. The parties had to file availability dates within 14 days of the order. And the order then said that the written judgment on the ATE premiums would be handed down at the next hearing. In fact, it came well before that as noted above. This may have been because the next hearing was in fact fixed for somewhat more than 21 days hence, namely 11 and 12 February 2019.

12. On 10 January 2019, the judge happened to see the claimants' present counsel, Mr Pilling, at a hearing on an unrelated matter and after that hearing finished and in the presence of the other parties to that hearing, the judge raised the question of the claimants' awaited response on the recusal matter that he had raised at the end of his October judgment. The court now has a redacted copy of an email sent by Mr Pilling to his solicitors on the following day, which must be regarded as accurate and it says this. Referring to his solicitors:

> "Dear Robin and Matthew, just to let you know, I had a CCMC before DJ Jenkinson yesterday on an entirely unrelated matter. And the conclusion of that, and with my opponent still present, he mentioned that Chandlers Wharf had been relisted, and said, was I aware of that.

> He then, uninvited, said he was not comfortable at all with dealing with, with assessing Shirley Hennessy's fees. I responded by saying only that I had seen his draft judgment in that respect, I would pass his further comments back, which I have now done. The fact that he elected to make comments to me (in circumstances in which I do not think it appropriate for him to have done so, quite frankly) clearly indicates he's considerably troubled by the position he's put himself in. He very obviously will seek to hive off that part of the assessment."

13. However, nothing was done by the claimants at that stage; but on 28 January, as already noted, they did make an application to the judge to recuse himself from all aspects of the assessment, including those he had dealt with in October, so that a new costs judge would have to do everything and give fresh judgments on the matters which had already been decided.

14. Both sides put in skeleton arguments in respect of that application, which was heard on 6 February. And on the same day, the judge gave the judgment which is now appealed against, O'Farrell J, having granted permission to appeal on paper on 10 April 2019. At the beginning of the appeal hearing before me, I gave permission to the respondent to rely upon a late-served respondents' notice, dated 22 May 2019, which (a) formally sought to crossappeal to the effect that there should have been no recusal at all (b) sought to support the district judge's decision on the further basis that the claimant had waived any right to apply for a recusal to the extent that this did not already form part of the district judge's decision. While Mr Pilling indicated realistically, that he was able and prepared to deal with those points at the hearing, I permitted him to put in written reply submissions on those points after hearing how Mr Sachdeva QC had expressed them in argument, rather than the usual immediate oral reply. Those written submissions were produced on 10 June. The respondent took the view that some of the points made were not in fact responsive points to the cross-appeal at all, but amplifications of or extensions to the existing appeal. That was not the last word, because at 11.15am today, further written submissions from the appellants were submitted, taking issue with the points that had been made by the respondent. I deal with all of those matters below.

The judgment.

15. It is necessary to read out various passages from the judgment. I deal first with the

factual background to the issue of the recusal as the judge recorded it. In paragraph 4, he said that during the course of his pre-reading in advance of the three-days hearing, he noted that counsel primarily involved on behalf of the claimants, whose fees were to form part of a detailed assessment, was Ms Shirley Hennessy, who since December 2016, had been a full time judicial colleague sitting at Birkenhead. He went on to say in paragraph 5 that he did not recall having identified this potential difficulty in assessing her fees at the previous directions hearing on 9 July, suspecting that that was because the time afforded to him for pre-reading, was limited and he simply did not identify the problem.

16. In paragraph 6, he noted that those representing the claimants, who made the application to recuse, would have been well aware of Ms Hennessy's appointment by the time of the directions hearing, and no issue was raised by them.

17. He then says in paragraph 7, that:

> "Be that as it may, according to paragraph 18 of the skeleton argument prepared by Mr Mallalieu, of 30 January, in opposition to the application to recuse, I did raise on the first day of that three-day hearing, that I had noted Ms Hennessy's involvement, identified she was now a judicial colleague, and queried whether the parties wished to raise any issue, which neither of them did."

18. In paragraph 9, he noted that in the course of preparing the October judgment, he reflected again, on the appropriateness or otherwise of assessing those fees. He felt there was potentially an issue of apparent bias to be considered. And therefore, he took the opportunity of communicating to the parties in the way that I have outlined he did in paragraphs 36 and 37 of that judgment.

19. At paragraph 15, he said that it was appropriate for the avoidance of any doubt, to set out the nature of his connection to DJ Hennessy, and the potential problem he thought this may raise. DJ Hennessy sat at Birkenhead, which given its extreme proximity to Liverpool County Court meant that there was a degree of professional and, perhaps more relevant for these purposes, social interaction between the district judges at both courts. A consequence of this was that at social events, for example, on the occasion of meals

convened for retirements or Christmas, both he and DJ Hennessy might well be in attendance, with the normal attendant social interaction that all this entails. He added:

> "For the avoidance of doubt, I have never socialised with DJ Hennessy beyond such occasions. That is the full extent of our relationship."

20. At paragraph 16 he said

> "To my mind, there is nothing in the extent of the interaction between us that I summarised, that would cause the parties any surprise. The parties cannot claim to be surprised by the fact there is a degree of social interaction between judges who sit at court, three miles apart. My recollection is that I ventilated it in the same terms, at the hearing in October 2018."

21. At this stage, I should say that the claimants now contend that in fact, and contrary to what is recorded by the judge in his judgment, he made no initial mention of the potential recusal issue at the start of the October hearing. This was on the footing that a transcript, which was obtained subsequently, did not record it. However, in the course of the recusal application hearing, Mr Pilling had clearly accepted that something was said about Ms Hennessy and the recusal, because he spent some time distinguishing it from what he said were the more detailed terms of paragraphs 36 and 37 of the October judgment, see paragraphs 2 and 3 at page 48 of the transcript of the recusal hearing.

22. Moreover, paragraphs 18 of the defendant's skeleton argument for, and before the recusal hearing, had said this about the October hearing:

> "On the first day of the hearing, the judge raised with the parties he had noted Ms Hennessy's name in the papers, and although she sat in Birkenhead, she was what he regarded as a judicial colleague. He queried whether any of the parties wished to raise any issue regarding that and neither did."

23. And at paragraph 19:

> "Indeed, the claimants' junior counsel made clear he was well aware of this point, and when making submissions on a number of the preliminary issues, that is in October, highlighted more than once, that claimants' counsel was Ms Hennessy, who was now a district judge."

24. In the recusal hearing before the judge, none of that was challenged as wrong. On the contrary, Mr Pilling accepted it, see above. For Mr Pilling now to suggest that there was no mention of Ms Hennessy at the beginning of the October hearing, in the light of all of that material, and his own concession that it was, is obviously somewhat difficulty for him personally, as he is counsel before me on the appeal. In fact, and to my mind, understandably, in oral argument, he did not press the point very firmly.

25. However, Mr Pilling did return to this matter in paragraphs 32 to 34 of his later written submissions. He pointed out that the transcript appears to contain no gaps, and the recording equipment was not reported as faulty. He points to the first reference on the transcript to Ms Hennessy as being on the second of the three days. And in that regard, what he said at paragraph 36 was that, what was said on the second day by him was that:

> "In respect of counsel's CFA, those instructing me have made enquiries via. Now District Judge Hennessy's former clerks as to whether there is any additional documentation we have not seen in that regard, and a response is awaited. We understand, I think, she is sitting in Birkenhead today."

26. It is said that this shows that there could have been no prior reference to her or about her on the first day. I do not agree that this follows. The point on the second day was obviously in relation to the question over her actual fees. But Mr Pilling also pointed to the fact that the day after the hearing, when judgment was given, the claimant solicitors did ask the defendants' solicitors for any contemporaneous notes of what had been said about recusal at the beginning of the October hearing, and when it precisely it occurred. No such notes were furnished, it seems. The defendants' solicitors merely saying that the evidence on the appeal would be limited to that before the district judge, in the absence of a successful application to adduce fresh evidence.

27. Later letters from the claimants' solicitors seem to suggest that the defendants' solicitors, DWF, had accepted that paragraph 18 of their counsel's skeleton argument for the hearing on the recusal was wrong, i.e. They now accepted that no mention was made of Ms Hennessy in the context of a possible recusal at the beginning of the October

hearing. For myself, I cannot see where DWF actually said that. This court would now be placed in a difficulty position. It should not have been, because if the claimants' legal team, solicitors and counsel, who were all there, who were there at the recusal hearing, took issue with the notion that something about recusal was said at the outset, they should have done so at the time, and not gone along with it. Short of hearing evidence from counsel and others who were present at that hearing, on the point, I cannot see how or why I should depart from the position that had been adopted before the district judge and I do not do so.

28. In that regard, I think there is force in the respondent's later submissions on the point that what this now really amounts to, is a challenge to the judge's findings of fact as to his mention of the matter at the beginning of the October hearing, as set out in the judgment now appealed against. It would be far too late to raise this, given that it has evidential consequences, as referred to it above. In the event, and as will be explained later, I do not consider that the resolution of this issue has a material effect on the outcome of this appeal.

29. Just to complete the picture, I should deal here with the question of knowledge by the claimants' legal team of the fact that Ms Hennessy had been appointed as a district judge in Birkenhead. At the appeal hearing, Mr Pilling unsurprisingly accepted he was aware that she had become a district judge at Birkenhead, from at least some time in the middle of 2017, being of course a practitioner on this circuit. And so, that is to be expected. And being part of the claimants' legal team on this case, he obviously knew that Ms Hennessy had been counsel instructed and that her fees, including the success fee element, were to be assessed.

30. At paragraph 12, the district judge dealt with the conversation he had had with Mr Pilling on 11 January, suggesting it may have been briefer than in fact, it was, although Mr Pilling at the time, seemed to agree with it. However, I have recounted what is said in the email. At paragraph 13, the judge, in his judgment said this:

> "Despite no objection being taken by those representing the claimant, to my involvement in this case at the directions hearing in July when they would have known Ms Hennessy had been appointed a district

> judge, following my expressly raising the issue at the commencement of the hearing in October, or in response to my draft judgment. Following, further identifying the issue in applications made on the 28 January. The adjourned detailed assessment was scheduled to commence on 11 February, but the court was able to accommodate the listing of that application today."

31. At paragraph 15 and 16, as I have already recited, he set out in more detail, the extent and the limit of his contact and interaction with the district judge. At paragraphs 17 and 18, he explained why he felt he should recuse himself in respect of the assessment of counsel's fees. He said that his:

> "concern was about the fees and the very extent of those fees, potentially raises a concern as to apparent bias. All present in court, myself included, appreciate the reality of the situation, whereby legal representatives are appointed to the bench and their then colleagues being called upon to determine issues involving outstanding fees prior to their appointment. It is unlikely, for example, that any fair minded observer would consider that there was a real possibility of bias, if for example, I have been called upon to take determine, to take perhaps an example at the other end of the spectrum, whether or not Ms Hennessy should recover 250 or £200 for the drafting of particulars of claim. Such decisions are routinely taken and cause no concern to any parties. In the present case however, her fees are substantial, including uplift they equate coincidentally but illustratively, to the annual salary of a district judge. I may be invited to determine that Ms Hennessy should not recover any of these fees, or at least should recover a considerably reduced sum. The consequences in financial terms to her are significant."

32. He added in paragraph 19, recusal was a matter for him. The views of the parties of relevance but not determinative. He then concluded as follows in paragraphs 22 to 23,

> "I have considered the position carefully, reminding myself, recusal is a matter for me." He thinks there is a real possibility, a fair minded observer may take the view there was a potential for bias, in that it may be felt that a judge, consciously or subconsciously might be minded to approach his or her colleagues' fees at this extent, generously."

33. Having formed that opinion that it was not appropriate to assess her fees, he recused himself from doing so. He then dealt with the more wide-ranging submissions made by the claimants that he should recuse himself entirely.

34. He said in paragraph 25 that Mr Pilling did not seek to contend it was not possible to hive off a specific issue for determination by another judge, and confirmed there was no procedural bar to it. Rather, he contended that the issues he had already determined in the case, and will be called upon in the future, should he decline to recuse himself, are linked to the issues of counsel's fees. He says for example, at paragraph 8 of the skeleton argument:

> "Claimants are gravely concerned with the effect of the connection between themselves and District Judge Hennessy may have resulted or result in decisions being made adverse to the claimants consciously or unconsciously, so as to avoid accusations by those representing the defendant, that any decisions adverse to them were influenced by that disclosed relationship."

35. He pointed, for example, to the level of success fees claimed for solicitors and counsel's contention that it would artificial for one judge assess the level of success fee from the solicitors and another for counsel when their respective CFAs were entered at a similar time. He further said out:

> "My previously having allowed no more than applicable guideline rates in respect of solicitors' fees, partly because of the heavy reliance on counsel would potentially impinge on the extent of a recovery of counsel's fees, double jeopardy may apply. Distilled, the claimants' arguments were essentially that consciously or unconsciously, I may make decisions detrimental to the claimants in respect of other issues, effectively to appease the defendants before they are faced with a less than robust assessment of my colleague's fees. I reject that position. I do not consider a fair minded observer who has taken to appreciate the reality of the operation of the legal system, and you can assume judges will deal with matters in accordance with their professional obligation and judicial oath, would see any risk of potential apparent bias there."

36. At paragraph 27, he noted what he described as the defendants' understandable concern that the application for a general recusal was tactical on the part of the claimants and arose only because they had done less well than the defendants on costs thus far, and

would therefore, prefer a fresh start with a different costs judge. At paragraph 28, he noted the dicta of Mummery LJ in the case of AWG v Morrison, [2006], EWCA Civ 6 to the effect that:

> "While it might be more convenient and efficient to proceed in that case with the trial to be heard by the judge, now the subject of an application for recusal, that was not the principal factor. The principal factor was the need for justice to be administered and seen to be administered fairly and impartially."

37. I, of course, respectfully agree. However, the district judge went on to say that AWG was concerned with a binary choice, recusal or not, as opposed to the case where there could be a partial recusal. As to the October hearing and the judgments he had already made, the district judge acceded to the defendants' argument that even if he had considered he should recuse himself from all aspects of the case, which he did not, he did not in fact, have the power as part of that, to undo or discharge as it were, his previous rulings. On that point, before me, the defendant respondents now accept that the judge would have had such a power if he needed to use it and I agree with that concession. However, the judge went on to say that even if he had the power, the recusal need not go beyond the assessment of counsel's fees.

38. He said in paragraph 32 that he was not persuaded that there was any realistic possibility that a fair minded observer would consider there was a real prospect of any of those decisions being influenced consciously, or subconsciously by his relationship with DJ Hennessy. In essence, those decisions were simply too far removed from the issue of her fees. In paragraph 34, he said there was merit in the point raised by the defendant that the court must have regard to the very late stage with which the request for recusal was made. In an ideal world, he would have identified the issue in the hearing in July 2018, however the reality is, he had not been afforded sufficient pre-reading time to identify it. But as he already indicated, it is primarily the extent of her fees that caused the potential issues, simply noting Ms Hennessy's involvement would not necessarily have identified the issue, because as I have indicated, lesser fees are frequently assessed without there being a problem.

39. And in 35, he went on to say:

> "The fact remains that those representing the claimant chose to issue these proceedings in Liverpool, did not raise the issue at the directions hearing or at the commencement of the threeday hearing when I did identify the issue, or timeously following circulation of my draft judgment, in which I again, identified the issue. Had at any stage, I revealed a closer connection to DJ Hennessy, that the parties may not have appreciated, such as, we socialise regularly with our families, the position may have been different. As I identified however, there is nothing in the extent of that relationship which would not have been anticipated by the parties, aware as they were, of the proximity of our respective courts."

40.

41. And having then referred to some case law, he rejected the suggestion that he should recuse himself any further than he had indicated.

Analysis

42. I will deal first with the issues as to whether the district judge should have recused himself at all on the one hand, or whether he was right to recuse himself to the limited extent that he did, or whether he should have recused himself entirely. We are concerned here only with a question of apparent, not actual, bias. An extensive recitation of the law is not necessary, save to say the following, so far as apparent bias is concerned. I have already referred to the relevant dicta from the case of Porter v Magill. It is cited, among other places, in paragraph 7 of the judgment of Mummery LJ in AWG that the test is now settled and it is:

> "That having ascertained all the circumstances, bearing on the suggestion that the judge was or would be biased, the court must ask whether those circumstances would lead a fair minded and informed observer to conclude there was a real possibility that the tribunal was biased."

43. Useful, though obviously not exhaustive further guidance was then given in paragraph 25 of the judgment of the Court of Appeal in Locabail saying:

> "Everything will depend on the facts, which may include the nature of the issue to be decided, but we cannot conceive of circumstances which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge, nor at any rate ordinarily, could an objection be soundly based on the judge's social or educational service or employment background or history, nor that of any member of the judge's family or previous political associations, or membership of social, sporting, or charitable bodies, masonic associations, previous judicial decisions, extra-curricular utterances, previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before, or members of the same inn, circuit, local law society, or chambers. By contrast, a real danger of bias might be well-thought to exist if there were personal friendship or animosity between the judge and any member of the public involved in the case, or the judge was closely associated with a member involved in the case, particularly if their credibility was in issue."

44. Next, and as already noted, the assessment as to whether there should be a recusal for apparent bias is not a matter for the discretion of the judge. Either there should be recusal based on an application of the fair minded observer test, or there should not; see paragraph 20 of the judgment in AWG. And if there was such a case, then recusal cannot be avoided by saying that it would cause inconvenience in the trial process. The importance of the trial being seen to be fair takes precedence. That said of course, whether in any given case there should be a recusal, is highly fact-sensitive and is a question of fact and degree. Further, the fair minded observer is not to be "unduly sensitive or suspicious." See paragraph 14 of the judgment of Lord Rodger in the House of Lords case of Helow v SSHD [2008], UKHL, 62.

45. Put another way, judicial discomfort at continuing with the case is not the test. As Chadwick LJ put it, in Triodos v Dobbs, at paragraph 7:

> "It is important for a judge to resist the temptation to recuse himself, simply because it would be more comfortable to do so. If judges recused themselves whenever a litigant criticised them, we would soon reach the position where litigants were able to select judges to hear their cases, simply by criticising all the judges they did not want to hear their cases."

46. For my part, I do not see that those remarks are particularly of limited ambit, as Mr

Pilling has suggested in paragraph 9 of his written submissions.

47. Reference has been made by both parties to the decision of the Court of Appeal in Otkritie International v Euromov [2014], EWCA Civ 131. This was a rather unusual case where a trial judge had made many adverse findings against the defendant, and subsequently, the successful claimant applied to the judge to hold committal proceedings for contempt on the basis of the defendants' knowingly false statement. The defendants objected to the judge hearing that on the basis of apparent bias, since he had already been so critical of the defendants' evidence. The judge decided to recuse himself, but gave permission to appeal and indeed, expressed the hope that his decision would be overturned. The Court of Appeal unanimously did so, finding no case for recusal at all. At paragraph 32, Longmore LJ observed thus:

> "Usually this court will be astute to support judges exercising what I have called this delicate jurisdiction of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases, otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined. Of course, if the judge himself feels embarrassed to continue, he should not do so. If he does not so feel, he should."

48. I do not read those remarks in context, as meaning that judges should recuse themselves simply because they feel embarrassed, whether or not they consider that the fair minded observer test is made out. The point rather, is that they should not recuse themselves where it is not necessary, which is exactly what happened in that case.

49. I do not accept, as possibly contended for in paragraphs 9 to 19 of Mr Pilling's written submissions, that there is some clearly separate ground of personal embarrassment as a basis for recusal as opposed to the application of the fair minded observer test. At least not when on any view, the object of the recusal is said to be apparent bias. Insofar as personal embarrassment was being advanced as a reason for recusal, separately and distinctly from apparent bias, on the basis of the fair minded observer, I would agree with the respondent that that submission would go beyond rebutting the cross-appeal where thus far, the parties have proceeded on the basis of the fair minded observer test. To that

extent, that argument should not be permitted. But in any event, for the reasons given above and for the reasons I give below, it makes no difference.

50. Indeed, the case of Locabail, which is also quoted in the written submissions, does not support that distinction. In the passage referred to me, the court said at paragraph 21, in Locabail this:

> "In any case giving rise to automatic disqualification on the authority of the Dimes case, the judge should recuse himself from the case before any objection is raised. The same course should be followed if, for solid reasons, the judge feels personally embarrassed in hearing the case. In either event, it is highly desirable if extra cost, delay and inconvenience are to be avoided, that the judge should stand down at the earliest possible stage, not waiting until the eve of the hearing. Parties should not be confronted with a last minute choice between adjournment and waiver."

51. But as to that, first this paragraph was really dealing with timing questions. Secondly, the distinction it was drawing was between automatic disqualification and what it then called, personal embarrassment "on solid grounds." The latter must be reference to a proper basis for recognising a case of apparent bias. The reference to solid grounds rather support, rather than detract from the notion that judges should not be oversensitive. Of course, in many and perhaps, in most cases, the fact of personal embarrassment will show as a piece of evidence, perhaps conclusively, that recusal on the grounds of apparent bias must follow, but it need not be.

52. So far as there was a reference to the Deeds case, that was a completely different case where there was a personal and financial interest in the relevant company, held by the Vice- Chancellor, whose recusal was being sought. Equally, it may well be rare if a judge has recused himself on a matter at first instance, for the Court of Appeal to say he should not have done, but it is not impossible as a matter of principle, nor should it be and Otkritie is an example of where the judge's decision was overturned on appeal. And I have given the reference immediately before this, to the Deeds case. I do not accept that the only way to deal with the oversensitive judge, is to rely upon the powers of the Lord Chancellor or Lord Chief Justice to suspend the judge if he or she was repeatedly guilty of such oversensitivity. If in principle, the judge has gone wrong in law in respect of a

decision to recuse, having regard to the circumstances of the particular case, then the place to put it right is on appeal, not by reference to some disciplinary power. This point is important, because otherwise, the relevant appeal court cannot give meaningful guidance to other judges, who might find themselves in the same position or an analogous position to the judge here. A possibility which, in my judgment, is by no means unlikely. Whether as a matter of case management, it might still be better to permit to District Judge Jenkinson to recuse himself, even if there were no solid grounds for him doing so in respect of counsel's fees, is another matter as we shall see.

53. But to return to the law, the simple point is that judges should take care to ensure that their recusal is in fact, necessary, according to an application of the objective, fair minded observer test. And that is the case whether they take the initiative to consider recusal or whether a party to the proceedings makes the application to recuse first. Finally, the case of Watts v Watts, [2015], EWCA Civ 1297 emphasises that the fair minded observer would know the high professional ethical standards in play when a judge sits, so that it would not be expected for example, that a deputy judge would favour one of the counsel in the case in front of him, just because they are in the same chambers, and even if he was leading that counsel in another case; that remains the position even if the counsel concerned was on a CFA so that success would, and could materially increase her chambers contributions. See paragraph 28(1) of the decision in Watts to that effect. And having talked about professional standards, it adds this:

> "These aspects of the legal culture of the bench and the legal professionals are not undermined by the fact that some litigation is now funded by means of a CFA."

54. In paragraph 24 of his written submissions, Mr Pilling suggests that this statement is rendered doubtful because in the earlier case of Smith v Kvaerner, [2006] EWCA Civ 242, (not a case about CFAs) the Court of Appeal had said that the existence of CFAs in chambers may mean that in some cases at least, there would be room to argue apparent bias. I see that, but in Watts, the Court of Appeal dealt with that point expressly. There is no real conflict in my view.

55. I should add finally, on the law, that I did not find either the respondents' reference to the judicial pensions litigation or the appellants' reference to the judicial whistleblowing case to be of any assistance or relevance.

56. One should consider first what the position here would have been, had one been starting with a blank piece of paper as it were. Had, for example, the defendant here, applied at the outset for the district judge to recuse himself, at least in connection with the assessment of Ms Hennessy's fees, on the basis she was now a judicial colleague of his, working nearby, I would have found it very hard indeed, to see how recusal would have been warranted on the ground of apparent bias. The district judge had no direct or indirect interest in the amount of counsel's fees allowed, nor were they so close socially, or on other
personal terms that a fair minded observer might think there was a risk of the judge being too generous over the question of fees, for fear of disturbing their friendship, for example.
57.

58. Indeed, the district judge accepted that if the amount of the fees claimed had been small, it would not have been a problem, rather it was the amount in issue. But I do not see that as a relevant distinguishing factor here. It is not unknown for judges to have to deal with costs of solicitors or barristers, who have now gone on to the bench. The fair minded observer would surely expect both parties to act professionally in the sense that the costs judge would assess in the normal way, without regard to the identity of the lawyer involved. And the lawyer involved, now a judge, would not objectively be expected to castigate the costs judge in some way, if he or she felt that in the event, too little was allowed.

59. It follows that in my judgment, the district judge was oversensitive about his position, no doubt acting out of an excess of caution. But in my view, if he had any initial concerns, then he was required to do no more than to refer to the fact, which was known in any event to the claimant, that Ms Hennessy had now become a district judge, and the details of which, may not have been so apparent that she was no more than a judicial colleague working nearby. He should then simply have asked the parties whether they had any objection to him dealing with her fees. I would be very surprised, had this been done

in this way at the outset, if the claimant then would have objected. And we know the defendant, the party most likely to be affected, would not have objected. There the matter would have rested, and the entire assessment would have been dealt with by the district judge.

60. A further point on the question of apparent bias here was made by the respondents, namely that as between solicitor and client, and counsel, the fees would in any event, be claimable as agreed, whatever happens on the assessment. In this case, I do not take that argument into account, because I accept that if, for example, success fees are reduced as between the parties, then they also fall to be reduced as between solicitor and counsel too. But the lack of this argument does not affect my overall decision. Also, I do not think, as the claimants contended, and as the district judge thought, that the fact that the district judge sits in an adjoining nearby court, so it could be regarded as the same court as this one in Liverpool, is a factor which tips the case over the edge into apparent bias. Especially where, as here, there are no particular factors as to their social relationship, above and beyond the fact that they are now both district judges on the same circuit, with the very limited social interaction that follows simply from those roles which the district judge has identified. I am afraid I just take the view that objectively speaking, it is not realistic to say that the fair minded observer test would have been satisfied here.

61. In my judgment, there was in fact, no case for the district judge to have recused himself at all, even to the extent of the assessment of counsel's fees. This was a case, in truth, of no more than some judicial discomfort, but which falls well short of establishing apparent bias. The very fact that it took some considerable prompting by the judge before the claimant belatedly applied to recuse him, and in circumstances where the party most affected – the defendant - never took the point, is some evidence of that. It follows that the district judge did not, in my view, need to dwell on the matter further as in fact, he did, following the October hearing and setting out his views in paragraphs 36 and 37 of the draft judgment. And it would have been much wiser, not to have repeated those concerns in formally, to Mr Pilling. But since he did, and since now the whole question of the district judge's assessment of counsel's fees has become so elevated in this appeal, and because the district judge, though unnecessarily, has obviously become concerned at having to deal with them, the better course is still to hive off that part of the costs

assessment to another costs judge, unless that is in any way unfair or impractical, matters with which, I deal below.

62. The decision I make here to uphold the partial recusal, is therefore made as a proportionate and appropriate case management decision, not as an application of the rules of apparent bias. I do not believe that this will encourage judges to be oversensitive; it is simply a response to the very unusual facts of this case. I now turn to the appeal and the claimants' claim that there should be entire recusal. The first point is obvious: since I have found there was no case for any recusal, it must necessarily follow that there is no case for any wider recusal. But I do go on to consider the position even if there had been a case for the more limited recusal or on the basis, as I have found, that as a matter of case management, the district judge will be recused from dealing with counsel's fees.

63. There is, in my view, no basis for saying that his handling of the rest of the costs assessment is tainted by apparent bias. I reject the notion that the fair minded observer would conclude there was a risk of the district judge being less favourable to the claimant as some kind of compensation for any perception he might be less favourable to the defendant on counsel's fees. He was right to reject that argument for the reasons he gave. In any event, any possible perceived risk disappears, once it is to be remembered that he will now not be assessing counsel's fees anyway, so far as matters in the future are concerned. To that extent, there will be nothing notionally for him to compensate against. There is, in my view, no other basis for recusing the district judge from the rest of the assessment. Indeed, in respect of the assessment he has already done, and which the claimant would wish to have discharged on the basis of apparent bias, the claimants have not pointed to any respect in which any part of the written judgment, or indeed the extemporary judgments given in October, suggest that the district judge must, or even may, have been guilty of apparent bias.

64. So, that is the position in relation to the generalised argument that there should be recusal of everything, which I reject. However, a separate claimed basis for the entire recusal of the district judge arose as follows. When the claimants applied for the recusal, their evidence included the following statement, which emerged on instructions to Mr Pilling from his instructed solicitors, and I quote:

> "Furthermore, for what it is worth, I have canvassed the situation which has now arisen on a hypothetical basis with a retired district judge from Liverpool. And he was quite adamant, it was clearly a matter for recusal without any doubt."

65. Having referred to that statement in his recusal judgment, the judge went on to say this:

> "During the course of initial discourse with Mr Pilling today, I express concern at this. I invited him to identify the retired district judge concerned, which Mr Makin declined to do. To my mind, it is utterly inappropriate to seek to pray in aid of such an application, the opinion of an unidentified retired member of the judiciary. Aside from the irrelevance of that opinion, it is to my mind, unprofessional and I said so during the hearing, and I stand by that position. However, it seems to me to be entirely unrealistic to suggest that the fair minded observer to whom reference had been made frequently within this judgment, would take the view that a judge would express such an opinion on the distinct issue during the course of a hearing as this, might now be seen to be at risk of apparent or actual bias in then approaching the balance of this detailed assessment in any way other than it would otherwise have been approached, I reject therefore, the application to recuse myself on the basis of that criticism made today.

66. I agree with the district judge that the making of such a statement was inappropriate. I also think he was entitled to use the word unprofessional, in the sense that experienced solicitors should know better than to attempt to support an application of this kind by seeking the opinion of a retired judge, as if that could or should somehow influence the judge who is the subject of the recusal application. Moreover, frankly it would have been better if the retired district judge had declined to express any view, although of course, I do not know in precisely what terms his opinion was sought, save that it appears to have been done on a hypothetical basis. When the judge makes reference to "unprofessional", I agree that that is not to indicate any particular item of professional misconduct, and the judge made that clear, see page 29 of the transcript of the hearing of 6 February itself.

67. I do not agree with paragraphs 26 to 31 of Mr Pilling's written submissions to the effect that this incident amounts to evidence of personal animosity by the judge, towards

the claimants' firm of solicitors. Indeed, and again, if personal animosity is now advanced as a separate ground in relation to this matter, it was not put in this way, or certainly not as high previously. In any event, for the reasons that I have given and will give, there is nothing in the point. There is a suggestion in the written submissions that what in fact, was done by the claimants' solicitors in making that statement, was really the same as what was recommended in the guide to judicial conduct. But what the guide to judicial conduct says is this, is that insofar as the judge whose recusal is being sought, reliance must be placed on the judgment of that judge and his or her judicial instincts and conferring with a colleague where possible and appropriate. That is completely different from a party seeking the opinion of a retired judge, and putting it forward to support a case of recusal. So I am afraid that the reference to the guide is completely irrelevant.

68. Equally, what happened in the case of Mengiste v Endowment Fund, [2013], EWCA Civ 1003, cited in paragraph 29 of the written submissions, was entirely different from the facts here. The judge in that case had continuously criticised the claimants' lawyers. He then criticised them subsequently, when they applied for him to recuse himself in respect of a putative wasted costs application to show clause. He went on to say that the recusal application itself was done in order to obstruct the wasted costs application and delay matters. That is completely different to the case here. Especially as the claimants' solicitors there, stood to lose financially, directly since if the wasted costs jurisdiction had been exercised, it would be exercised against them personally. Nor in my judgment and for the record, were the observations of the district judge here, unnecessary or without any proper basis.

69. Further, and all of that said, this was an isolated incident in the overall recusal application. And while the district judge was perfectly entitled to comment, as he did, it hardly follows that he must be guilty of apparent bias. No fair minded observer would so conclude. If it were otherwise, it would follow that every time a judge has cause to comment critically on one aspect of the conduct of a party's solicitors, he would then have to recuse himself. Sometimes, the making of such observations are part and parcel of dealing with litigation, especially on questions of costs orders. Assuming that is, that there was a proper basis for those remarks, as there was here. Accordingly, the district judge was right to reject this as an additional ground for recusal and I do so too. Equally, in my

judgment, there is no basis for any complaint against District Judge Jenkinson in this regard, or any reason at all, why he should not deal in the future, with other cases including involving the claimants' solicitors, should he be allocated to them.

70. That then just leaves the question of whether it is fair or appropriate to hive off counsel's fees assessment from the rest of the costs assessment. It is suggested that this cannot sensibly be done, because the cost issues or at least, some of them, are inextricably linked to counsel's fees. I do not see that. It is possible, I suppose, that this district judge may assess solicitors' success fees at a rate which differs from those awarded by the new costs judge on the assessment of counsel's fees, noting as I do, that it was made clear to me that they were not agreed at precisely the same time. But I doubt in fact, if that is very likely. Indeed, if as I propose, the new costs judge does not deal with counsel's fees until after the District Judge Jenkinson has dealt with all the other points, he can see what has been done. He can be guided by it, or not, as he sees fit.

71. It has to be remembered, that out of the total fees in question here, of some £1.7 million, counsel's fees are, on a 100 per cent success fee basis, some £103,000. Obviously substantial, but only around seven per cent of the total. There has to be a sense of proportion here. It has been said that because the district judge has already taken the view on solicitors' fees, because there has been heavy reliance on counsel, there is a risk of double jeopardy if a new costs judge decides to reduce counsel's fees considerably. I see no such risk in reality. Again, it must be recalled that the base fees are some £50,000 and those are the fees in question in terms of what hours have been done. And the new district judge can take full note, if he wishes, of what the district judge has said on solicitors' fees.

72. I am afraid I regard the potential problems of overlap as set out in Mr Pilling's written submissions, at paragraphs 52 to 55, although strictly this is not a matter raised by the cross-appeal, as unrealistic. I do not consider that solicitors' costs cannot be determined in advance of counsel's costs, nor do I think that their hourly rates or the level of the appropriate fee earner involved, must await a decision on counsel's fees. I do not accept that the supposed indirect consequences for the assessment of counsel's fees entailed by the district judge's decision on all of the other matters, amounts to a real risk that counsel's fees cannot be properly hived off. Nor am I assisted by the case which was

posited by Mr Pilling, of a witness known to the judge, who gives evidence only on limitation, as supposed in paragraph 57 to 58 of the written submissions. If and how it is appropriate to hive issues off, dealt with separately and by different judges, is highly fact sensitive.

73. Equally, one element of the assessment for the new district judge, would be the question of the uncertainty of the terms of counsel's general CFA, but that is question of law, it is not a matter even of discretion. I agree that the new costs judge may need a little time to read in, but I venture to suggest not too much, given that he or she will have all the judgments of the DJ on all of the other issues, along with this judgment. It is then said that the new district judge will have to do the line by line assessment of counsel's fees, as well as decide the points of principle. That is true, but all of that can be done at the same time. I cannot see how any more than a day would be needed for the new costs judge to deal with counsel's fees. Moreover, in the light of my earlier findings, I do not consider it necessary for the new judge to be in London. If it were necessary to put some distance between Birkenhead and the new judge for these purposes, which I do not accept, but if one wanted to do so, then surely a costs judge in for example, Leeds, could do the assessment. And if there turns out to be any particularly close relationship with DJ Hennessy, that is something which would undoubtedly emerge.

74. For the avoidance of doubt, I should briefly deal with the question whether there can be a "partial recusal". This has occurred here, though in fact, as a matter of case management in the light of the history of this matter, not because the district judge actually needed to recuse himself at all. It is not appropriate to lay down any general rule, because in my view, circumstances where partial recusal will arise, are likely to be rare. It has happened where the trial judge, a deputy, after the trial recused himself from the costs assessment because he was regularly instructed by the firm whose costs and hourly rates were being assessed, and whose hourly rate, he as counsel might have to justify on another occasion, that is the case of Amey. Accordingly, having done the trial, he did not assess the costs but that is obviously different from this case, and nor does it add any support for the claimants' case on recusal here.

75. It seems to me that each case must be examined by reference to its own facts, and if the issue of recusal is really highly confined, it may follow that the judge can recuse himself from the relevant part, but not other parts. Beyond that, it is not necessary for me to go, save that I see nothing unlawful about taking that course and the course which the court has decided to take here.

76. In the light of the findings that I have now made, the waiver arguments all fall away. So does any objection on the grounds of waiver, if it is related to the question only of the wider recusal rather than on counsel's fees. But as the point has been argued, I should express my views briefly on the point. So far as the law is concerned, both sides accept in the light of the many authorities, that a party who would otherwise have a right to seek a recusal can be stopped from advancing it because he has waived it. See in general, De Smith paragraph 10-066.

77. And then, as put pithily by Jacobs LJ in the case of Baker v Quantum Clothing, [2009], EWCA Civ 560, paragraph 36, he says:

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

78. In my judgment, the claimants clearly did waive any right to seek a recusal, had there been any to begin with. The legal team was well aware of the elevation of Ms Hennessy to the district judge by mid-2017. And they knew that a neighbouring district judge would be assessing her fees. So that was the position even before the first directions hearing, in July of 2018.

79. Moreover, at that stage, for all they knew, the District Judge Hennessy might have been very well known to District Judge Jenkinson. They might have been close friends; they might have seen each other on many more occasions than simply at Christmas parties. They could have raised the matter in July 2018, but they did not. They could have raised it after the judge alerted them to it at the beginning of October, but they did not.

And even if, for the sake of argument, the district judge did not raise it at the outset of the October hearing. Her name, and her issue as to fees came up later in the hearing and was a reminder, if it was necessary, of a potential problem, if as the claimant maintained, there was a problem. At any stage in the October hearing, they could have raised it, even if the district judge did not do so at the start.

80. And then after that, they left it for more than two months after reading paragraphs 36 and 37 of the draft ATE judgment. I am told that part of this delay was because it was necessary to get insurers instructions. And I am told that the insurers would fund the recusal application, and this appeal. But I fail to see in ongoing litigation, why it would take insurers so long. Moreover, the ultimate recusal application was for the entire recusal, which is not what the district judge had been talking about. I note from paragraph 45E of the written submissions, that it is said that time was also needed to make enquiries of the district judge, via. Her former clerk and chambers. But I do not know what the detail of that was. It may have been, as was alluded to expressly in the passage from the October hearing to which I have referred, simply all have been about her particular fees, for the purpose of the substantive arguments in the October hearings, and not at all about her relationship or interaction with the district judge was such as to maintain a recusal application. There is simply no evidence about that before me, so I cannot take any real note of that factor.

81. Finally, it is said that no court time was wasted by when the application was ultimately made. While I have relied in my judgment, on delay from 13 November as part of the overall delay, as it were, I have also held that the point could and should have been raised long before October, in July. And if it had been, then most certainly time and costs would have been saved. Moreover, while the facts may have been more extreme in the cases footnoted to paragraph 45M, of the written submission, each case of waiver has to be viewed on its own facts. This was a case where, in fact, no initial from the judge sought to be recused, was needed at all. The essential facts were at all material time, known to the claimant, about the position of Ms Hennessy and the district judge. And as noted above, if the claimant was uncertain about the extent of the interaction between the district judge and Ms Hennessy, all the more reason to raise the point at the beginning so that they could

have been allayed or not, as the case may be, by what the actual position between these two individuals was.

82. And if in truth, the delay was because of a consideration of a tactical decision to seek recusal so as to have the opportunity to revisit judgments already made, which were adverse to the claimant, that is hardly a good reason for delay in terms of any waiver argument. Overall then, there was in real terms, of a delay of at least eight months or so from July 2018 and earlier, if one goes to the position before the directions hearing, but after this costs assessment had started, given that the claimants knew what was entailed in the costs assessment, and given that they knew of the appointment of Ms Hennessy from mid-2017. But even if we say six months, or even from the beginning of October and say four months, that length of delay, coupled with the circumstances of this case, is more than enough to amount to waiver. And indeed, in my judgment, even if one went to the end of the October hearing, it is more than enough.

83. This is particularly so where all parties knew that there was going to be an adjourned hearing as early as 21 days after the last one. And yet, that appeared to have injected no urgency into any consideration of the recusal application. In the event of course, the 11 and 12 February hearing was vacated. True, it may have been vacated because of the impending appeal, but the point is that it may have been fixed at an earlier point for all the parties knew at the end of October. For all those reasons therefore, in my judgment, had it been necessary, I would have said that the claimant had waived all their rights to seek an entire recusal. In the alternative, if I was wrong about that, then they would at the very least, have been stopped from reopening the judgments in October. But in fact, those findings are academic in the light of my earlier findings.

Conclusion.

84. Accordingly, this appeal fails and the cross-appeal succeeds to the extent that there was in fact, no reason to recuse at all and in the alternative, on the grounds of waiver, it does not result in any different order for the reasons which I have already explained. The only question is location of the hearing of the issue concerning counsel. The district judge said that should be in London, I do not consider that is necessary. That concludes my judgment.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.