

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

**Claim No: BVIHC (COM) 2020/0215, 2021/0003 and 2021/0073
CONSOLIDATED CLAIM**

BETWEEN:

MEX CLEARING LTD

Claimant

-and-

(1) MEX SECURITIES SARL

(2) MULTIBANK FX INTERNATIONAL CORPORATION

(3) VON DER HEYDT INVEST SA

Defendants

Appearances:

Mr. Tim Penny QC and Mr. Alexander Cook, with them Mr. Alex Hall Taylor QC and Mr. Simon Hall of Carey Olsen for Von der Heydt Invest SA

Mr. John Carrington QC and Ms. Reisa Singh of Kendall Law for Mex Clearing Ltd

Mr. Hefin Rees QC and Mr. Daniel Warents, with them Mr. Oliver Clifton of Walkers for Multibank FX International Corporation

Mex Securities SarL did not appear and was not represented

2021 December 14
 December 17

JUDGMENT ON RECUSAL

- [1] **JACK, J [Ag.]:** By an application dated 8th December 2021 MBFX asks me to recuse myself from hearing any further applications in this matter. There were major applications listed for hearing on 15th December 2021. I directed that the recusal application be heard on 14th December 2021 at 9.30am, so it could be determined

prior to the substantive hearing. Due to some miscommunication counsel were unaware of the timing. I therefore put the hearing back, but it was still able to be heard.

[2] The background can be seen from my earlier judgments in this matter and in particular my judgment on the freezing order delivered on 4th October 2021. (Some corrections were made on 19th October 2021.) I also dealt with the issue of confidentiality in a judgment of 19th October. Further issues I determined at a consequential hearing on 12th October 2021. A forum challenge made by MBFX and costs issues, I adjourned to 15th December 2021. One application, MBFX's second disclosure application, I heard on paper.

[3] No explanation has been given for the very late issuance of the application for recusal, which had the potential seriously to disrupt the hearing of the matters listed for 15th December.

The grounds for recusal

[4] The application originally listed ten grounds for recusal. In his skeleton for the recusal application Mr. Rees QC for MBFX put forward the following four heads of recusal:

“2. The sole basis on which this application is advanced is that there exists a real possibility of apparent bias. To be clear, MBFX does not suggest actual bias on the part of the Judge.

3. Rather, for the following reasons — which are expanded below — MBFX invites the Court to find that there is, at the lowest, a real possibility that a fair-minded and informed observer would conclude that the Judge will not approach future hearings in these proceedings with an open mind:

3.1. First, in his judgment of 4 October 2021 (‘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. 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.

3.2. 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 to a 'need' to vary such restrictions so as to permit disclosure of (inter alia) the WFO Judgment and the Confidentiality Judgment to the regulators of all companies in the MultiBank Group. He also commented that 'it would be perfectly open to the [BVI Financial Services Commission] to ask Mr. Taher to stand aside whilst the Court proceedings continue.' The Judge's apparent concern that overseas regulators should be provided with copies of his judgments, and his apparent invitation to the FSC to direct Mr. Taher to stand down as Chairman, were outside the scope of his judicial functions in respect of the applications before him.

3.3. 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 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.

3.4. Fourth, the Judge made a series of orders and directions by which (i) MBFX was precluded from relying upon evidence, (ii) MBFX was afforded limited time orally to present its case and (iii) MBFX was required to pay \$42.2m into Court as a condition for maintaining confidentiality restrictions. The making of these directions, which have adversely affected MBFX's participation in the proceedings, would lead an informed observer to apprehend a real possibility of bias against MBFX."

The relevant legal principles

- [5] The principles on which a judge needs to act in considering whether to recuse himself are well-established. I discern no difference in the law as put forward in MBFX's and VDHI's skeletons. The law as stated in Mr. Rees QC's skeleton is this:

"5. The test for apparent bias is well-known. In **Porter v Magill**,¹ the House of Lords approved the following formulation:

¹ [2001] UKHL 67, [2002] 2 A.C. 357 at [102] to [103].

'The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the tribunal was biased.'

6. The attributes of the 'fair-minded and informed observer' who is the subject of the inquiry were considered by the English Court of Appeal in **Sengupta v Holmes**.² There, the Court accepted that this person is distinctly not a lawyer, and thus it is 'not enough to show that those in the know would not apprehend any bias'. In reaching that conclusion, the Court referred to the decision of the Supreme Court of South Australia in **Southern Equities Corp Ltd v Bond**.³

'The attributes of the fictitious bystander to whom courts defer have therefore been variously stated. Such a person 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 relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish that they had not, without necessarily disqualifying themselves from continuing to exercise their powers. The bystander must also now be taken to have, at least in a very general way, some knowledge of the fact that an adjudicator may properly adopt reasonable efforts to confine proceedings within appropriate limits and to ensure that time is not wasted. The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality. Acting reasonably, the fictitious bystander would not reach a hasty conclusion based on the appearance evoked by an isolated example of temper or remarks to the parties or their representatives, which was taken out of context. Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious.'

² [2002] EWCA Civ 1104 at [11].

³ [2000] SASC 450 at [39], recently affirmed by the UK Supreme Court in *Halliburton Co v Chubb Bermuda Insurance Ltd* 28, [2020] UKSC 48, [2020] 3 W.L.R. 1474 at [52]-[53] and by the Privy Council in *Stubbs v The Queen* [2018] UKPC 30, [2019] AC 868 at [18]

7. Questions of apparent bias often arise where a judge is called upon to decide successive phases of the same litigation. For instance, a fair-minded and informed observer may apprehend a real possibility of bias in respect of a forthcoming hearing where a judge has, at a previous hearing, made serious findings of dishonesty or fraud against one of the parties.

8. In **Zuma's Choice Pet Products Ltd v Azumi Ltd**,⁴ the English Court of Appeal observed that a balance must be struck. Whilst the mere fact that a judge has decided applications or issues in the past adversely to a litigant is not generally a reason for that judge to recuse himself at further hearings:

"The position might well be different if in the past the judge has expressed a final, concluded view on the same issue as arises in the application."

9. Similarly, in **Locabail (UK) Ltd v Bayfield Properties Ltd**,⁵ the English Court of Appeal observed that:

'...a real danger of bias might well be thought to arise... if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion.'

10. One of the leading authorities on the approach a court should take to a recusal application is to be found in the decision of Rix LJ in **JSC BTA Bank v Ablyazov (No.9)**:⁶

'a case for recusal may always arise, however, where a judge has previously expressed himself in vituperative or intemperate terms.'

11. In **Sengupta**, the English Court of Appeal acknowledged that in some cases, a judge's inability to open his/her mind in future hearings may be not just apparent, but real:⁷

'...if after a careful and professional review of all the evidence, given by witnesses whom, so to speak, he has looked in the face, he has arrived at the conviction that the party in question is a crook or a rogue, guilty as charged (whether the case is criminal or civil), he might not conscientiously be able to put himself back into a state of mind where he has no preconceptions about the merits of the case.'

⁴ [2017] EWCA Civ 2133 at [30].

⁵ [1999] EWCA Civ 3004, [2000] 1 QB 451 at [25].

⁶ [2012] EWCA Civ 1551, [2013] 1 W.L.R. 1845 at [65].

⁷ At [33].

12. The authorities establish that this is not a matter of discretion but rather a matter of law. Either there is no apparent bias, in which case the judge cannot recuse him or herself, or there is, in which case the judge must do so. It is like a light switch, either on or off.

13. It follows from this, that the Court's concerns (if there are any) about the prejudicial effect that recusal may have on the parties or on the administration of justice more generally (e.g. delays and listing problems) are irrelevant: **Sir Alexander Morrison v AGW Group Ltd**.⁸

14. Finally, in any case 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: **Locabail**.⁹

[6] In his oral submissions, Mr. Rees QC also cited **Stubbs v The Queen**, in the Privy Council on appeal from the Bahamas, where Lord Lloyd-Jones said:¹⁰

“15. The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. The appearance of bias includes a clear indication of a prematurely closed mind: **Amjad v Steadman-Byrne**.¹¹ The matter was expressed by Longmore LJ in **Otkritie International Investment Management Ltd v Urumov** in the following terms:¹²

‘The concept of bias... extends further 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.’

16. A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed

⁸ [2006] EWCA Civ 6, [2006] 1 WLR 1163 at [6]

⁹ At [25].

¹⁰ [2018] UKPC 30, [2019] AC 868.

¹¹ [2007] EWCA Civ 625, [2007] 1 WLR 2484 *per* Sedley LJ at [16].

¹² [2014] EWCA Civ 1315 at [1].

observer that the judge's mind is closed in some respect relevant to the decision which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case... However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced.

17. It is not acceptable for a judge to form, or to give the impression of having formed, a concluded view on an issue prior to hearing full argument by all parties on the point. **In re Q (Children)** provides a strong example.¹³ In care proceedings the judge expressed himself at a case management hearing in terms which made clear that he accepted the account given by the father and rejected the allegations made by the mother, in circumstances where the mother had not yet given evidence. The Court of Appeal allowed an appeal against an order made by the judge in a subsequent fact-finding evaluation. McFarlane LJ observed¹⁴ that there is a thin line between case management and premature adjudication. Here however, the judge had strayed beyond the case management role by engaging in an analysis, which, by definition, could only have been one-sided, of the veracity of the evidence and the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process."

[7] To these authorities, Mr. Penny QC for VDHI added:

"9.8. 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'¹⁵ or 'vituperative and intemperate terms'.¹⁶ In **Al Zawani v Newson-Smith**,¹⁷ for example, a Master expressed irritation and frustration in his comments to one side's counsel. The High Court, having analysed the context in which those comments were made, concluded that: '[i]n my judgment the fair minded and informed observer would not conclude from these comments... and the context in which they

¹³ [2014] EWCA Civ 918, [2014] Fam Law 1397.

¹⁴ At [53], [54] and [57].

¹⁵ Locabail at [25].

¹⁶ Ablyazov (No 9) at [65].

¹⁷ [2016] EWHC 2796 (QB).

were said that there was a real possibility that Deputy Master Leslie was biased in such a way as to determine the outcome of the substantive applications, nor would the fair-minded observer conclude that there was a risk that the Master had a closed mind or had pre-judged the issues arising on the substantive applications. So, for example, the full context shows that, despite irritation, the Master did listen to the submissions being made about the wording of the recital. Further, he was prepared to hear responses from the Appellant's counsel. Thirdly, some of the comments were clearly responding to the counsel's oral submissions".

9.9. It is important to distinguish between bias and a litigant disagreeing with the decision of the tribunal. Thus in the recent English High Court decision of **WWRT Ltd v Tyshchenko**,¹⁸ a defendant complained that the judge was biased but almost all of the grounds advanced were objections to the substantive findings made in the relevant judgment — Bacon J observed that '[i]f either of the defendants took issue with the findings in my judgment the proper forum in which to raise that would have been an appeal.' The judge went on to say¹⁹ that:

'[The applicant] undoubtedly disagrees, in very strong terms, with my findings. But he has not identified any point on which my views were expressed in such extreme, unbalanced, or otherwise unjudicial terms as to cast doubt on my ability to continue to hear applications in these proceedings with an objective mind.'

9.10. Finally, the authorities have emphasised that judges should not recuse themselves too readily, especially in long and complex cases, otherwise the convenience of having a single judge overseeing both the procedural and substantive parts of a case will be seriously undermined. While it is important that justice must be seen to be done, it is

'equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.'²⁰

¹⁸ [2021] 7 WLUK 43 (judgment of 6th July 2021); there is as yet no neutral citation number.

¹⁹ At [4].

²⁰ Locabail at [22].

Fourth ground of recusal

- [8] I shall consider MBFX's fourth ground of recusal first. This consists of two elements: the first the case management orders I gave on the morning of 21st September 2021; the second my continuing the confidentiality order on terms that MBFX lodge \$42.2 million in Court. So far as the case management orders are concerned, the position was that between the hearing in July, which was adjourned part-heard to September, more evidence had been lodged. For reasons I gave at the time, it would have been completely disruptive of the hearing if that fresh evidence was allowed in. The time for submissions was roughly evenly divided. I understand from Mr. Hall Taylor QC that an appeal is pending against those case management decisions. Whether I erred in these case management decisions or not, I cannot see that there is evidence of bias in my making them.
- [9] As regards the requirement to lodge money in Court, I had held that the "open justice" principle required the seal and gag orders to be lifted. I was mindful of the potentially adverse effect on MGW and its subsidiaries of publishing the various judgments. However, continuing the confidentiality orders would interfere with VDHI's ability to communicate with noteholders and its ability to take proceedings in the Cayman Islands. As a balancing exercise, I therefore imposed the condition. MGW has never said it has or would have any difficulty complying with the condition, so quite why it did not do so is unclear. Mr. Rees QC was unable to assist in answering this point. Requiring the payment into court was intended to assist MGW, given its fears for its reputation in the marketplace.
- [10] The Court of Appeal agreed with my decision as to the payment into Court. It gave a short further period for MGW to make the payment into Court, but otherwise refused to give MBFX any further relief. If the Court of Appeal upheld my decision, I cannot see on what basis MBFX can assert I was biased when I made the decision at first instance. The condition has now been determined definitively by the Court of Appeal to be appropriate. (No appeal to the Privy Council has been brought.)

The third head: the finding of contempt

[11] As to the finding of contempt by Teare J in **Marketmaker Technology (Beijing) Co Ltd v CMC Group Plc**,²¹, that was a matter fully explored by Mr. Gee QC, appearing on behalf of MBFX. He had in fact appeared on behalf of Mr. Taher in the appeal against Teare J's finding and was able to produce a copy of the order of Richards LJ. From this it was apparent that the appeal had not been allowed. (A single lord justice could not have allowed an appeal in any event.) Instead, by way of compromise the order for committal had been discharged. This is simply a matter of fact. Teare J's reasons are also readily available and explain how Mr. Taher had been manipulating the litigation before him by late service of evidence. I cannot see how reciting these facts gives rise a suspicion that I was biased.

[12] Mr. Carrington QC says that **Marketmaker** was in VDHI's authorities bundle for the hearing. That may be the case, but it was Mr. Woolgar, appearing as Mr. Carrington's junior for Mex Clearing, who brought the finding of contempt to my attention. I could hardly ignore it thereafter. As I have said, Mr. Gee QC dealt with the point. A fair-minded observer would not discern bias.

The second head: disclosure to regulators and steps to mitigate

[13] As to the second head of recusal, this comprises two elements: first my allowing disclosure of my judgment to the various regulators of MGW's subsidiaries and second my "apparent invitation to the FSC to direct Mr. Taher to stand down as Chairman". As to the first element, it is very common now-a-days for regulators to require regulated entities to self-report any significant issues of potential misbehaviour. Mr. Rees QC confirmed that such requirements did exist among at least some of the eleven regulators identified in respect of MGW subsidiaries.

[14] I said at the hearing that it was not for the Court to report the subsidiaries. The only exception was that I directed a copy be sent to the BVI Financial Services Commission, which Mr. Gee QC agreed was completely appropriate. The problem

²¹ [2009] EWHC 1445 (QB).

in relation to 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. The Order of 19th October 2021 reflected this point:

“6. In any event, with immediate effect, the Confidentiality Orders and MCL Confidentiality Orders are varied, and the Confidentiality Undertakings are released to the extent necessary, to permit disclosure of the judgment and documents in this consolidated matter to:

6.1. Regulators of Mex Clearing, MBFX and MGW (as defined in the Court’s judgment of today’s date) and any direct or indirect subsidiaries of MGW (including, for the avoidance of doubt, the Cayman regulatory authorities);

6.2. the Solicitors Regulatory Authority of England and Wales...”

- [15] As to the second limb, I gave no invitation, apparent or otherwise, to the FSC to ask Mr. Taher to stand aside temporarily. As part of the balancing exercise, in deciding whether to give priority to the “open justice” principle, I considered potential ways in which the effect on MGW of lifting the seal and gag orders might be mitigated. One of these might have been Mr. Taher stepping aside. Discussing mitigation of the harm potentially caused by lifting the seal and gag orders hardly shows bias; it shows me trying to be even-handed.

The first ground: making findings of fact

- [16] As regards the first ground of recusal, Mr. Rees QC relied in his oral submissions on the following passages of my 4th October judgment to show bias:

“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. The Tomlin order was made almost immediately after the action was commenced, as was always intended: see Mr. Smith’s ‘I don’t want to overcomplicate it’ in the transcript above. (There are other transcript references showing this, which I have not reproduced.)

...

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.

...

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."

[17] Mr. Rees QC submitted in his skeleton:

"23. ...[T]he Judge correctly directed himself in [96] of the WFO Judgment that the merits standard which he was required to apply was whether the Claimant had a case 'which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.'

24. In spite of this, the Judge did not confine the conclusions he drew about the merits of the Claimant's case to the 'good arguable case' standard. Instead, without hearing any oral evidence / cross-examination (including in respect of Mr. Taher), the Judge proceeded to make final and concluded 'findings' of fraud against MBFX.

25. At the heart of the Claimant's case is an assertion that a claim (i.e., action 2020/0215) commenced by Mex Clearing against Mex Securities and MBFX, which was subsequently compromised by the parties by a settlement agreement scheduled to a consent order was a fraudulent device. In particular, in its 'Statement of Ancillary Claim', the Claimant alleges that the consent order was a sham and was obtained by fraud / collusion."

[18] Mr. Penny QC's response to Mr. Rees QC's submissions is:

"12. First, this objection does not get off the ground because the quotations relied upon do not come close to representing 'final and concluded "findings" of fraud'. Tellingly, the quotations in MBFX's application are shorn of any context — MBFX has studiously avoided pointing to other paragraphs in the judgment which make it clear that the judge had well in mind the standard of which he had to be satisfied. For example:

12.1. [66] of the judgment states '...it is useful; to consider whether VDHI has shown a good arguable case that there was a conspiracy to defraud.' And [80] of the judgment expressly concludes '[s]tanding back and looking at these matters in the round, in my judgment VDHI have shown a good arguable case of fraud', while [81] goes on to address the consequences of that finding when dealing with the discharge application in the following terms: '[t]he fact that VDHI have established a good arguable case of fraud against... MBFX'.

12.2. Again, in the context of dealing with MBFX's submissions, the judge, again, says '[t]he evidence, as I have set out above, shows a good arguable case that there was an unlawful means conspiracy to defraud' and, later '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'.

13. As is apparent from the authorities above, the fair-minded observer does not look at quotations taken in isolation, but is cognisant of all of the surrounding circumstances whether publicly-available or not. The quotations in [12] above put into context remarks elsewhere in the judgment. Given also that the... evidence against MBFX is so striking — another factor of which the fair-minded observer would be cognisant — it is not surprising that the judgment is expressed in the terms that it is."

Mr. Penny QC then submits as follows. I wish to emphasise, however, that I have made no final determination that these facts do show fraud. I have merely found that they give rise to a good arguable case of fraud:

"Bluntly the Mex Clearing proceedings are, on the evidence the parties to it themselves produced, obviously fabricated and not a genuine loan repayment claim. The collusive and dishonest behaviour of those involved in the conspiracy is evident from their own self-produced transcripts of their conversations at the time. The fact that there still has been no attempt by the Mex parties, including MBFX, even to explain let alone defend the Mex

Clearing claim in the terms in which it was pleaded, advanced and compromised, is telling, as is the 'new case' now put forward by MBFX which does not begin to match up to or justify it. The Mex parties still have the chance to explain themselves, but have not yet availed themselves of that opportunity. As the Judge said in the Confidentiality Judgment:

'If Mex Clearing and MBFX wish it, I would be open to ordering that a trial of this matter be expedited. That would allow MGW properly to tell the world that they disagree profoundly that any arguable case of fraud has been shown against them, but that they will confidently await the judgment of the Court to vindicate them after trial.'

14. Furthermore, the complaint appears to be that these utterances were made without Mr. Taher having had an opportunity to put in any evidence to explain himself. This is a hopeless point, indeed it is misleading. MBFX had ample opportunity to put in evidence which it considered supported its position, and it did in fact put in reams of voluminous evidence, just not evidence from Naser Taher. MBFX's decision not to adduce evidence from Mr. Taher was a deliberate one, no doubt for its own tactical reasons. However, MBFX is in no position now to complain that findings have been made in the absence of that evidence. In fact, the absence of evidence from Mr. Taher — in circumstances where such accusations were being made against him — itself speaks volumes. It is certainly not a basis upon which that observer would 'conclude that there was a real possibility that the tribunal was biased'.

15. To suggest that the Judge made 'final and concluded "findings" of fraud against MBFX' in the judgment, is a hopeless argument. No issue estoppel could possibly arise from the finding by the Judge of the existence of a good arguable case in fraud. All of the findings of the Court are necessarily only to a 'good arguable case' threshold, and a fair-minded and informed observer would realise that. Indeed, the Judge noted precisely this point at [20] of the Confidentiality Judgment.

16. Further, if — contrary to VDHI's primary submission — the Judge wrongly reached final and concluded findings of fraud, this is a matter for an appellate court, and would suggest an error of principle by the Judge. It is not an indicia of apparent bias."

[19] I accept Mr. Penny QC's submissions (subject to the caveat I have made in the middle of his para 13). The error into which MBFX falls is that it confuses the final determination, namely that there is a good arguable case of fraud, with the evidential steps on the road to that conclusion. The various pieces of evidence on which a

party relies to show a good arguable case will inevitably be of different weights. Some of the evidence may be incontrovertible. Some may be of doubtful reliability. Much will be somewhere in the middle. The judge's task will always be to look at the individual pieces of evidence and then take a view of all the evidence considered in the round.

[20] In the current case, I held that "Action 2020/0215 was in my judgment clearly collusive" and that "Action 2021/0003 [was] even more suspicious." That remains my view. I am open to revisiting these conclusions, if fresh evidence to explain the bringing of the two actions is forthcoming, but none has been to date. If I am wrong about these points, then the Court of Appeal can put me right. However, the fact that one action was collusive and that the obtaining of a Mareva against a company in the same group was highly suspicious does not — either automatically or at all — mean that there was a fraud. They are mere indications that something is untoward. They are points to put in the balance in deciding whether VDHI has shown a good arguable case of fraud or not. They are by no means conclusive of there having been a fraud.

[21] The same goes for Mr. Rees' objection to para [77] of my 4th October judgment. This was part of the evidence which I had to weigh as part of my determination as to the good arguable case.

[22] As to para [122], the authorities (which I cited in the 4th October judgment) are clear that in deciding whether there is a risk of dissipation, the Court must look for concrete evidence of such a risk. That is precisely what I did. Again, if I have erred, it is for the Court of Appeal to set me right.

Conclusion

[23] In my judgment, none of the four heads on which MBFX relies for its recusal application succeed. I have considered whether a different result might be reached, if the four heads are considered cumulatively, rather than separately. There may be cases where the cumulative effect of allegations of bias is greater than the effect

of allegations treated separately. This case is not, however, one of them. There is in my judgment nothing in any of the four heads which could lead to a conclusion of bias, so there is no scope for the whole to be greater than the parts.

[24] In my judgment the 'fair-minded and informed observer' would not consider that there was any real possibility that I had any bias for or against any of the parties. I accordingly refuse to recuse myself.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar