

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0025

BETWEEN:

GREATER SAIL LIMITED
(A company incorporated in the British Virgin Islands)

Appellant

and

[1] NAM TAI PROPERTY INC. (A company incorporated in the
British Virgin Islands)
[2] NAM TAI GROUP LIMITED (A company incorporated in the
Cayman Islands)
[3] NAM TAI INVESTMENT (SHENZHEN) CO. LTD.
(A company incorporated in the People's Republic of China)

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C. Farara

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

Appearances:

Mr. John Carrington KC with him, Mr. Andrew Emery for the Appellant
Mr. Edward Davies KC with him, Mr. Ben Griffiths for the Respondents

2022: October 4.

Interlocutory appeal - Appeal against dismissal of recusal application – Whether judge erred in failing to recuse himself – Apparent bias - Whether judge's statements were indicative of a real possibility that he was biased against the appellant - Whether judge descended into the arena - Whether judge trespassed beyond the permissible ambit of what may be considered robust case management – Test of the fair-minded and informed observer - Whether judge adopted the wrong approach in determining recusal application

The Appellant, the defendant in Claim No. BVIHC (Com) 2022/0016 before the Commercial Court, applied for an order that the learned judge recuse himself from adjudicating further in the said claim. The grounds upon which the application for a recusal order was made concerned certain statements made and steps taken by the judge during the course of two hearings in the said proceedings, the first on 24th February 2022 and the second on 1st March 2022. The Appellant's contention was that these statements, suggestions and orders made by the judge, evinced to the fair-minded and informed observer that the learned judge had descended into the arena, pre-determined certain issues of fact and law, and were indicative of a closed mind leading to the appearance of bias against the Appellant and a lack of impartiality. By an order dated 11th March 2022, the learned judge, inter alia, dismissed the Appellant's recusal application for the reasons set out in a written judgment dated 14th March 2022.

The Appellant appealed to the Court of Appeal and relied on two main grounds in support of their appeal. Firstly, that the learned judge, in dismissing the recusal application, failed to apply to each allegation or complaint, the objective test of whether the fair-minded and informed observer would conclude that the matters complained of by the Appellant gave rise to a real possibility of actual or apparent bias but, instead, focused on defending and explaining his previous statements and actions and, in so doing, committed an error of law. Secondly, that had the learned judge objectively considered the complaints of the Appellant, individually and cumulatively, as he was required to do, he would have come to the conclusion that there was, to the fair-minded and informed observer, a real possibility of him being biased and not impartial and, accordingly, he ought to have granted the application that he recuse himself from further adjudicating in the proceedings.

The Appellant relied on five sub-grounds or categories of complaint which were the reasons advanced in the court below in support of the recusal application. These are that the learned judge: (i) suggested that the Respondents should make an application for an anti-suit injunction and on certain grounds; (ii) suggested that the Respondents file an application to appoint receivers on certain grounds over the shares in the Appellant company, advised as to the procedure that should be used under the Civil Procedure Rules 2000, and indicated that if the Respondents were to make the two applications suggested by him that they would be well-founded and likely to succeed before him; (iii) made a service out order although the claim in which the service out order related to was only filed the day before the 24th February 2022 hearing and had not been served on the Appellant; (iv) pre-determined the Appellant's previously filed forum challenge application; and (v) made comments during the 1st March 2022 hearing which indicated a real possibility of bias towards the Appellant.

On 4th October 2022, the appeal came up for hearing before the Full Court. This Court handed down its decision allowing the appeal and making an order recusing the learned judge from any further adjudication in the claim in the court below, with reasons to follow.

Held: allowing the appeal; setting aside paragraph 2 of the judge's order dated 11th March 2022 dismissing the recusal application; ordering that the judge is recused from presiding over or adjudicating any further applications and/or any further hearing in Claim No. BVIHC (COM) 2022/0016; setting aside (in part) paragraph 3 of the judge's order dated 11th March

2022 in so far as it relates to costs in the recusal application, and ordering costs to the Appellant on this appeal and in respect of the recusal application below to be assessed unless agreed within 21 days, that:

1. The relevant test and principles applicable to a court's consideration of an application that a judge recuses himself or herself from any further involvement in a matter or proceedings are well-established. The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real, as opposed to a fanciful, possibility that the judge might be biased towards a party or not impartial in the proceedings. The approach of the 'fair-minded observer' is not to be confused with that of the person or party complaining of bias in the tribunal. Fair-mindedness here means that the observer must not be impulsive, precipitous, or quick to reach a settled view, conclusion or judgment. The observer must always reserve judgment on each point of complaint until they have seen, fully understood, and considered the material facts and circumstances and, importantly, both sides of the argument. Likewise, an 'informed' observer is one who first informs themselves of all the relevant facts and circumstances before embarking upon an assessment or evaluation of the veracity of the complaint and before taking a balanced approach to any information given.

Porter v Magill [2002] 2 AC 357 applied; **Helow v Secretary of State for the Home Department** [2008] 1 WLR 2416 applied.

2. The test of apparent bias does not prevent the judge from expressing certain views 'along the way'. It is a proper exercise of the judicial function for judges to comment adversely in the proceedings or in a previous case on a party or his witness or the unreliability of their evidence. However, where a judge expresses a view on a question at issue in the proceedings before him, particularly during the course of the hearing, in extreme and unbalanced terms, this may give rise to a real danger or real doubt as to his ability to try the issue with an objective and impartial judicial mind. Where there is a real doubt as to the impartiality or apparent bias of the judge in a matter, that doubt must be resolved in favour of the applicant for recusal.

Locabail (UK) Limited v Bayfield Properties Ltd [2000] Q.B. 451 applied; **Keston Riley v The Attorney General and Another** MNIHCVAP2020/0003 (delivered 17th September 2020, unreported) followed.

3. The test of apparent bias is not aimed at or directed to the integrity or reputation of the judicial officer, but singularly to preserving confidence in the administration of justice. Hence there is a presumption in law of impartiality in relation to a judge or court which can only be rebutted by substantial and cogent evidence of the real possibility of bias on the part of the judge. It is also important to the proper administration of justice that parties to litigation are not allowed, effectively, to choose their own judge or the complement of the court or tribunal. The issue of recusal is therefore one which is fact sensitive. Accordingly, it ought not to be raised lightly or on tenuous or fickle evidence.

JSC BTA Bank v Ablyazov [2012] EWCA Civ 1551 considered; **Walsh v Ward and others** (2015) 87 WIR 101 applied.

4. When a judge is faced with a recusal application it is imperative that the objective test of the fair-minded and informed observer and the applicable law is kept foremost in mind and applied to his assessment of each ground of complaint. In giving his judgment on the recusal application, the learned judge failed to make a single reference to this test and its application to his assessment of the complaints of apparent bias made by the Appellant. Instead, the judge incorrectly focused his mind on providing in his written judgment justifications and explanations for each of the statements complained of by the Appellant. The test of the 'fair-minded and informed observer' was only mentioned in the earlier section of his judgment dealing with the law on recusal. It is no answer to say, as did the Respondents, that the judge, having correctly stated the test earlier in his judgment, must be taken to have had that test in mind when he came to deal with each of the Appellant's complaints. It is not for an appellate court to presume or to assume that he did so. It is for the judge below to demonstrate in his judgment that he has done so when reaching his conclusions on recusal. The learned judge was obliged in these circumstances: (i) to apply the test of apparent bias to the factual bases of each complaint; (ii) to do so in an objective manner; and (iii) to stand back and determine objectively whether, taken in the round, the fair-minded and informed observer would conclude that there was a real possibility that he, the judge, might be biased against the Appellant in the proceedings, such that he ought to recuse himself from any further participation therein. Accordingly, the judge's approach to the recusal application was wholly incorrect and an error of law.
5. It is pellucid, on any reasonable and objective basis, that each of the five grounds of complaint made by the Appellant, as evidenced by the official transcripts of the proceedings in the court below, have merit and were made out. On any proper and objective consideration of these five grounds of complaint, whether taken individually or cumulatively, the 'fair-minded and informed observer' would conclude that there was a real possibility that the judge had descended into the arena, had predetermined issues in the proceedings, and that objectively he was not impartial in the said proceedings. Accordingly, there was a real possibility that the learned judge was biased against the Appellant in the said proceedings, and the judge erred in not granting the application and recusing himself from any further involvement in the said proceedings.

REASONS FOR DECISION

- [1] **FARARA JA [AG.]:** On 4th October 2022, after a full hearing, this Court unanimously allowed the appeal by Greater Sail Limited (“the Appellant” or “GSL”) against the order of the learned judge of the Commercial Division in the Territory of the Virgin Islands dated 11th March 2022, *inter alia*, dismissing GSL’s application that he recuse himself from adjudicating further in Claim No. BVIHC (Com) 2022/0016 (“Claim No. 16 of 2022”). The decision of the learned judge on the recusal application is set out in his written judgment dated 14th March 2022, which judgment also dealt with two other applications. These are: (i) GSL’s application for an extension of time to comply with an order dated 31st January 2022 in Claim No. 16 of 2022; and (ii) the Respondents’ application (as claimants) by fixed date claim form in a separate action (Claim No. BVIHC (Com) 2022/0042) for declarations that GSL and Ms. Li Jianping (“Ms. Li”) and Mr. Mai Fan (“Mr. Mai”) are in contempt of court (“the Contempt Action”), and for orders of sequestration against GSL and committal against Ms. Li and Mr. Mai and for a fine against all three. The outcome of these two applications are not engaged by this appeal. However, what transpired in relation to each of these applications at the hearings before the learned judge on 24th February and 1st March 2022 are part of the procedural background to GSL’s recusal application.
- [2] In allowing this appeal against the order dismissing the recusal application, the Court set aside paragraph 2 of the judge’s order and made an order that the learned judge is recused from presiding or adjudicating over any application or proceeding in Claim No. 16 of 2022. This Court also set aside the judge’s order as to costs on the recusal application (part of paragraph 3 of the judge’s order); and ordered that the Respondents pay the Appellant’s costs of the appeal and costs in the recusal application, such costs to be assessed by a judge of the Commercial Division, if not agreed by the parties within 21 days. These are the reasons for the said decision.

Claim No.16 of 2022

- [3] Claim No. 16 of 2022 was commenced before the Commercial Division by Nam Tai Property Inc. (“NTP”) on 27th January 2022 against GSL on the basis, *inter alia*, of unlawful means conspiracy between GSL and Mr. Jiabiao Wang (“Mr. Wang”). The allegations of conspiracy relate to letters sent on 1st and 6th December 2021 to the Bao’an Branch of the Shenzhen Administration for Market Regulation (“the Bao’an AMR”) in China, urging the Bao’an AMR not to register changes in the composition of the board of Nam Tai Investment (Shenzhen) Co. Ltd. (“NTI”), a subsidiary of NTP. This action had been preceded by a claim in BVIHC (Com) 2020/0165 to set aside the decision of the board of NTP to issue new shares (the “PIPE”) and to allot these new shares to certain persons, including GSL. This Court in Appeal No. BVIHCMAP2021/0010 gave judgment dismissing an appeal against the judgment and orders of Jack J dated 3rd March 2021 in Claim No. BVIHC (Com) 2020/0165, by which the learned judge had set aside the issuance of the new shares in NTP and made an order for the holding of a requisitioned meeting of the shareholders of NTP as previously constituted. In dismissing the appeal, this Court made an order that the requisitioned meeting of shareholders be held on 30th November 2021. At the requisitioned meeting certain directors were removed and new directors appointed who took control of NTP.

The recusal application

- [4] The grounds upon which GSL applied for an order that the learned judge recuse himself from the proceedings below focused on and concerned certain statements made by the judge during the course of two hearings, the first on 24th February 2022 and the second on 1st March 2022. It is GSL’s contention that certain statements, suggestions and orders made by the judge during these two hearings, evinces to the fair-minded and informed observer, that he had descended into the arena, pre-determined certain issues of fact and law, and were indicative of a closed mind leading to the appearance of bias against GSL and a lack of impartiality. Accordingly, GSL had lost confidence in the judge being impartial in dealing with any further proceedings in Claim No. 16 of 2022.

- [5] GSL complained in the recusal application that the learned judge had descended into the arena by making suggestions at the hearing on 24th February 2022 in the nature of advice to the Respondents, as to how they should conduct their case in the future, specifically, suggestions that they should file two new applications. The first suggestion was applying for an anti-suit injunction against GSL in relation to ongoing proceedings in the People's Republic of China ("the Chinese Actions") involving, as defendants, certain subsidiaries of NTP. The second suggestion was applying for the appointment of receivers over the shares in GSL, and to use the procedure under rule 42.12 of the **Civil Procedure Rules 2000** ("CPR") against a non-party to the proceedings against which no allegations of wrongdoing had been made.
- [6] Additionally, GSL complained in the recusal application, that the learned judge had not only suggested the filing of these two applications to the Respondents, but he also advised them as to the specific grounds upon which each of these two applications should be brought, indicating that if brought, they would be well-founded and therefore likely to succeed before him. GSL also complained that the learned judge went on to shortlist the said suggested applications for consideration and possible determination on 1st March 2022 – a mere 2 clear days hence. In the course of doing so, he made statements indicative of him having pre-determined: (i) his suggested anti-suit and receivership applications; (ii) GSL's extant forum application on the basis that the Chinese Actions were 'merely a form of harassment', that GSL has 'no claim against these subsidiaries', and that the Chinese actions 'ought to be stopped'; and (iii) the substantive claim of unlawful means conspiracy in the main action Claim No. 16 of 2022.
- [7] It was the case for GSL that in making these statements and/or in giving the said suggestions and advice to the Respondents, the learned judge had trespassed beyond the permissible ambit of what may be considered robust case management. The recusal application was supported by the fourth affirmation of Mr. Mai filed in support thereof, which exhibited copies of the transcripts of the

proceedings before the judge on 24th February and 1st March 2022. Accordingly, there was no dispute as to what in fact the learned judge had said and done during those hearings. The only difference between the parties in this appeal related to the import of the judge's statements and whether, taken in context, they were indicative of bias or impartiality on the part of the learned judge.

- [8] Having heard and considered the argument and submissions of counsel for GSL and for the Respondents, this Court came to the clear conclusion that most, if not all of these complaints, were concerning and, on any reasonable and objective application of the test of the 'fair-minded and informed observer', were well founded as being indicative that there was a real possibility that the learned judge was biased against GSL in the said proceedings. Accordingly, the appeal was allowed and the recusal order made.

The law on recusal

- [9] The relevant test and principles applicable to a court's consideration of an application that a judge recuse himself or herself from any further involvement in a matter or proceedings, is uncontroversial. The principles of law are well-established and were not in dispute either before the learned judge or in this appeal. Extracts from certain decided cases dealing with the applicable test and principles on recusal were set out by the judge in paragraphs [3] to [4] of his judgment.
- [10] The starting point is the applicable test as formulated in the speech of Lord Hope in the seminal case of **Porter v Magill**:¹

“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.”

¹ [2002] 2 AC 357 at 494 paragraph 103.

- [11] What then are the important characteristics of the notional 'fair-minded and informed observer'? This question was comprehensively answered by Lord Hope in **Helow v Secretary of State for the Home Department**.² The said notional observer must be both fair-minded and fully informed as to all relevant matters. Fair-mindedness requires that the observer must come to the task at hand with certain imbedded characteristics. He must not be impulsive, precipitous, or quick to reach a settled view, conclusion or judgment. This demands that the observer must always reserve judgment on each point of complaint until they have seen, fully understood and considered the material facts and circumstances and, importantly, both sides of the argument. Likewise, the observer is not a person who is unduly sensitive or suspicious, neither should they be complacent.
- [12] The approach of the 'fair-minded observer' is not to be confused with that of the person complaining of bias in the tribunal, as the complainer necessarily sees matters through a different lens. In considering whether there was a real (as opposed to a fanciful) possibility of bias, the fair-minded observer is required to exercise a measure of detachment. He must consider and assess matters dispassionately and objectively and avoid simply adopting the assumptions and arguments of the complainer, however strongly or forcefully they are made. Importantly, this exercise must be carried out by the observer with a full understanding that fairness and impartiality are important pillars of the rule of law, critical to public confidence in the administration of justice. These hallmark principles require that the presiding judge or tribunal must be unbiased, as a biased decision maker undermines the rule of law and hence public confidence in the administration of justice. That said, it is equally important that the 'fair-minded observer' is not one who will shrink from their duty if their conclusion, reached objectively and dispassionately, is that by virtue of what the judge or tribunal has said or done, or the associations which they have formed, it may be difficult for

² [2008] 1 WLR 2416.

them to impartially and objectively adjudicate the case or matter before them, thereby giving rise to a real possibility of bias.

[13] The second important attribute is that the fair-minded observer must be an 'informed' one. This requires that they must first inform themselves of all the relevant facts and matters before embarking upon an assessment or evaluation of the veracity of the complaint and before taking a balanced approach to any information given. This aspect of the duty requires the observer to put whatever they have read or seen into its overall context. This requires placing and assessing the statement or event complained of in the context in which it was said or occurred, before reaching a conclusion or passing judgment. In the final analysis, the fair-minded and informed observer is required to not only consider each complaint individually, but upon completion of that part of the exercise, to stand back and consider these matters in the round, when reaching a final conclusion as to whether there is a real possibility that the judge or tribunal was biased or not impartial, thereby disqualifying them from their role and function as the decision maker in the particular proceedings.

[14] It is a proper exercise of the judicial function for judges to comment adversely in the proceedings or in a previous case on a party or his witness or the unreliability of their evidence. However, where a judge expresses a view on a question at issue in the proceedings before him, particularly during the course of the hearing, in extreme and unbalanced terms, this may give rise to a real danger or real doubt as to his ability to try the issue with an objective and impartial judicial mind. This important distinction was explained in the joint judgment of Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V.C. in **Locabail (UK) Limited v Bayfield Properties Ltd.**³ Moreover, where there is some real doubt as to the impartiality or apparent bias of the presiding judge in a matter, that doubt must be resolved in favour of the applicant for recusal. In **Locabail** it was stated:

³ [2000] Q.B. 451.

“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 other, will be obvious. But if in any case there is a real doubt, that doubt has to be resolved in favour of recusal.”⁴

[15] It is also important to the proper administration of justice that parties to litigation are not allowed, effectively, to choose their own judge or the complement of the court or tribunal. To permit this, would be to undermine the rule of law and cast doubt on the independence and impartiality of the court or judge, leading to a loss of public confidence in the administration of justice, especially where this practice repeats itself. Accordingly, there must be substantial evidence of actual or apparent bias in the judge or tribunal before he or they ought to recuse themselves from any further part in the proceedings. The issue of recusal is therefore one which is fact sensitive. Accordingly, it ought not to be raised lightly or on tenuous or fickle evidence.

[16] A poignant illustration of the principle that bias is not to be imputed to a judge by reason, without more, of his previous rulings or decisions in the same matter, is the case of **JSC BTA Bank v Ablyazov**.⁵ There the first instance judge refused an application that he recuse himself from any further involvement in the proceedings brought on the basis that he had made a finding of contempt of a freezing order against the defendant, and that the defendant had lied while being cross-examined about his assets. This passage from the judgment of the English Court of Appeal (cited by the learned judge) is instructive and bears repeating here:

“[U]nless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge – other than that he is more experienced in the litigation. In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and

⁴Supra n. 3 at 480 paragraph 25.

⁵[2012] EWCA Civ 1551.

parcel of his judicial assessment of the litigation before him: he is not “pre-judging” by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case... He is judging the matter before him, as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias.”⁶

[17] The facts of the case of **Walsh v Ward and others**,⁷ a decision of the Caribbean Court of Justice (“CCJ”) on appeal from the Court of Appeal of Barbados, are somewhat unusual. This is so because the complaints of apparent bias were made against judges of the Barbados Court of Appeal, who had recently engaged a lawyer to determine whether they should institute legal proceedings for defamation against counsel appearing in a matter before them. The CCJ found it ‘inconceivable’ that the fair-minded and informed observer would not have concluded that there was the appearance or possibility of bias on the part of these judges and, accordingly, they ought to have recused themselves from hearing any case involving that counsel, at least ‘until it could be said that a decent period elapsed sufficient for one to believe that any ill-feeling [animus towards counsel] had subsided.’ The joint judgment of the judges of the CCJ was delivered by Byron P. On the issue of apparent bias, the CCJ illuminated the well-established and principled purpose of the law relating to bias, its importance to the maintenance of confidence in the administration of justice, and what is the proper approach of a review court to the application of the test of the ‘fair-minded and fully informed observer’. At paragraph [95] Byron P opined:

“The law on apparent bias is well settled. In determining whether, in instances such as these, a judge is disqualified from hearing a case, the reviewing court must place itself in the position of an objective and fair-minded lay observer fully informed of the facts. The pertinent question is whether such an observer would conclude that there was a real possibility of bias. What matters is not so much the reality of bias or prejudice on the part of the judge but its appearance. This test is aimed at preserving confidence in the administration of justice and not at censure of the judge.

⁶ Supra n. 5 at paragraphs 69-70.

⁷ (2015) 87 WIR 101.

If an objective bystander thought that there was a real (as opposed to fanciful) possibility a judge might be biased, justice delivery is compromised. This remains the case even when the judge himself, and his peers, might confidently consider that the judge was a competent and impartial judge. What is at stake is not the integrity of the judicial officer but that of the administration of justice. It is important to stress that for a judge to recuse herself, or be asked to do so, does not reflect negatively on the probity or competence of the judge.”

[18] There is a presumption in law of impartiality in relation to a judge or court. This presumption is a cornerstone of the rule of law, the administration of justice, and the independence of the judiciary. However, it is only a presumption, one which is capable of being rebutted by substantial and cogent evidence pointing to the possibility of bias. In **Walsh v Ward**, Byron P pointed out that this presumption of judicial impartiality was not an ‘impenetrable barrier’ to the making of a successful recusal application.

[19] In **Keston Riley v The Attorney General and another**,⁸ this Court reviewed the relevant authorities on bias and distilled the salient principles applicable to actual and apparent bias. In this matter, even though the Appellant had relied on actual bias in its written submissions, the kernel of the complaints and the real focus of its submissions were on apparent bias. From the learning in **Keston Riley**, I extract the following principles:

- (1) a judge ought to recuse himself where a fair-minded and informed observer would conclude that there was a real (as opposed to a fanciful) possibility that he could not give one of the parties a fair hearing.
- (2) this test is a two- stage process: the court must first ascertain all the circumstances bearing on the complaint that the judge may be biased, and then go on to ask itself the question of whether the fair-minded and informed observer would conclude that there was a real

⁸ MNIHCVAP2020/0003 (delivered 17th September 2020, unreported).

possibility that the judge is biased against a party or parties to the litigation.

- (3) in deciding an appeal from a lower court's determination of a recusal application, an appellate court is well able to assume the role and vantage point of the fair-minded and informed observer with knowledge of all the relevant circumstances in deciding whether there was a real possibility of the judge below being biased.
- (4) in carrying out this assessment the appellate court is not reviewing the exercise of discretion by the judge below; accordingly, the principles governing appellate restraint in appeals from the exercise of a discretion are not engaged: either there was a real possibility of bias, in which case the judge ought to recuse himself, or there is not, in which case he ought not to do so.
- (5) whether there was apparent bias requires an objective determination, it deals with the judge's conduct and the surrounding circumstances, while actual bias is subjective and deals with the judge's state of mind.
- (6) where there is real ground for doubt as to whether there was a lack of bias, that doubt must be resolved in favour of recusal and the recusal order made.
- (7) the appearance of bias as a result of pre-determination or pre-judgment is a well-recognized ground for recusal, and the appearance of bias includes a clear indication of a prematurely closed mind.

[20] The defining parameters of judicial activism in the conduct of litigation was addressed by Baptiste JA at paragraphs [40] and [41] of **Keston Riley**. The principles referred to therein are, in my view, of particular relevance to the

application of the test of the 'fair-minded and informed observer' to the complaints made by the Appellant in its recusal application, and therefore, to the outcome of this appeal. There it was stated:

"[40] It is perfectly proper for a judge, having pre-read the papers and skeleton arguments to have a provisional view before coming into court. It is well recognised that a judge will commonly begin forming views about the evidence as it goes along, and he may legitimately give assistance to the parties by telling them what is presently in his mind. For this disclosure enables the parties to know the way he is currently thinking and accordingly where attention needed to be focussed (more particularly by the claimant) to change his mind: see **Costello v Chief Constable of Derbyshire [Constabulary]**. In **Arab Monetary Fund v Hashim**, Bingham MR said at page 356 A-C:

"But on the whole the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking. It does not sanction the pre-mature expression of factual conclusions or anything which may prematurely indicate a closed mind." (My emphasis)

[41] It is proper for the judge to inform the parties of his view so long as he did not give the impression that he had a closed mind on the issue. The test of apparent bias does not prevent the judge from expressing certain views 'along the way'. What is not allowed is for him to express views that demonstrate that he or she has reached a concluded view on something prematurely. There must not be a premature formation of a concluded view adverse to a party. Bias in this case means the premature formation of a concluded view adverse to a party. It is, however, unacceptable for the judge to form or to give the impression of having formed a firm view adverse to the credibility of Riley, even before hearing evidence in his damages claim. The judge was approaching the matter with a closed mind, notwithstanding his comment that his mind was open. He clearly erred in doing so." (My emphasis)

Grounds of Appeal

[21] The Appellant relies on two interrelated grounds of appeal. They will be considered together. They are:

- (1) The learned judge failed to consider objectively whether on the whole the matters complained of by the Appellant gave rise to a real

possibility of actual or apparent bias but merely sought to defend his previous statements without considering the effect that these matters would have had on a fair-minded informed observer of the proceedings.

- (2) Had the learned judge considered the complaints of the Appellant objectively and cumulatively as he was required to do, he would have come to the conclusion that a real possibility of bias and of improper judicial conduct had been made out.

Grounds 1 and 2

Judge's failure to apply test of the 'fair-minded and informed observer'

- [22] The Appellant submits that the learned judge having stated correctly the test and principles of law applicable to apparent bias, failed to apply the established test when determining the complaints made in the recusal application. Specifically, the learned judge failed to analyse each of the grounds of complaint against the standard of the fair-minded and informed observer, and therefore did not approach each complaint with that test in mind. They submit that in doing so the learned judge committed a fundamental error of law which ought to result in the appeal being allowed and his dismissal of the recusal application set aside.
- [23] It is clear from a reading of the judgment that this submission is well made out. At no time in his consideration and assessment of the various complaints relied on by the Appellant in its recusal application, did the learned judge apply the objective test of the fair-minded and informed observer. It is telling that there is not a single reference to this test and its two-stage application in those parts of the judgment where the learned judge identified and dealt with the complaints seriatim. The test of the 'fair-minded and informed observer' was only mentioned in the section of the judgment dealing with the law of recusal. This is an objective test which a judge faced with a recusal application must be careful to keep foremost in mind and to apply to each ground of complaint. Instead, as the Appellant contends, the learned judge focused in the judgment on attempting to explain or to justify the statements

made by him during the 24th February 2022 and 1st March 2022 hearings forming the bases of GSL's complaints, which statements are not in dispute as they are evidenced by the relevant transcripts. In several respects, the judge's proffered justification involved him relying on matters not specifically mentioned by him during the said hearings, in his apparent effort to provide 'context' to what he had said or done.

[24] This approach by the judge when faced with an application that he recuse himself from any further involvement in the extant proceedings, was a wholly incorrect one. As stated by Byron P in **Walsh v Ward**, the test of apparent bias is not aimed at or directed to the integrity or reputation of the judicial officer, but singularly to preserving confidence in the administration of justice. This means that the judge must consider what he or she said or did which is the subject of the complaints upon which the recusal application is grounded, against the test of the fair-minded and informed observer, and stand back and determine whether, to that independent observer, it can be said that there was a real (as opposed to a fanciful) possibility that he, the judge, might be biased against GSL in the proceedings, such that the administration of justice might be compromised. In the instant matter, there is no dispute as to what the learned judge actually said and did during the hearings on 24th February and 1st March 2022. Accordingly, the judge's primary task on the recusal application (there being no real dispute on the applicable law) was to apply the test and the applicable law to those statements as captured in the transcripts of the proceedings. This, with respect, the learned judge failed to do leading to him committing a fatal error of law.

[25] It is no answer to GSL's submission on this point that the learned judge adopted a completely wrong approach and thereby erred in law, to say, as did the Respondents, that the judge, having correctly stated the test earlier in his judgment, must be taken to have had that test in mind when he came to deal with each of the Appellant's complaints. The judge's task in these circumstances was to apply the test of apparent bias to the factual bases of each complaint, to do so

in an objective manner, and to determine whether objectively, in those circumstances, the fair-minded and informed observer would conclude that there was a real possibility of partiality or bias as the presiding judge in the proceedings below, such that he ought to recuse himself from any further participation therein.

- [26] A primary duty of any judicial officer is to uphold the integrity of the administration of justice in a democratic society. This called for the learned judge to adopt the correct approach to a recusal application and to apply the test of the fair-minded and informed observer. It is not for an appellate court to presume or to assume that he did so. It is for the judge below to demonstrate in his judgment that he has done so before reaching his conclusions on recusal. Unfortunately, the learned judge's failure to do so is pellucid. This much is clear from the judgment under review. To the contrary, the judgment is demonstrative of the judge not having discharged this duty. Moreover, having considered each complaint in this way, the learned judge ought to have stood back or looked at matters in the round, before making a final determination as to whether the fair-minded and informed observer would conclude that there was a real possibility that he might be biased towards the Appellant, such that he might no longer be an impartial adjudicator in the proceedings below. The learned judge clearly did not do any of these matters. He adopted an approach which is not sanctioned by the law and failed to apply the well-established test of the fair-minded and informed observer equipped or imbued with all of the relevant characteristics as set out in the case law. In doing so, he committed a fatal error of law. On this basis alone his judgement is flawed, with the consequence that the order dismissing the recusal application could not stand and was accordingly set aside by this Court on 4th October 2022.

The complaints

- [27] The Appellant relied in its skeleton argument in the appeal on five sub-grounds or categories of complaint arising out of certain statements made and steps taken by the learned judge during the 24th February and 1st March 2022 hearings. The Appellant contends that having regard to the matters complained of, taken

individually and/or cumulatively, the learned judge ought to have found that there was a real possibility that he may be biased against GSL. It is GSL's case that the learned judge had descended into the arena; pre-determined certain issues and applications; dealt with matters not then before him for consideration; and made certain directions which effectively prejudiced GSL's position in the litigation and would not have accorded to it adequate time or opportunity to respond to any of the two suggested new applications, had they been made by the Respondents. Further, had the learned judge applied the correct test, he ought to have acceded to the recusal application, and made an order recusing himself from any further role or involvement in the proceedings in the court below.

[28] These five areas of complaint will be dealt with seriatim.

(1) Suggesting the Respondents bring an application for anti-suit injunction

[29] The Appellant contends that the learned judge descended into the arena when during the 24th February 2022 hearing he suggested or invited the Respondents to make an application for an anti-suit injunction against GSL to stop GSL from proceeding with the Chinese Actions brought against subsidiaries of NTP. It is important to note that the Chinese Actions were not commenced by GSL. Instead, GSL is party to arbitration proceedings in Hong Kong which concerns its recovery of the sum of US\$150 million paid for the shares issued to it in NTP being part of the PIPE, which issuance was set aside by the Commercial Court, and its decision upheld by this Court on appeal. The Appellant also contends that the learned judge did not only suggest to the Respondents the bringing of an application for an anti-suit injunction but went so far as to suggest the basis or grounds for such an application. The transcript for 24th February 2022 reveals that what the learned judge stated was that the Chinese Actions were 'merely a form of harassment', and that GSL has 'got no claim against these subsidiaries and the action ought to be stopped.'⁹

⁹ Transcript of Proceedings 24th February 2022 page 8, lines 15-19.

- [30] In his judgment on the recusal application, the learned judge at paragraph [9] sought to justify his suggestion that the Respondents bring an application for an anti-suit injunction, on the ground of what he termed 'sensible case management to flush out as soon as possible what applications might be in the offering, so that suitable directions can be given.' He also saw the raising of this issue by him as 'neutral.' GSL strongly disputes the judge's classification of this issue as 'neutral', and points to the actual words used by the judge being not supportive of such a conclusion. We are in agreement with the Appellant on this aspect for the reasons which are set out at paragraph [35] below.
- [31] The Appellant also contends that the learned judge went further, impermissibly, as his statements on this aspect clearly indicated or conveyed the impression that he considered his suggested anti-suit injunction application, on the grounds which he stated, to be well-founded, and that it was likely to be granted if made. The learned judge also went on to state during the 24th February 2022 hearing, that should such an application be made he 'might' make it returnable on 1st March 2022, and may dispose of it at that time. This was, notwithstanding, it would amount to extremely short notice (2 clear days at best) and would (if filed) deprive GSL of any reasonable time within which to properly consider and respond to such an important application.
- [32] The suggested anti-suit injunction application, the grounds for it, and the judge's stated intention to have it shortlisted if filed, were all done by the judge in circumstances where he had not inquired of any of the parties as to whether they intended to make any new applications for which he could give consideration when case managing the proceedings. Moreover, the Respondents had at that stage (and have not since then) given any indication whatsoever that they were contemplating or that they wished to make an application for an anti-suit injunction, much less that it be listed and dealt with by the judge as a matter of urgency or expedition. Likewise, the Respondents had not raised any issue as to the merits of the Chinese Actions, which the learned judge considered and stated prematurely,

to be ill-founded and ought to be stopped. These suggestions and matters were all squarely of the judge's own making. As matters unfolded after 24th February 2022, no application for an anti-suit injunction was filed or has been filed to date in the proceedings below by the Respondents to stop the Chinese Actions. The issue of the merits of the Chinese Actions was a matter governed by Chinese law, upon which no expert evidence of Chinese law had been served by either party in the proceedings, more likely because GSL had not in fact brought those proceedings.

- [33] The learned judge at paragraph [11] of his judgment, sought to explain his actions on the basis of 'simple case-management'. He also stated that there 'was obviously going to be no determination of any fresh application on 1st March. But it was important that all applications were issued in such a way that sensible case-management directions could be given on 1st March, for example, as to timetabling the service of evidence.' The Appellant again takes issue with the judge's explanation on this matter. They point out that there was no indication by the judge at the 24th February 2022 hearing that he was proposing to list the suggested anti-suit injunction application for directions only. What the judge did say was that the anti-suit injunction application can be considered on 1st March 2022, thereby giving rise to a real possibility that he might do so, to the detriment of GSL. The judge's exact words were: '[a]nd equally, if you are seeking an anti-suit injunction, then that's something which again is something which can be considered on Tuesday and whether it needs to go over for a one day hearing.' GSL also points out that given the added fact that the judge did indicate that he proposed to deal summarily, at the 1st March 2022 hearing, with the issue of whether GSL had a sustainable claim as a matter of Chinese law, the reasonable observer could not have concluded that the learned judge only intended to give directions on 1st March 2022 but, instead, that he might deal with the application substantively on that date.¹⁰

¹⁰ See Skeleton Argument of Appellant, paragraph 19.3.

- [34] At paragraph 19.4 of its skeleton argument, GSL submits:
- “By offering an explanation that did not appear on the transcript, the learned judge incorrectly attempted to interpose his own subjective views on what had transpired during the hearing, contrary to the proper approach to the determination of apparent bias.”
- [35] In our considered view, this ground of complaint has been made out by GSL. What the learned judge said and indicated he intended to do as a consequence of his suggestion that the Respondents file an application for an anti-suit injunction, went well-beyond what is permissible by a presiding judge in the interest of robust case management. These statements were not simply expressions of the learned judge’s preliminary or current thinking. They were unsolicited and unprompted suggestions by the learned judge to one of the parties in the litigation, in circumstances where there was ‘equality of arms’, to file an application for an anti-suit injunction and the bases or grounds upon which such an application ought to be made. The judge’s characterisation of the Chinese Actions as being ‘merely a form of harassment’ by GSL which ought to be stopped, were indicative of the learned judge having not only descended into the arena, but of his pre-determination of the said yet unfiled application. These matters are evidence upon which it could be concluded, objectively, that there was a real possibility that the judge was not impartial and/or might be biased towards GSL in the proceedings. They are also indicative of a closed mind. They may aptly be classified as premature expressions of legal and factual conclusions indicative of a closed mind.
- [36] In our considered opinion, it is inconceivable that this would not lead the fair-minded and informed observer to conclude that there was a real possibility that the learned judge might be biased towards GSL, and that he lacked the necessary impartiality essential to the proper administration of justice in the said proceedings. On this basis, the learned judge, had he properly considered this complaint against the applicable test, ought to have granted the application and made the requisite order recusing himself from the said proceedings. In not coming to this conclusion, the learned judge committed an error of law and his judgment in this

material respect is fatally flawed. On this basis alone, the appeal ought to be allowed.

(2) Suggestion of an application to appoint receivers over shares in GSL

- [37] This second ground of complaint also relates to the 24th February 2022 hearing. The learned judge also suggested that the Respondents file an application to appoint receivers over the shares in GSL, as a means of facilitating the receivers appointing new directors who can then send the letter required by the court's order dated 31st January 2022 or, alternatively, if GSL is found in contempt, 'then [he] could appoint sequestrators which would then allow them to send the letter.'¹¹ He went on to state:

"But Mr. Griffiths [counsel for the Respondents] if you are wanting to make an application for the appointment of receivers, then that too can be issued and I can give consideration to it on the 1st March.

What you will need though is an order under CPR 42.12 so that the proceedings will be binding on Kaisa who are obviously the people who own the shares in Greater Sail, but since they control Greater Sail, I don't see there is any particular difficulty as a matter of law with appointing receivers. But again, that's a matter for argument on Tuesday." (My emphasis)

- [38] The suggestion of an application to appoint receivers was a matter solely of the judge's making. No such application (which is draconian in nature) was suggested or hinted at by the Respondents. Indeed, no application to appoint receivers over the shares in GSL has been filed by the Respondents in the proceedings below. Moreover, as GSL contends, there was a clear indication by the judge that such an application would be considered by him at the 1st March 2022 hearing and, importantly, that he saw no 'particular difficulty' as a matter of law with receivers being appointed. GSL points to this as clearly evincing pre-determination or a closed mind on the part of the learned judge of another yet unfiled application,

¹¹ Transcript of Proceedings 24th February 2022 page 11, lines 2-4.

indicative of apparent bias when viewed through the lens of the fair-minded and informed observer. Also, to indicate that an application of that nature and seriousness could be dealt with effectively by GSL on 2 clear days' notice, was unfair to GSL and is likewise indicative of the real possibility that the learned judge was biased towards GSL, such that he ought, objectively, to have recused himself from any further involvement in the proceedings.

[39] At paragraph [13] of the judgment, the learned judge relies on the need to 'flush out applications' as part of the case management function. GSL argues that this was not the way in which he had expressed himself at the 24th February 2022 hearing and, in any event, there was no need for him to flush out a receivership application which had not even been hinted at by the Respondents. To the contrary, the Respondents, who are represented by learned and experienced specialist senior lawyers, had chosen to enforce the court's order through the prism of an application for contempt, which application was then pending before the court in separate proceedings. The learned judge went on to state, unhelpfully, at paragraph [13] of his judgment:

"The fact that a party is represented by "experienced practitioners, and specialist leading and junior counsel" does not avoid the problem of the late issuance of applications with an expectation that they be dealt with regardless of listing difficulties. Indeed such lawyers may be especially prone to such behaviour."

[40] It is our considered view that this second complaint has been made out by GSL in its recusal application, as matters indicative of apparent bias on the part of the learned judge. This is yet another basis on which the learned judge ought to have concluded, had he applied the applicable test of the fair-minded and informed observer, that there was a real possibility that he might be biased towards GSL, such as would render him incapable, in the interest of the administration of justice, to continue to preside in the proceedings below. Again, his suggestion to the Respondents to file an application for the appointment of receivers over the shares in GSL and his premature indication that he saw 'no particular difficulty as a matter of law with appointing receivers', went well-beyond what is permissible of a judge

actively case managing the proceedings before him. These statements would be seen by the fair-minded and informed observer as the judge again descending into the arena, pre-determining issues of law and possibly of fact and giving the impression or conveying a real possibility that the judge had a closed mind. Accordingly, the learned judge, had he applied the established test, ought to have concluded in favour of his recusal from the proceedings in the court below.

(3) The making of the service out order

- [41] This complaint centers on the learned judge having made, at the 24th February 2022 hearing, a service out order granting NTP permission to serve the contempt proceedings on the named individual defendants in Claim No. BVIHC (Com) 2022/0042 out of the jurisdiction. The Contempt Action had been filed the previous day (23rd February 2022) and had not been served on GSL. GSL was made aware of the Contempt Action a mere 10 minutes before the hearing started.¹²
- [42] GSL complains, firstly, that the learned judge made the service out order despite counsel for NTP informing the judge that they did not propose to pursue the application at that hearing, since it had not been served on GSL. Nevertheless, the judge proceeded to hear and determine the application without hearing submissions from NTP. Secondly, the judge then fixed 11th March 2022 for the hearing of the Contempt Action. This allowed for a mere 2 weeks for service on the foreign defendants, and for those defendants and GSL to consider and to prepare to respond to the Contempt Action. It is GSL's submission that in doing so the learned judge did not address his mind to whether realistically service on the foreign defendants could be effected within that time period, whether the documents may need to be translated from English into another language for the benefit of these defendants, and whether GSL and those defendants could be in a position to properly respond to such a serious application.

¹² Transcript of Proceedings 24th February 2022 page 4, line 17.

- [43] The judge addressed this complaint at paragraph [20]:
- “CPR 53.8(1) requires that seven days’ notice of an application be given, fifteen days’ notice was thus in compliance with the Rules. If service could not have been effected, then the hearing would have been ineffective. However, in the event, service was effected successfully and the hearing on 11th March was effective. If the respondents had needed more time to adduce evidence, then they could have made an application for that purpose. In fact they have not done so. No unfairness has resulted.”
- [44] Counsel for the Appellant, Mr. Carrington KC, points out correctly that the judge’s reference to CPR 53.8(1) is erroneous. The simple reason is that CPR 53.8(1) has no application, since the application for contempt is made in fresh proceedings (Claim No. BVIHC (Com) 2022/0042), and the defendants in China sought to be served out of the jurisdiction, would be entitled, under the relevant Practice Direction, to 56 days within which to file their defence. What occurred therefore amounted to a severe abridgement by the learned judge of this period, without any request for the time for filing their defence to have been abridged, and without the learned judge himself addressing his mind to the abridgement of that period.
- [45] The gravamen of this complaint by GSL is that the learned judge acted without any specific application before him, and in circumstances where counsel for the Respondents had expressly stated that they were not inviting the judge to deal with the Contempt Action, particularly as GSL had effectively not been served with it or had no prior notice of it. Moreover, the learned judge disadvantaged GSL and potentially the foreign defendants by severely short listing the hearing of the Contempt Action. In our view, the judge’s rationale for so acting belies an overly robust and overzealous approach to case management, especially when the Contempt Action was not, on 24th February 2022, before him to be case managed.
- [46] The question is whether this complaint when properly considered alongside the applicable test, would lead the fair-minded and informed observer to conclude that there was a real possibility that the judge might be biased towards GSL. In our considered view, while this ground of complaint does not have the same compelling force as complaints 1 and 2 dealt with above, it is likely that the fair-

mindful and informed observer would conclude that the judge's actions and statements were premature and precipitous, and when viewed alongside complaints 1 and 2, may objectively be considered to be indicative of there being a real possibility that the judge might be biased towards GSL.

(4) Pre-determination of GSL's forum challenge

[47] The entirety of GSL's complaint on this issue was reproduced by the learned judge at paragraph [25] of his judgment on recusal and also at paragraph [28] of the Appellant's skeleton argument in the appeal. I see no need to regurgitate them here. In summary, GSL complains that despite its forum challenge application being before the judge at the 24th February 2022 hearing purely for directions, the judge raised issues as to the merits of the application, which points had not been taken by NTP. The judge proceeded on incorrect assumptions and conclusions concerning the Chinese Actions, incorrectly attributing this to GSL, and concluded that as a matter of BVI law these claims were a 'non-starter'.¹³ He then threatened to dismiss the forum challenge on 2 days' notice, listing it for summary determination before him on 1st March 2022 'to consider whether you've got an arguable claim for saying that this action [the Chinese Actions] can properly be brought in the way you have. Because I suspect what Mr. Griffith is going to want to do is to have a cross-application of an anti-suit injunction on the basis that this is merely a harassment. You have got no claim against these subsidiaries and the action ought to be stopped.'¹⁴ To this Mr. Carrington KC, learned counsel for GSL responded: '[w]ell, My Lord, I think that would be rather premature, because what we are saying is that that is a claim under Chinese law, not under BVI law.'¹⁵

[48] There followed an exchange between the learned judge and leading counsel for GSL in which the judge underscored the requirement, as he saw it, for GSL to

¹³ Transcript of Proceedings 24th February 2022 page 8, lines 2-5.

¹⁴ Ibid lines 12-19.

¹⁵ Ibid lines 20-23.

show, by expert evidence, that it (GSL) has a viable claim under Chinese law in the Chinese Actions, to which GSL is not a party. The judge then said this:

“So it seems to me that you may want to put further evidence in, but I imagine what Mr. Griffith is going to want to do is issue an application for an anti-suit injunction which I might make returnable on the 1st March as well and obviously I will consider directions as to”

[49] This was followed by counsel for GSL bemoaning to the learned judge that his suggestion as to the filing of an anti-suit injunction was ‘unfortunate’. Mr. Carrington KC then indicated that GSL would like to consider putting in further evidence on its forum application and to consider the ‘concern’ which the judge had shown on GSL’s evidence and whether it was ‘well-founded’. He indicated that the date of 1st March 2022 proposed by the judge for a hearing on the forum application was ‘really not convenient to [GSL]’, as it gives GSL basically the weekend. To this the learned judge responded:

“Well, I mean you have issued the application. I mean, I could determine it just today and say that you haven’t shown any arguable case, but I am giving you some further time to do that.

I mean I am not determining the matter. I mean it may be that you have got a good claim in Chinese law, but you have obviously had the opinion of that for, well ten days now...but all I am going to do is to list it for the 1st March so that we can see whether there is anything viable about it. If there is, then obviously I will give you some directions and then Nam Tai can file some evidence and the date in April seems to be perfectly sensible, but there is no point doing that if there is nothing which is going to be triable.”¹⁶

And further:

“You’ve got the forum application by Greater Sail, which if it succeeds, will ... or if I decide that it is not hopeless, that will have to have directions given and the whole picture of the case will change depending on whether that challenge exists.

I mean, it may well be that Mr. Carrington put in more evidence of Chinese law so that one can see how there is a viable claim there. And equally, if you are seeking an anti-suit injunction, then that’s something which again

¹⁶ Transcript of proceedings 24th February 2022 page10 lines 3-19.

can be considered on Tuesday and whether it needs to go over for a one-day hearing.”¹⁷

[50] Mr. Carrington KC for GSL stressed that GSL’s forum challenge in Claim No. 16 of 2022 is not based on the Chinese Actions, ‘it is based on the fact that [the] BVI Court is not the natural forum for the claims that NTP and the other parties have brought against GSL.’ This comment solicited the following responses and exchanges between the learned judge and counsel for GSL:

The Court: “.... Its all part of the forum non conveniens issue. But, yes, I mean I will just have to consider that as part of the question as to whether the Chinese litigation is something which is properly brought.....I mean, at the moment, Mr. Mai doesn’t really explain what’s happening. I mean, how is it that you have got these ex-employees of Nam Tai on the fact of it interfering with the new management of Nam Tai taking over these...”

Mr. Carrington KC: “Well, My Lord, that is not a matter for GSL to explain, that’s for Messrs., I think, Zhang and Wang to explain and they have not been made parties to these proceedings before Your Lordship. So this Court can only assume that the NTP Parties are dealing with that issue in China. That is not before this Court.”

The Court: “Yes. What is before the Court at the moment is the suggestion that Greater Sail are part of Kaisa Group who are wanting to make difficulties with the transfer of management. I mean, that’s the underlying issue which is being brought by Nam Tai. I don’t think so far it has been addressed on the merits at all, has it?”

Mr. Carrington KC: “Well, no My Lord, because we have not put in a defence because we are saying that BVI Court is not the appropriate forum to determine whether that alleged conspiracy does exist.”¹⁸

[51] The learned judge, in responding to this complaint at paragraph [26] of the judgment, treated it as an issue which goes, not to the question of bias, but as a substantive issue, which GSL says he got wrong. He noted that he had pre-read the forum challenge application, perceived there were legal problems with it, and

¹⁷ Transcript of proceedings 24th February 2022 page13 lines 7-19.

¹⁸ Transcript of proceedings 24th February 2022 page15 lines 10-25 to page 16 lines 1-11.

what he did on 24th February 2022 was to '[flag] these up to Mr. Carrington [KC] (see above), so that Greater Sail could deal with the point.'

[52] GSL agrees that the judge's alleged misapprehension of the Chinese law issue, and his focus on that issue rather than on where NTP's claim against GSL should be brought, is a substantive issue. However, GSL argues, this does not preclude it from being a bias issue. They argue further that the learned judge's position on this issue was so 'confused that it would have been perceived by the reasonable observer as explicable by bias, rather than merely substantive error';¹⁹ and that a full reading of the transcript would give rise to the conclusion that the learned judge 'was not merely raising an issue, but indicating a closed mind on the [said] issue.'²⁰

[53] At paragraph [27] of the judgment, the learned judge addressed his shortlisting of the forum challenge in this way:

"It is right that listing the matter for an assessment of the viability of the application is an unusual course, but it is not unheard of. If an application has no reasonable prospects of success, then the Court should dispose of it as soon as possible (having of course given the applicant adequate opportunity to show cause why the application was viable). There is no point listing such an application for a substantive hearing with further evidence from both sides at substantial expense to the parties and significant waste of Court time. Judges in the twenty-first century are not expected to sit back and silently umpire disputes. They have a duty actively to case-manage matters before them: CPR 25.1. The Court can make orders and give directions on its own initiative: CPR 26.2."

[54] In GSL's submission, not only was the course of action adopted by the judge an unusual one, as he acknowledged, but he failed to give GSL a fair opportunity to be heard on its application which indicated that he held a closed mind at an early stage. This was not just active or robust case management, but in the eyes of the fair-minded and informed observer it was the result of a closed mind. I note at this

¹⁹ See Skeleton Argument of Appellant paragraph 30.1.

²⁰ Ibid paragraph 30.2.

juncture, that GSL did subsequently file additional expert evidence of Chinese law in support of its forum challenge. In the end, the learned judge dismissed the forum application on 11th March 2022. This decision, we understand, has since been appealed to this Court. Accordingly, I will be careful not to make any statement as to any issue which may fall for this Court's determination in GSL's forum challenge dismissal appeal.

[55] In our considered view, much of what GSL complains of under this complaint, is explicable, on its face, on the basis of robust case management by the learned judge. In particular, the judge indicating his concerns over what he saw (rightly or wrongly) as the connection between the viability of the Chinese Actions under Chinese law to the merits of GSL's forum application, the potential 'gap' in the expert evidence then before the Court from GSL of Chinese law, and his attenuation which the assertion that GSL is part of the Kaisa Group who are wanting to make it difficult for NTP with the transfer of the management of its Chinese subsidiaries following the 30th November 2021 requisitioned meeting and the change of control on the board of NTP.

[56] GSL's forum challenge was before the learned judge on 24th February 2022 for case management. In considering what directions he ought to make at that stage, it was appropriate for the judge to point out any legal or other issues or areas of difficulty which he saw with the application. The correctness of this approach has nothing to do ultimately with whether the judge's thinking was correct in law, unless the way in which the learned judge approached GSL's forum application, and his pointing out of issues of law and fact which then concerned him, was done in such a way as to be patently unfair to GSL, or were indicative of - predetermination or a closed mind, so as to call into question his impartiality. The correctness of the judge's view of the Chinese Actions in relation to the forum challenge is more properly a matter to be taken on appeal from his order dismissing the forum application. This includes the point underscored by counsel that GSL is not a party to the Chinese Actions and whether issues relative to

whether, notwithstanding GSL is not a party, it had the burden of showing that it (GSL) has an arguable claim in the Chinese Actions. Those and other issues raised in the appeal are matters to be considered by this Court in due course upon full argument.

- [57] The difficulty with the learned judge's approach to the case management of GSL's forum non conveniens application at the hearing on 24th February 2022, is the judge linking the issue of a viable claim in the Chinese Actions to his suggestion, on more than one occasion, to the Respondents that they file an anti-suit injunction application, and indicating that such an application would be well founded on the bases that the Chinese Actions are 'merely a form of harassment'. This complaint has been considered above and found to be indicative of apparent bias. In those circumstances, subject to my comments at paragraphs [51] and [52] above, this ground of complaint has been made out by GSL.

(5) The 1st March 2022 hearing

- [58] At the 1st March 2022 hearing, the learned judge, in dealing with GSL's forum challenge, remarked about its application to extend time to comply with the 31st January 2022 order. He did so in terms suggesting that it would not be appropriate for the court to effectively waive a breach by extending time to comply. He took the position that this issue went more to mitigation of punishment for contempt. Counsel for GSL then pointed out to the judge that his comments about mitigation presupposes a finding of contempt having been made, which issue had not been dealt with and determined in the Contempt Action.
- [59] GSL also contends that the learned judge went so far as make comments 'that appeared to assume that NTP's substantive claim was already made out' when he raised, in the context of the forum challenge, the question of what possible justification there was for GSL interfering with the takeover of NTI and Zastron (two Chinese subsidiaries of NTP). This question was asked by the judge even though no defence had yet been filed by GSL to NTP's substantive claim, GSL

having made a forum challenge. This was followed by the judge stating: '[t]he facts are very straightforward. There's completely wrongful interference with Nam Tai Properties' takeover of its subsidiaries.'²¹

[60] With regard to the failure to handover the chops of the NTP subsidiaries, the learned judge remarked, in response to counsel categorizing it as a complaint: 'It is not a complaint. It's established, isn't it? What possible defence do you have to the failure to deliver up the chops?' The judge was then reminded by counsel for GSL that no facts had yet been found and, in any event, NTP's pleaded case was that GSL is not in possession, and never has possessed, the chops. To this the judge retorted: '[i]t's just a vehicle of Kaisa, isn't it, as is Mr. Wang.' GSL submits that these statements 'show objectively that the judge had made a predetermination of the claim against the Appellant and therefore apparently had a closed mind as to its position in the proceedings.'²²

[61] At paragraph [29] of the judgment, the judge classifies this challenge as GSL 'cherry picking' passages from 43 pages of transcript. He also proffers the explanation that his reference in the quoted passage to the failure to deliver up the chops, 'is obviously to the underlying dispute between Nam Tai on the one hand and Kaisa on the other. It was not a reference to the current action. Greater Sail did not have the chops and there was no claim to deliver them up. The reference to the mitigation of punishment is in the context of the application for relief from sanctions, which I shall deal with below. I was foreshadowing the issues which arose on that application. There was no presumption that the defendants were guilty of contempt.'

[62] This Court is in full agreement with and adopt the submissions by GSL on this ground of challenge. These two passages from the 1st March 2022 hearing relating to mitigation and to delivery up of the chops by GSL, are clear evidence of a real

²¹ See Skeleton Argument of Appellant paragraph 33.2.

²² Ibid paragraph 34.

possibility of the learned judge having predetermined the Contempt Action and an issue arising in the substantive Claim No. 16 of 2022. In our considered view, the fair-minded and informed observer would conclude that, in those circumstances, there was a real possibility of bias and the judge ought to have recused himself.

Disposition

- [63] We have found merit in each of the points of complaint made by the Appellant in its recusal application, warranting a finding of apparent bias on the part of the learned judge. These matters, taken individually are sufficient to allow the appeal. Standing back and looking at them in the round, it is clear that the fair-minded and informed observer would also conclude that there might be a real possibility of apparent bias on the judge's part, warranting the making of a recusal order. This conclusion does not reflect negatively on the integrity or probity of the learned judge who is an experienced and competent judge of the Commercial Court.
- [64] For the reasons given above, the appeal was allowed by this Court and the orders made on 4th October 2022.

I concur.
Dame Janice M. Pereira DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar