

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**TERRITORY OF THE VIRGIN ISLANDS**

**BVIHCMAP2022/0001**

**BETWEEN:**

**MULTIBANK FX INTERNATIONAL CORPORATION**

Applicant/Appellant

**and**

**VON DER HEYDT INVEST S.A.**

Respondent

Before:

The Hon. Mr. Mario Michel  
The Hon. Mr. Paul Webster  
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal  
Justice of Appeal [Ag.]  
Justice of Appeal [Ag.]

Appearances:

Mr. Hodge Malek KC, Mr. Hefin Rees KC and Mr. Philip Hinks for the Appellant  
Mr. Tim Penny KC, Mr. Alexander Cook and Mr. Simon Hall for the Respondent

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2022: April 25, 26, 27, 28, 29.

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*Commercial appeal – Appeal against refusal of applications for recusal – Apparent bias – Whether fair-minded informed observer would conclude that there was real possibility of bias – Adverse comments - Whether the Judge came to factual conclusions on matters which were not the subject of evidence - Whether judge erred in making conclusionary findings - Whether the judge exceeded the scope of judicial functions*

By notice of application filed on 8<sup>th</sup> December 2021, the applicant/appellant, Multibank FX International Corporation (hereafter “MBFX”), applied for an order that Jack J [Ag.] recuse himself from all further proceedings in claims numbered BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073 (hereafter “the Claims”). The application was made in light of certain comments and findings made by the learned judge in judgments delivered by him on 4<sup>th</sup> October and 19<sup>th</sup> October 2021 in proceedings in the Claims. On 14<sup>th</sup> December 2021, the learned judge heard the recusal application and on 17<sup>th</sup> December 2021 he delivered a judgment wherein he held that there was no real possibility that a fair-minded and informed

observer would conclude that he (the learned judge) would not approach future proceedings in the Claims with an open mind, and he dismissed MBFX's recusal application.

Being dissatisfied with the decision, MBFX by notice of application filed on 4<sup>th</sup> January 2022, sought leave to appeal the judgment of the learned judge dismissing MBFX's recusal application. Exhibited to the application was a draft notice of appeal, whilst skeleton arguments in support of the leave application and recusal appeal were also filed by MBFX at the same time. Von Der Heydt Invest S.A., the respondent (hereinafter referred to as "VDHI"), filed skeleton arguments on 19<sup>th</sup> April 2022 opposing the application for leave to appeal and the appeal itself.

During the sitting held on 25<sup>th</sup> to 29<sup>th</sup> April 2022, this Court heard the application for leave to appeal and the substantive appeal in this and other related matters and on 29<sup>th</sup> April 2022, ordered that:

- 1) Leave is granted to the applicant to appeal against the order of Jack J [Ag.] dated 17<sup>th</sup> December 2021 by which the learned judge dismissed the application to recuse himself from hearing any further applications in the BVI High Court Claim Nos. BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073.
- 2) The appeal against the judgment is allowed and the order of the learned judge dismissing the application to recuse himself is set aside.
- 3) All further proceedings in Claim Nos. BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073 shall be heard by a different judge sitting in the Commercial Division of the High Court of the Territory of the Virgin Islands.
- 4) The award of costs in the application for leave to appeal and in the appeal is reserved.

This Court also stated at the conclusion of the proceedings on 29<sup>th</sup> April 2022 that the reasons for its decision would be given on a date to be fixed by the Chief Registrar.

**Held:** Affirming the orders made at (a), (b) and (c) of paragraph 6 hereof, and ordering VDHI to pay MBFX's costs on both the application and the appeal, which costs are to be assessed if not agreed by the parties within 21 days, that:

1. It is settled law that the test of apparent bias is essentially whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Apparent bias arises when there is something in the judge's conduct of the hearing or behaviour that gives rise to a suspicion that he or she will not be able to decide the case in an impartial manner. Having reviewed the complaints made by the appellant and considering (i) the conduct of the learned judge in allowing the judgments to be disclosed to the regulators; (ii) the invitation by the learned judge for the FSC to direct Mr. Taher to stand down as Chairman; (iii) the judge's previous findings of collusion and suspicion on the part of MBFX and Mex Clearing; and (iv) that these findings were made at the interlocutory stage of the

matter, it is likely that the fair-minded observer would conclude that these circumstances give rise to an inference of apparent bias.

**Porter v Magill** [2002] 2 AC 357 applied; **Dr. Sengupta and another v Holmes and others** [2002] EWCA Civ 1104 applied; **Southern Equities Corporation Limited ( In Liquidation) and ors v Bond** and ors [2000] SASC 450 applied; **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] 1 All ER 65 applied.

2. The facts of the case will determine whether it is appropriate for the judge to recuse himself. Recusal is a highly fact-sensitive issue, so it ought not to be lightly done. An appellate court is able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. The Appeal Court must determine whether there is a genuine possibility of bias after independently evaluating all the relevant facts and circumstances. There is no set list of circumstances under which the possibility of perceived bias may exist. However, the views expressed must be such as to lead to a concluded view, as distinct from the judge merely expressing a preliminary view. The applications which were before the Court did not require the Judge to make the disputed comments and the making of these comments fell well outside the scope of his judicial remit. Where there is real ground for doubt as to whether the test for apparent bias is established, that doubt should be resolved in favour of recusal. Consequently, the judge ought to have recused himself from all future proceedings in claims numbered BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073.

**Keston Riley v The Attorney General and the Director of Public Prosecutions** MNIHCVAP2020/003 (delivered 17<sup>th</sup> September 2020, unreported) followed; **Mengiste and another v Endowment Fund for the Rehabilitation of Tigray and others and Chubb v Endowment Fund for the Rehabilitation of Tigray and others** [2013] EWCA Civ 1003 applied; **Benjamin Exeter v Winston Gaymes et al and Lauron Baptiste v Vil Davis et al** <sup>1</sup> SVGHCVAP2016/0021 consolidated with SVGHCVAP2016/0022 (delivered 13<sup>th</sup> June 2017, unreported).followed; **Otkritie International Investment Management Ltd and Ors v Mr George Urumov** [2014] EWCA Civ 1315.applied;

## JUDGMENT

### (The Recusal Appeal)

- [1] **MICHEL JA:** By notice of application filed on 8<sup>th</sup> December 2021, the applicant/appellant, Multibank FX International Corporation (hereafter “MBFX”), applied for an order that Jack J [Ag.] recuse himself from all further proceedings in

claims numbered BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073 (hereafter “the Claims”).

- [2] The application was made in light of certain comments and findings made by the learned judge in judgments delivered by him on 4<sup>th</sup> October and 19<sup>th</sup> October 2021 in proceedings in the Claims.
- [3] On 14<sup>th</sup> December 2021, the learned judge heard the recusal application and on 17<sup>th</sup> December 2021 he delivered a judgment wherein he held that there was no real possibility that a fair-minded and informed observer would conclude that he (the learned judge) would not approach future proceedings in the Claims with an open mind, and he dismissed MBFX’s recusal application.
- [4] By notice of application filed on 4<sup>th</sup> January 2022, MBFX sought leave to appeal the judgment of the learned judge dismissing MBFX’s recusal application. Exhibited to the application was a draft notice of appeal, whilst skeleton arguments in support of the leave application and recusal appeal were also filed by MBFX at the same time.
- [5] On 19<sup>th</sup> April 2022, the respondent, Von Der Heydt Invest S.A. (hereafter “VDHI”), filed skeleton arguments in opposition to the application for leave to appeal and to the appeal itself.
- [6] On 25<sup>th</sup> to 29<sup>th</sup> April 2022, this Court heard the application for leave to appeal and the substantive appeal in this and other related matters and ordered, inter alia, that:
  - (a) Leave is granted to the applicant to appeal against the order of Jack J [Ag.] dated 17<sup>th</sup> December 2021 by which the learned judge dismissed the application to recuse himself from hearing any further applications in the BVI High Court Claim Nos. BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073.

- (b) The appeal against the judgment is allowed and the order of the learned judge dismissing the application to recuse himself is set aside.
- (c) All further proceedings in Claim Nos. BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073 shall be heard by a different judge sitting in the Commercial Division of the High Court of the Territory of the Virgin Islands.
- (d) The award of costs in the application for leave to appeal and in the appeal is reserved.

We also stated in our order made at the conclusion of the proceedings on 29<sup>th</sup> April 2022 that the reasons for our decision will be given in a written judgment on a date to be fixed by the Chief Registrar. Our reasons follow.

#### **Leave to appeal**

- [7] I will deal first with the reason for granting leave to appeal. We entertained no doubt that, given the comments and findings made by the learned judge in his judgments dated the 4<sup>th</sup> and 19<sup>th</sup> October 2021 on the basis of which the application was made for the judge to recuse himself, the appeal against the judge's dismissal of the recusal application had a real prospect of success. This was a sufficient reason to grant leave to appeal and so we granted the application for leave and proceeded to hear the actual appeal.

#### **The appeal**

- [8] In relation to the substantive appeal, having granted leave to appeal, we treated MBFX's draft notice of appeal (exhibited to the application for leave to appeal) as the notice of appeal and proceeded to hear the appeal on the basis of the draft notice and the grounds contained therein.
- [9] The draft notice of appeal purports to list 13 grounds of appeal, but there is really a single ground of appeal contained in the notice, which is that:

“The learned judge erred in law and/or as a matter of principle in concluding that there is no real possibility that a fair minded and informed observer would conclude that the Judge would not approach future hearings in the Proceedings with an open mind on the basis of the three matters set out below.”<sup>1</sup>

[10] The “three matters set out below” are the following:

“First, in his judgment of 4 October (‘the WFO Judgment’), the Judge purported to make final and concluded ‘findings’ of fraud against MBFX and the Chairman of the group of companies of which MBFX forms part (‘the MultiBank Group’), Naser Taher (‘Mr. Taher’). The Judge did so without hearing or reading any evidence from Mr. Taher and without being required to make any such findings for the purpose of the applications which were then before the Court.”<sup>2</sup>

“Second, in his judgment of 19 October 2021 (‘the Confidentiality Judgment’), the Judge – in lifting certain confidentiality restrictions which had previously applied to the proceedings – referred at [40] to a ‘need’ to vary such restrictions so as to permit disclosure of (inter alia) the WFO Judgment and the Confidentiality Judgment to the 11 regulators of all companies in the MultiBank Group. By this it is evident that the Judge considered and envisaged that such regulators may be encouraged to take action against MBFX and Mr. Taher or at least to consider doing so.”<sup>3</sup>

“Third, without any argument to this effect being advanced by the Claimant, the Judge held that Mr. Taher has ‘form’ for disruptive litigation behaviour by relying upon a finding of contempt made by the English Court (in the case of *Marketmaker Technology (Beijing) Co Ltd v CMC Group plc* [2009] EWHC 1445 (QB)) some 11 years ago, where the order for committal was subsequently discharged. There is – at the lowest – a real possibility that an impartial observer would conclude that the Judge has ‘entered into the arena’ against MBFX in disposing of applications before him by reference to arguments other than those deployed by the Claimant.”<sup>4</sup>

### **Appellant’s Submissions**

[11] The appellant (MBFX) submitted that there exists a real possibility of bias on the part of the learned judge and that a fair-minded and informed observer would conclude that, at the lowest, there is a real possibility that the learned judge is

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<sup>1</sup> Paragraph 3 (1) of the draft notice of appeal.

<sup>2</sup> Ibid at paragraph 3 (2).

<sup>3</sup> Ibid at paragraph 3 (7).

<sup>4</sup> Ibid at paragraph 3 (12).

predisposed against MBFX. The learned judge was therefore wrong in refusing to recuse himself from hearing further proceedings in the Claims.

- [12] The appellant claimed that the judge, at the interlocutory stage of the proceedings, made 'conclusionary findings' against MBFX and Mr. Taher in the Worldwide Freezing Order ("WFO") and Confidentiality judgments.<sup>5</sup> The parts of the learned judge's judgments that the appellant says infer apparent bias are, inter alia, paragraphs 75, 77, 79 and 112 of the WFO Judgment.<sup>6</sup> These are reproduced below:

"[75] Action 2020/0215 was in my judgment clearly collusive. The sole purpose of commencing the action was so that it could be settled on terms already agreed...."

"[77] Action 2021/0003 is even more suspicious. It is extraordinary for one wholly owned solvent subsidiary to seek and obtain an injunction against another wholly owned solvent subsidiary in the same group."<sup>7</sup>

"[79] The improper purpose for obtaining the seal and gag orders is borne out by the subsequent history. I find that they were intended to, and did, make it difficult for any investigation to be carried out into what had occurred."

"[112] I start my consideration by reminding myself that MBFX is wholly under the control of Mr. Taher, against whom a good arguable case of fraud has been made. He has a conviction for contempt of court and appears to have been happy to manipulate the processes of this Court in the current set of three proceedings. MGW has a web of some thirty-two subsidiaries in many different countries into which Mr. Taher is able to move assets from MBFX. By the nature of its business in foreign exchange MBFX can (and must regularly) move assets out from this jurisdiction very readily indeed. If necessary, Mr. Taher has the means readily to create new companies held in non-transparent ways, so as to hide any assets moved from MBFX."

- [13] In the Confidentiality Judgment,<sup>8</sup> the parts of the learned judge's judgment the appellant says infer apparent bias are, inter alia, paragraphs 14 and 40 as follows:

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<sup>5</sup> Appellant's Skeleton Argument. Consolidated Appeals Bundle. Volume 12, pdf page 3 at paragraph 3.

<sup>6</sup> BVIHC (Com) 2021/0073 and 2020/0215 (delivered 4<sup>th</sup> October 2021 and corrected 19<sup>th</sup> October 2021) ("the WFO Judgment") Consolidated Appeal Bundle, Volume 3 Pages 165-166.

<sup>7</sup> Action 2021/0003 was the action commenced by Mex Clearing seeking a freezing order against MBFX.

<sup>8</sup> Judgment on sealing the various proceedings (delivered 19<sup>th</sup> October 2021, unreported) ("the Confidentiality judgment") Consolidated Appeals Bundle Volume 3 pages 204-220.

“[14] It is not clear that these apocalyptic consequences would necessarily follow. As I have noted above, Mr. Gee QC accepts that it was completely appropriate to inform the relevant BVI regulator of the Court’s concern. It would be perfectly open to the FSC to ask Mr. Taher to stand aside whilst the Court proceedings continue. Nonetheless, I accept that there will inevitably be, at least temporary, damage to MGW’s reputation from the lifting of the seal and gag orders and the publication of my judgment of 4th October 2021.”

“[40] The terms of the seal and gag order will need to [be] varied so as to permit disclosure of the judgments and documents in this consolidated matter to regulators of Mex Clearing, MBFX, MGW and any direct or indirect subsidiaries of MGW (including, for the avoidance of doubt, the Cayman regulatory authorities) as well as the Solicitors Regulatory Authority of England and Wales...”

- [14] Mr. Hodge Malek KC, counsel for the appellant, stated that the starting point in dealing with a question of apparent bias is the test as enunciated in the locus classicus case of **Porter v Magill**.<sup>9</sup> In that case, Lord Hope of Craighead, in giving his opinion in the House of Lords, reviewed and revised the test laid down by Lord Goff of Chieveley in *R v Gough* and stated the test for apparent bias as follows:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

- [15] Mr. Malek KC posited that ‘the fair-minded and informed observer’ is the person as described in the English Court of Appeal decision in **Dr. Sengupta and another v Holmes and others**<sup>10</sup> which referred to the Australian decision of **Southern Equities Corporation Limited (In Liquidation) and ors v Bond** and ors<sup>11</sup> There the court accepted that this fictitious bystander:

“...is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations

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<sup>9</sup> [2002] 2 AC 357 at paragraphs 102-103. See also Appellant’s Skeleton Argument. Consolidated Appeals Bundle. Volume 12, pdf page 165, paragraph 5.

<sup>10</sup> [2002] EWCA Civ 1104.

<sup>11</sup> [2000] SASC 450 at paragraph 39.

relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances.”

[16] Mr. Malek KC also referred the Court to authorities such as **Desmond v Bower**<sup>12</sup> to illustrate that it is ‘not uncommon for even the most eminent of judges to recuse themselves on grounds of apparent bias’<sup>13</sup> and **Locabail (UK) Ltd v Bayfield Properties Ltd**<sup>14</sup> on the point that where there is a real ground for doubt as to whether there is apparent bias, the doubt should be resolved in favour of recusal.

[17] With respect to the first of the three matters set out in paragraph 10 above, the appellant submits that one of the indications of apparent bias on the part of the learned judge arose when the learned judge made ‘final and concluded ‘findings’ of fraud against MBFX and Mr. Taher”<sup>15</sup> in the WFO Judgment. For context, the appellant states that the WFO Judgment mainly concerned VDHI’s application to continue the Worldwide Freezing Order (“WFO”) granted by the judge to VDHI on 26<sup>th</sup> April 2021 and the cross-applications of Mex Clearing and MBFX to discharge that order on the substantive merits and for material non-disclosure.

[18] The appellant contends that while the learned judge correctly directed himself on the test for determining whether to continue the freezing order, and the merits standard to be applied (that is, whether VDHI had a good arguable case), the learned judge did not confine his findings to that issue. Mr. Malek KC argues that the terms “clearly collusive” (in paragraph 75) or “even more suspicious” (in paragraph 76) are emphatic terms going well beyond what is necessary in considering whether there was a good arguable case. The findings of fraud, the appellant argues, were made by the judge without hearing any oral evidence or cross-examination. Further, the appellant submits that the learned judge was not required to make such a finding to determine the issues in the WFO Judgment.

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<sup>12</sup> [2009] EWCA Civ 857 at paragraph 7.

<sup>13</sup> Appellant’s Skeleton Argument. Consolidated Appeals Bundle. Volume 12, pdf page 11 at paragraph 20.

<sup>14</sup> [2000] 1 All ER 65.

<sup>15</sup> Appellant’s Skeleton Argument. Consolidated Appeals Bundle. Volume 12, pdf page 11 at paragraph 22.1.

- [19] Mr. Malek KC submitted that what gave rise to apparent bias is the way the learned judge expressed his findings, which he argues went beyond the extent of expressing the test in a good arguable case.
- [20] Mr. Malek KC, in his submissions, referred this Court to the **Southern Equities**<sup>16</sup> case. This was an Australian case which Mr. Malek KC submitted is very similar to the instant case. In that case, the first instance judge (Debelle J) had made definitive findings of wrongdoing against one of the parties when determining an application for a WFO.<sup>17</sup> The Supreme Court of Southern Australia held that the judge was disqualified on the grounds of apparent bias from hearing further proceedings. Mr. Malek KC quoted parts of the judgment, including the court's conclusion at paragraph 64 that:
- “It is almost inevitable that, if Debelle J now embarks upon the trial, there will be a strong perception that he comes to his task from a particular point of view, and with a particular feeling towards the all important issues of the credibility and probity of the appellants – from which it is reasonably considered that he may find it intellectually difficult, if not impossible, to retreat.”
- [21] Mr. Malek KC accepted that the mere fact that a judge has given a ruling is not the test for apparent bias, rather, one must look at what the judge has said and what he has done. In the case at bar, Mr. Malek KC argued that what the judge said went directly to the merits of the case, which at that stage in the proceedings the learned judge was not required to do.
- [22] With respect to the second matter set out in paragraph 10, the appellant says that the judge's apparent concern that overseas regulators should be provided with copies of his judgments, and his apparent invitation to the BVI Financial Services Commission (“FSC”) to direct Mr. Taher to stand down as Chairman, were outside

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<sup>16</sup> *Supra*, note 11.

<sup>17</sup> Appellant's Skeleton Argument. Consolidated Appeals Bundle. Volume 12, pdf page 7 at paragraph 11.

the scope of his judicial functions in respect of the applications before him. Further, the appellant submits that a fair-minded observer would conclude, at the lowest, that the learned judge wanted to ensure that regulators worldwide were shown his judgments because he had decided that MBFX and Mr. Taher had been engaged in some form of wrongdoing.

[23] The indications of apparent bias here are found in the learned judge's Confidentiality Judgment which concerned whether the seal and gag orders made in BVIHC (COM) 20200/0215, 2021/0003 and 2021/0073<sup>18</sup> should be discharged for material non-disclosure.

[24] The appellant's submission is that the learned judge went outside of his judicial scope when he appeared to invite the FSC to direct Mr. Taher to stand down as Chairman of the Multibank Group.<sup>19</sup> Mr. Malek KC alleges that the learned judge sent a copy of the judgment and gave the link to the court files to the FSC even though the matter was only at an interlocutory stage. This, Mr. Malek KC says, was clearly an invitation by the judge to the FSC to direct Mr. Taher to stand down. Moreover, having regard to the fact that judges have great influence on the public, great care should be taken in what they say, because whatever they say may be taken literally and seriously by others. How then, Mr. Malek KC argues, can the judge take the steps as he did, then say that it is left open to the FSC to require Mr. Taher to step down?<sup>20</sup> In addition, Mr. Malek KC submits that the applications which were before the court did not even require the judge to make the finding that there was a 'need' to vary the confidentiality restrictions to permit disclosure of the WFO Judgment.<sup>21</sup> Mr. Malek KC says that the conclusion to be derived is that the learned judge exceeded his judicial authority.

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<sup>18</sup> *Supra*, note 8. Pdf page 204 paragraph 1.

<sup>19</sup> See paragraph 14 of the Confidentiality judgment reproduced at paragraph 7 above.

<sup>20</sup> Judgment on sealing the various proceedings (delivered 19<sup>th</sup> October 2021, unreported) ("the Confidentiality judgment") Consolidated Appeals Bundle Volume 3 pdf page 210 paragraph 14.

<sup>21</sup> See paragraph 40 of the Confidentiality judgment reproduced above at paragraph 7.

[25] With respect to the third matter set out in paragraph 10, the appellant submits that the learned judge held that Mr. Taher has 'a form for disruptive litigation behaviour' by relying upon a finding of contempt made some 11 years ago, notwithstanding that the contempt order was subsequently discharged. The learned judge illustrated the 'disruptive behaviour' by reference to the case of **Marketmaker Technology (Beijing) Co Ltd v CMC Group plc**<sup>22</sup> in which a finding of contempt was made against Mr. Taher by an English Court in 2009. To this effect, the learned judge commented at paragraphs 64 and 112 of the WFO Judgment that:

"[64] ...Mr. Taher has 'form' for disruptive litigation behaviour such as non-cooperation... and late service of evidence".

"[112] He has a conviction for contempt of court and appears to have been happy to manipulate the processes of this Court in the current set of three proceedings".

[26] Mr. Malek KC says that the **Marketmaker** case was included in the authorities bundle by VDHI as an authority in support of its submissions on a jurisdiction point. Mr. Malek KC, in his oral reply, reiterated that it was the judge himself who looked at the judgment and discovered the finding of contempt which he then used to support his conclusion of disruptive behaviour on the part of Mr. Taher. This is a clear example, Mr. Malek KC says, of the judge 'entering the arena on behalf of [VDHI]'. The judge is not to go out himself and find reasons. Mr. Malek KC submits that this clearly gives rise to an appropriate situation where the judge should recuse himself on the ground of apparent bias.

[27] On the issue of waiver, the appellant submits that it did not waive its right to object to the judge determining future hearings since in its notice of appeal dated 26<sup>th</sup> October 2021 challenging the order of the judge dated 12<sup>th</sup> October 2021, whereby he continued the WFO until trial, apparent bias was set out as one of the grounds of appeal.

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<sup>22</sup> [2009] EWHC 1445 (QB).

## Respondent's Submissions

- [28] In the submissions filed on behalf of the respondent, learned counsel for the respondent, Mr. Tim Penny KC, reiterated the test as enunciated in **Porter v Magill** as the test for apparent bias. He stated that this test has been cited with approval in many authorities, including recent decisions from this Court such as **Adam Bilzerian and another v Terrence V. Byron and another**<sup>23</sup> as follows:

“The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’. The observer is meant to be fair minded, waiting until he/she understands both sides of the argument before reaching a decision and so his/her approach should not be confused with that of the complainant as he/she requires objective justification of the complaint. The observer is also informed meaning that he/she will take a balanced approach to information given to him/her and put it into its overall context appreciating that context forms an important part of the material to be considered before reaching a decision.”

- [29] Mr. Penny KC also drew to the Court's attention the case of **Goldteam Group Ltd v Qin Hui and others**,<sup>24</sup> which set out the principles of apparent bias in detail, citing the locus classicus **Porter v Magill** and several other pertinent authorities, including **JSC BTA Bank v Ablyazov and others (No 9)**<sup>25</sup> and **Otkritie International Investment Management Ltd v Urumov**.<sup>26</sup>

- [30] In relation to the first of the three matters set out in paragraph 10, that the learned judge purported to make concluded findings of fraud against MBFX, the respondent submits that a fair-minded observer would have not so found. Mr. Penny KC says that the hypothetical and well-informed observer would read the judgment of the learned trial judge as a whole. In this regard, Mr. Penny KC submits that when one looks at the WFO Judgment<sup>27</sup> in which the learned judge spoke about 'fraud' under the heading "Good arguable case of fraud", the learned judge was clearly analysing

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<sup>23</sup> SKBHCVP2020/0003 (delivered 22<sup>nd</sup> October 2021, unreported).

<sup>24</sup> BVIHC (COM) 2018/0180 (delivered 22<sup>nd</sup> October 2020, unreported).

<sup>25</sup> [2013] 1 WLR 1845.

<sup>26</sup> [2014] EWCA Civ 1315.

<sup>27</sup> Supra, note 6. Paragraph 66.

the case in accordance with the principles applicable to whether a good arguable case of fraud had been made out. Thus, he submits, the judge saying that ‘clearly VDHI has showed a good arguable case of fraud’ is the judge plainly expressing himself in the context of considering those matters.

- [31] In addition, Mr. Penny KC argues that the appellant has “cherry picked” the “offending” paragraphs and has not considered them in the context of what the judge was considering, which is whether there was a good arguable case of fraud.
- [32] Mr. Penny KC, in response to a question from this Court, opined that the judge’s language in paragraph 112 of the judgment is not unjudicial, as it was said in the context of the risk of dissipation. Therefore, Mr. Penny KC submits, the complaint that the judge made concluded findings of fact is unsustainable and the judge was entirely justified and right in rejecting that submission when he refused to recuse himself.
- [33] In relation to the second matter set out in paragraph 10, the respondent says that there is nothing in the appellant’s complaint. The respondent submits that in the Confidentiality Judgment at paragraph 40 where the judge comments that the terms of the seal and gag order would need to be varied to permit disclosure to regulators, the judge was merely considering the practical consequences of his judgment and was not encouraging anyone to send the judgment to the regulators. The respondent also drew to the court’s attention that Mr. Gee KC, on behalf of MBFX, had agreed that it would be appropriate for the BVI judgment to be sent to the main regulator.<sup>28</sup> When asked by the Court if the judge’s suggestion was an unusual step for a judge to take, Mr. Penny KC replied that the judge was not telling, advising or in any way suggesting to the regulators what they should do. It was just that, based on the principles of “open justice”, the judgment should be published.

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<sup>28</sup> Supra, note 5 at pdf page 82-83 at paragraph 14.

- [34] In support of this submission, reference was made to paragraph 15 of the judgment on recusal, where the learned judge stated that he gave no invitation “apparent or otherwise” to the FSC to ask Mr. Taher to stand down temporarily as Chairman. In that paragraph, the learned judge went on to say that he was only discussing potential ways of how the harm of lifting the seal and gag orders can be mitigated.
- [35] In relation to the third matter set out in paragraph 10, the respondent submits that the judge’s reference to the **Marketmaker** case was the judge reciting an authority that had been cited to him. The learned judge had already found evidence of disruptive behaviour. Therefore, Mr. Penny KC argues, it was open to the judge to say that Mr. Taher has engaged in disruptive behaviour in this matter and has done it in the past. Notably, he says, while the sanction for contempt was discharged against Mr. Taher, the finding of contempt was never appealed or challenged and remains.
- [36] Mr. Penny KC also referred to paragraphs 11-12 of the judgment on recusal where the learned judge concluded that the finding of contempt against Mr. Taher in **Marketmaker** was a matter of fact which he, the judge, was merely stating.

### **Law on recusal**

- [37] It is settled law that the test of apparent bias is that stated by Lord Hope of Craighead in **Porter v Magill**.<sup>29</sup> Apparent bias arises when, although the judge is not a party to the proceedings and does not have an interest in its outcome, there is something in the judge’s conduct of the hearing or behaviour that gives rise to a suspicion that he or she will not be able to decide the case in an impartial manner. Apparent bias, as distinct from actual bias, is an objective test and the observer’s objective approach must not be confused with the approach of the complainant.<sup>30</sup>

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<sup>29</sup> Supra, note 9.

<sup>30</sup> See *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at paragraph 2.

[38] In **Helow v Secretary of State for the Home Department**,<sup>31</sup> Lord Hope helpfully set out the characteristics of “the fair-minded and informed observer”. The passage from Lord Hope has been cited in many cases from this jurisdiction, including **Goldteam Group Ltd v Qin Hui**<sup>32</sup> (a case referred to in the respondent’s oral submissions)<sup>33</sup>. It reads:

“The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson*. Her approach must not be confused with that of the person who has brought the complaint. The ‘real possibility’ test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.”

[39] In **Mengiste and another v Endowment Fund for the Rehabilitation of Tigray and others; Chubb v Endowment Fund for the Rehabilitation of Tigray and others**<sup>34</sup> Arden LJ explained:

“[2] Judicial recusal occurs when a judge decides that it is not appropriate for him to hear a case listed to be heard by him. A judge may recuse himself when a party applies to him to do so. A judge must step down in circumstances where there appears to be bias, or, as it is put, ‘apparent bias’. Judicial recusal is not then a matter of discretion.”

Further, it was said in **Locabail (UK) Ltd v Bayfield Properties Ltd**<sup>35</sup> that:

“The mere fact that a judge, earlier in the same case or in 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

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<sup>31</sup> Ibid.

<sup>32</sup> BVHIHC (COM) 2019/0180 (delivered 22<sup>nd</sup> October 2020, unreported).

<sup>33</sup> Supra note 24 at paragraph 22.

<sup>34</sup> [2013] EWCA Civ 1003 at paragraph 2.

<sup>35</sup> [2000] QB 451 at paragraph 25.

other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.”

[40] The list of situations in which the possibility of apparent bias may arise is not fixed. A common situation however is where the judge has expressed views upon the evidence or issues in the case prior to its conclusion. However, the “views” expressed must be such as to lead to a “concluded view”, as distinct from the judge merely expressing a “preliminary view”.

[41] In **Benjamin Exeter v Winston Gaymes et al and Lauron Baptiste v Vil Davis et al**,<sup>36</sup> a decision of this Court, Baptiste JA considered **Otkritie International Investment Management Ltd and Ors v Mr George Urumov**<sup>37</sup> where the English Court of Appeal said:

“... the concept of bias...extends...to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have ‘pre-judged’ the case.”

[42] What is clear from the case law is that whether it is appropriate for a judge to recuse himself is highly dependent on the facts of the case. In **Locabail**, the English Court of Appeal said:<sup>38</sup>

“We repeat: every application 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.”

[43] Similarly, in **Keston Riley v The Attorney General and the Director of Public Prosecutions**,<sup>39</sup> Baptiste JA in considering the case of **Otkritie International**<sup>40</sup> said:

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<sup>36</sup> SVGHCVAP2016/0021 consolidated with SVGHCVAP2016/0022 (delivered 13<sup>th</sup> June 2017, unreported).

<sup>37</sup> [2014] EWCA Civ 1315 at paragraph 1.

<sup>38</sup> Supra, note 39

<sup>39</sup> MNIHCVAP2020/003 (delivered 17<sup>th</sup> September 2020, unreported).

<sup>40</sup> Supra, note 37.

“The issue of recusal is extremely fact sensitive and recusal ought not to be lightly done.”

He further explained:<sup>41</sup>

“The test for apparent bias has a two staged process. The court has to ascertain all the circumstances bearing on the suggestion that the judge would be biased and ask whether all those circumstances would lead the fair minded and informed observer to conclude that there was a real possibility that the judge was biased. The facts and context are critical, with each case turning on an intense focus [of] its essential facts.”

[44] As it relates to the appellate court’s approach to apparent bias, Mummery LJ in **Morrison and Anor v AWG Group Ltd and Anor**<sup>42</sup> as cited by Baptiste JA in **Keston Riley** opined:

“On the issue of disqualification, an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.”

[45] In **JSC BTA Bank v Ablyazov (No. 9)**,<sup>43</sup> Rix LJ stated:

“While each case will be judged on its own facts, language or comments used by the judge will have to be expressed in ‘extreme and unbalanced terms’ or ‘vituperative and intemperate terms’.”

### Discussion

[46] The main issue for this Court’s determination is whether the learned judge erred in law and/or as a matter of principle in finding that a fair-minded and informed observer would not conclude that there was a real possibility of bias which would impede the learned judge from approaching future hearings with an open mind.

[47] In relation to the first matter set out in paragraph 10, concerning the continuation of the WFO, it is useful to first consider the test to be applied when the court has before

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<sup>41</sup> Supra, note 39 at paragraph 16.

<sup>42</sup> [2006] EWCA Civ 6 at paragraph 20.

<sup>43</sup> Supra, note 25.

it an application seeking to continue an injunction. This Court considered the test as explained by Mustill J in **Ninemia Corp. v Trave Schiffahrtsgesellschaft mbH & Co. KG (The "Niedersachsen")**<sup>44</sup> in the BVI case of **Rustam Yusufovich Gilfanov et al v Maxim Valeriovich Polyakov et al**:<sup>45</sup>

"The test to be applied by the court ... is whether, after the plaintiff has shown that he has at least a good arguable case and after considering the whole of the evidence before the court, the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction."

[48] In **JTrust Asia PTE Ltd v Mitsuji Konoshita and A.P.F. Group Co. Ltd**<sup>46</sup> Adderley J (in giving judgment in the Commercial Court in the BVI) stated that:

"At this stage, it is not the function of the court to launch a mini trial of the issues. In applying the test of good arguable case all that is required to do is no more than a preliminary appraisal of the claimant's case."

[49] Bearing these two authorities in mind, along with those cited earlier in this judgment on the fair-minded observer and what may constitute apparent bias, this Court must now assess whether the learned judge formed conclusions beyond a preliminary view of the case.

[50] I take the view that the description of the claims as "clearly collusive" at paragraph 75 and "even more suspicious" at paragraph 77 of the WFO judgment suggests, even in the slightest, a hint of partiality. Even if, as the learned judge says, these findings do not 'either automatically or at all mean that there was a fraud',<sup>47</sup> that is not the test for apparent bias. The court must look at what a fair-minded and informed observer, having regard to the test to be applied in an application for the continuation of an injunction and knowledge of the circumstances of the case, would conclude. To a fair-minded observer, the use of such strong emotive words to simply

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<sup>44</sup> [1984] 1 All ER 398.

<sup>45</sup> BVIHMAP2016/0009 (delivered 3<sup>rd</sup> February 2017, unreported) at paragraph 25.

<sup>46</sup> BVIHC (COM) 2017/0226 (delivered 20<sup>th</sup> March 2018, unreported) at paragraph 22.

<sup>47</sup> Judgment on recusal. *Supra*, note 5. Volume 12 pdf page 87 paragraph 20.

convey that on a preliminary review of the matter there was a good arguable case of fraud, would be enough to give rise to a suspicion that the learned judge will not be able to decide the case in an impartial manner.

[51] In relation to the second matter set out in paragraph 10, the learned judge's conduct is a bit puzzling. At paragraph 14 of his judgment on recusal, the learned judge wrote – 'I said at the hearing that it was not for the Court to report the subsidiaries...The problem in relation to the other regulators was that, if the gagging order continued unamended, there might be - or at least might be thought to be - a problem in the subsidiaries self-reporting, because it might breach the terms of the gagging orders'. These two statements appear to be contradictory. On the one hand, the learned judge notes that the court is not to step out of its judicial function and report subsidiaries, but on the other hand he makes provisions for the judgments and access to the electronic documents from the court to the regulators.<sup>48</sup>

[52] Thinking of the fair-minded and informed observer and considering (i) the conduct of the learned judge in allowing the judgments to be disclosed to the regulators; (ii) the invitation by the learned judge for the FSC to direct Mr. Taher to stand down as Chairman; (iii) the judge's previous findings of collusion and suspicion on the part of MBFX and Mex Clearing; and (iv) that these findings were made at the interlocutory stage of the matter, I am of the view that the fair-minded observer would agree that these circumstances give rise to an inference of apparent bias. To take such actions and make such findings months before the trial, peaks suspicion that the judge had already pre-judged that there was some sort of wrongdoing on the part of MBFX and its subsidiaries.

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<sup>48</sup> Confidentiality Judgment. *Supra*, note 8. Paragraph 41.

[53] In relation to the third matter set out in paragraph 10, I agree with the appellant that the comment by the judge that Mr. Taher has a “form” for disruptive litigation behaviour is prejudicial. The main points that underlie this position are that:

- (i) The learned judge was considering an application to continue the worldwide freezing order he had previously granted, how then was this finding necessary to that application?
- (ii) The learned judge made this finding on his own initiative. The point of Mr. Taher’s previous contempt conviction had not come up as an issue during the proceedings thus far or at all. There was therefore no need for the learned judge to mention it.
- (iii) The **Marketmaker** case which the judge relied on to support the comment that Mr. Taher has “form” for disruptive behaviour was cited to the learned judge for a point unrelated to anything to do with Mr. Taher’s conduct or the finding that there is a real risk of dissipation. The inference that arises is that the learned judge went “fishing” for something against Mr. Taher.

[54] Taking these points and applying the principles in **Porter v Magill**, and in the other authorities cited above, I am of the view that there is a real possibility that a fair-minded and informed observer would conclude that the learned judge will not approach future hearings of the proceedings in BVI Commercial Court claims numbered 215 of 2020, 3 of 2021 and 73 of 2021 with an open mind and that the comments and findings made by the learned judge in previous hearings in these proceedings will give rise to the appearance of bias.

### **Conclusion**

- [55] For the foregoing reasons, the judge ought to have recused himself from all future proceedings in claims numbered BVIHC(COM) 2020/0215, 2021/0003 and 2021/0073.

### **Costs**

- [56] In the order made on 29<sup>th</sup> April 2022 granting leave to appeal the learned judge's dismissal of the recusal application and allowing the substantive appeal, we reserved costs. We find no reason to depart from the usual costs order that costs follow the event. Accordingly, MBFX having prevailed on both the leave application and the actual appeal, both of which were resisted by VDHI, VDHI shall pay MBFX's costs on both the application and the appeal, which costs are to be assessed if not agreed by the parties within 21 days.

I concur.

**Paul Webster**

Justice of Appeal [Ag.]

I concur.

**Gerard St. C. Farara**

Justice of Appeal [Ag.]

**By the Court**

**Chief Registrar**