

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM NO. BVIHC (COM) 2019/0180

BETWEEN:

GOLDTEAM GROUP LTD

Claimant

and

**[1] QIN HUI
[2] DAYSPRING INVESTMENTS LTD
[3] KING FAME TRADING LTD
[4] LIU XUEMIN**

Defendant

Appearances:

Mr. Richard Baird of Forbes Hare for the claimant
Mr. Michael J. Fay QC of Agon Litigation for Qin Hui
Dayspring Investments Ltd and King Fame Trading Ltd did not appear on this application
Ms. Liu had not been served with the proceedings and did not appear

2020: October 12,
October 22

JUDGMENT (corrected under the slip rule)

[1] **JACK, J [Ag.]:** By an application made on 6th October 2020 the first defendant (“Mr Qin”) sought an order that I should recuse myself from continuing to hear this matter and should not have any involvement with an application to strike out or dismiss an application dated 23rd September 2020 issued by the claimant (“Goldteam”) seeking a finding of contempt against Mr. Qin.

- [2] The application came in the middle of a number of important applications in the proceedings. On Friday 9th October 2020, I was due to hear an application by Goldteam for permission to serve the fourth defendant (“Ms. Liu”) outside the jurisdiction. The initial return date on the application that I recuse myself was in November. It was obviously inappropriate for me to hear the application in respect of Ms. Liu whilst there was an unresolved question of my having to recuse myself. Further the 23rd September application in respect of an alleged contempt of court committed by Mr. Qin was due to be heard in November, as was a cross-application by Mr. Qin to strike out the 23rd September application. Again, neither of these applications could proceed until the question of my recusal was resolved.
- [3] Fortunately, due to a matter going off, I was able to list Mr. Qin’s application to be heard on Monday 12th October 2020. Because Mr. Fay QC relied solely on submissions based on the terms in which I expressed myself in my judgment of 13th August 2020, no evidence was or needed to be served by Mr. Qin. At the conclusion of Mr. Fay’s submissions on 12th October, I indicated that I would not recuse myself. I said that I would give my reasons in writing. These are those reasons.
- [4] Because Mr. Fay indicated that Mr. Qin might want to appeal against my refusal to recuse myself, but obviously could not without sight of my reasons, I extended time for appealing, so that it ran from the handing down of this judgment. After indicating that I would not recuse myself, I heard the application to serve Ms. Liu outside the jurisdiction, which I had stood over from the Friday. For the reasons I gave orally I granted that application.

The law

- [5] There was no dispute as to the relevant principles. Mr. Fay QC, who appeared for Mr. Qin, relied on the summary of the law given by Freeman J in **Surrey Heath Borough Council v Robb**,¹ who said:

¹ [2020] EWHC 1952 (QB).

“19. It is of fundamental importance that judicial decisions should be made free from bias or partiality. It has long been recognised that justice must not only be done, it must also be seen to be done see **R v Sussex Justices, ex parte McCarthy**.²

20. The classic statement in respect of the legal test for apparent bias is not in dispute. It is taken from... the speech of Lord Hope in **Porter v Magill**,³ whether:

‘the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.’

21. As Lord Hope stated at [102-103], this was a minor modification from the test used in **re Medicaments and Related Class of Goods (No.2)**⁴ per Lord Phillips MR at [85]:

‘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... that the tribunal was biased.’

22. [Counsel for the defendants] helpfully drew attention to the judgment of Lord Hope in **Helow v Secretary of State for the Home Department**⁵ setting out the characteristics of the notional fair-minded and informed observer as follows:

‘2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in **Johnson v Johnson**.⁶ Her approach must not be confused with that of the person who has brought the complaint. The “real possibility” test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

² [1924] 1 KB 256.

³ [2001] UKHL 67, [2002] 2 AC 357 at para [103].

⁴ [2000] EWCA Civ 350, [2001] 1 WLR 700.

⁵ [2008] UKHL 62, [2008] 1 WLR 2416.

⁶ (2000) 201 CLR 488 at para 53

3. Then there is the attribute that the observer is “informed”. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political, or geographical context. She is fairminded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment.

23. In **Locabail (UK) Limited v Bayfield Properties Ltd**,⁷ it was stated by Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott V-C in a joint judgment at [25] that:

‘...By contrast, a real danger of bias might well be thought to arise if.... on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see **Vakauta v. Kelly**⁸); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same 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 real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be. Finally, [counsel for the claimant] drew to the attention of the Court a further passage in **Locabail**... to the following effect: Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.’”

⁷ [1999] EWCA Civ 3004. [2000] QB 451.

⁸ (1989) 167 CLR 568.

[6] Mr. Baird, for Goldteam, took a neutral stance on the application, “because”, as he put it in his skeleton, “as a matter of principle, it is not for the parties to choose their own judge.” He helpfully drew my attention to our Court of Appeal’s decision in **Riley v Attorney General**,⁹ which cited the leading cases cited above. Our Court of Appeal laid particular weight on the English Court of Appeal decision in **Otkritie International Investment Management Ltd v Urumov**,¹⁰ which held:

“There must be substantial evidence of actual or apparent bias before the general rule can be satisfied. The issue of recusal is extremely fact sensitive and recusal ought not to be lightly done. Bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case in which a party has participated and been heard) unless it can be shown that he is likely to reach his decision by ‘reference to extraneous matters or predilections or preferences’. [B]ias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case.”

[7] He also drew my attention to **JSC BTA Bank v Ablyazov**,¹¹ where the first instance judge had held the defendant to be in contempt of a freezing order and to have lied while being cross-examined about his assets. The judge refused to recuse himself from subsequent involvement in the case. That decision was upheld by the Court of Appeal, which asked itself “whether there could be any difference between the judge who bears in mind his own findings and observations and another (second) judge who reads what the first judge has written, as he must be entitled to do”, and answered at paras [69]-[70]:

“‘[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 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

⁹ MNIHCVP2020/0003 (determined 23rd June 2020). *Stuart A Lockhart v Valentina Nonini and others* ANUHCVP 20198/0004 (determined 14th October 2020) is to the same effect.

¹⁰ [2014] EWCA Civ 1315 at paras [13] and [22].

¹¹ [2012] EWCA Civ 1551, [2013] 1 WLR 1845.

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.”

Mr. Fay QC’s main challenge

[8] Mr. Fay QC raised a number of matters which he said meant that applying the above tests I should recuse myself. However, the keystone of his application was based on my approach to Mr. Qin’s defence to the 2010 default judgment in Hong Kong. All the other matters on which he relied he accepted were less serious and might not, taken individually sustain a claim of bias. In para 11 of his skeleton, Mr. Fay said:

“[A]t paragraph 15 [of the August judgment]: ‘...service of the Hong Kong proceedings appears to have been effected in accordance with the terms of the [Loan].’

1. In fact, the evidence before the learned judge demonstrated that there was, at the very least, a live issue as to whether the Loan contained any provision addressing service. The learned judge chose to ignore that evidence in order to find against the first defendant.

2. The fact that there was likely to be an issue on service was even conceded by the claimant, but the learned judge chose to ignore that concession in order to prefer the position of the claimant.

[A]t paragraph 16: ‘...the defence of forgery now sought to be run by Mr. Qin [in respect of the Loan Agreement] bears a striking similarity [to the defence ran against an SMI company back in 2010].’

1. This was the most serious occasion on which the learned judge manifested bias against the defendants.

2. In fact, no such defence was advanced or advocated by the first defendant (or any of the other defendants) in respect of the Loan Agreement.

3. Having wrongly directed himself that the first defendant was advancing a defence of forgery in respect of the Loan (and without any good reason save to provide himself with a purported basis to find against the first defendant, and in particular to enable him to make a finding that the first defendant was dishonest), the learned judge then considered and admitted as evidence (notwithstanding that the same was not in evidence in these proceedings) a judgment of the Hong Kong Court in proceedings that were entirely unconnected to the current proceedings in Hong Kong or the Virgin Islands.

a. The judgment of the Hong Kong Court was not in evidence in these proceedings.

b. The judgment of the Hong Kong court found that a suggestion made in evidence by and on behalf of the first defendant (who was not a party to such proceedings but who gave evidence in an affidavit in such proceedings) that a board resolution was a forgery did not give rise to a triable issue. There was no finding of dishonesty by the Hong Kong Court — there are numerous occasions (indeed on most conflict of fact resolved by common law courts throughout the world) where the Court does not accept the evidence on a witness without concluding that such witness was dishonest.

c. It is the first defendant's contention that:

i. the learned judge's admission of the Hong Kong judgment for the purported reasons set out in paras [23] to [28] of his judgment would have been wrong and demonstrated bias and/or partiality against the first defendant even if the first defendant had sought to advance a defence of forgery of the Loan Agreement in these proceedings.

ii. absent such a plea by the first defendant there was, and is, not a basis for the admission of the Hong Kong judgment.

iii. the learned judge appears to have come up with the purported defence of forgery, and then relied on the judgment of the Hong Kong Court in proceedings to which the first defendant was not a party, in order to provide him with a basis to find that the first defendant was dishonest.

4. The claimant has been quick to jump on the finding of dishonesty — see for example paragraph 4(b) of its submissions filed on 31 July 2020, in the New York proceedings, and in the HK proceedings.

[9] Neither side obtained a transcript of the hearing on 25th and 26th June 2020. I have thus had to rely on the note I made of the hearing and the documents filed on the e-litigation portal. Mr. Temmink QC in his skeleton argument of 23rd June 2020 noted in a footnote that:

“As this skeleton was being finalised, informal notification was received of an unfiled summons accompanied by an unsworn and untranslated affidavit of Mr. Qin, in support of an intended application to set aside the judgment [in Hong Kong]. References in the skeleton below to the absence of any application now need to be read in the context of that unevidenced, untranslated, unsworn application which appears to have been made last night.”

[10] I was not shown a copy of that affidavit at the June hearing. After the hearing of the recusal application, Mr. Fay QC made a copy of the affidavit available to me in translation. Most of the affidavit addresses the argument that service on him of the Hong Kong proceedings was defective because “[t]he address provided in the Loan Agreement is a correspondence address and not a service address.” The issue argued by Mr. Qin in the affidavit is that Great Panorama mistranslated the Chinese ideogram in the Loan Agreement as “service address” where as it was merely an ordinary address. All that Mr. Qin says about the merits is this in para 25 of his affidavit:

“In addition to the preceding grounds relating to procedural matters, I also have ample substantive grounds of defence against the plaintiff’s claim. My solicitors have prepared a draft defence according to my instructions, a copy of which is at pages 37 to 44 of Exhibit ‘QH-1’.”

[11] I have not seen the draft defence (and the terms of the footnote to Mr. Temmink’s skeleton suggests he had not either), so it is unclear what precisely was being alleged in the proposed defence. However, in the quotation in my August judgment from para 40(c) of Mr. Qin’s third affidavit *in this claim* he says expressly that

“I did not agree to give the purported guarantee, which is said to give rise to the alleged debt *in this claim*, and the document appears to contain a forgery of my signature.” (My emphasis.)

[12] In my judgment I can hardly be blamed for taking on its face Mr. Qin’s assertion that he is making a defence of forgery. Certainly, that is how Mr. Temmink QC presented the case to me. Mr. Fay QC did not say at the hearing before me that this was a fundamental misunderstanding and that there was no issue raised by Mr. Qin in Hong Kong as to his signature having been forged on the guarantee or that the claim in the proceedings in this Court was not the claim under the (allegedly forged) guarantee. Rather his main point was that the 2010 judgment, which was relied upon by Mr. Temmink as similar fact evidence, was inadmissible

under the **Evidence Act 2006**.¹² I dealt with Mr. Fay's submission on admissibility at paras [18]ff of my August judgment. He does not rely on my conclusions on the proper construction of the 2006 Act to show bias on my part.

[13] In my judgment I was obliged to consider the evidence put forward on the claimant's part that Mr. Qin was seeking to set the default judgment in Hong Kong on the basis of forgery, the same defence he had made in the 2010 Hong Kong proceedings. I cannot now remember whether it was argued that the judgment of Fok J in the 2010 proceedings needed to be verified on affidavit. Given that the judgment was an official Hong Kong Court document, it would have been easy for the claimant to give an undertaking to swear an affidavit exhibiting Fok J's judgment. I do not recall this being required by Mr. Fay. Rather his objection was its admissibility under the 2006 Act.

[14] In my judgment there is nothing in my treatment of the defence of forgery which could give rise to any justified fear of bias or partiality on my part. I have never met any of the parties to this action. I know nothing about the case apart from what I have learnt in the course of these proceedings.

[15] As to the other submission that I wrongly concluded that the Hong Kong proceedings had been properly served, all I said was that the proceedings "appeared" to have been properly served. I was making no conclusion of fact. Since hearing the recusal application, I have looked at the Hong Kong **Rules of the High Court**.¹³ Order 10 rule 3(1)(b) provides for service at a contractually agreed address. Order 10 rule 1(2)(a) provides for service at a defendant's "last known address". This is precisely what I would have expected in a common law jurisdiction like Hong Kong. My general knowledge of English-heritage common law procedure was the basis for my conclusion in my August judgment that there "appeared" to have been good service. Even if Mr. Qin succeeded in his submission that the address of service was not a contractual "service address"

¹² No 15 of 2006, Laws of the Virgin Islands.

¹³ Cap 4, section 54, Laws of the Special Administrative Region of Hong Kong.

falling within Order 10 rule 3(1)(b), he would still face the difficulty that, so far as appears, the address in the Loan Agreement would appear to have been his last known address.

- [16] In my judgment my conclusion that there appeared to have been good service does not give rise to any reasonable apprehension of bias or partiality as defined in the case law.

De facto control of assets as director

- [17] Mr. Fay QC's next point was:

“At para [45]: ‘In the current case, Mr. Qin remained the sole director of King Fame after the purported transfer of the share to Ms. Liu. As such he retained control of Applegreen Drive... the fact that he remained a director was in my judgment sufficient on its own to mean that Applegreen Drive fell within the English standard form of definition of assets subject to a freezing order.’

1. In fact, the mere fact that the first Defendant remained a director of King Fame did not mean that he fell within such definition. The definition further requires, as the learned judge accepted when he recited the standard form of definition of assets at para [42] of his judgment, that a person has the ‘power, directly or indirectly, to dispose of or deal with [the asset] as if it were its, her or his own’.

2. The learned judge inexplicably, save that the learned judge was biased and/or partisan against the first defendant, ignored:

- a. the basic proposition of corporate law that a director is not entitled to dispose or deal with a corporate asset as if such asset were his own.
- b. the express words used in the definition of assets notwithstanding that he had recited it a few paragraphs before.
- c. the fact that the first defendant had intimated a desire to resign as a director of King Fame, and only remained a director because the claimant would not consent to his resignation.
- d. the fact that the registered agent of Vistra changed its records to record Ms. Liu as the client of record (notwithstanding the inadvertent failure to change the director).”

- [18] Mr. Fay is correct to assert as a matter of general law that “a director is not entitled to dispose or deal with a corporate asset as if such asset were his own.” However, one does not need to sit long in this Court to learn that plenty of

directors do in fact deal with company assets as their own, notwithstanding the strictures of company law. Further a director who is the beneficial owner may be able to deal with a company's assets as his own on **Duomatic** principles:¹⁴ **Ciban Management Corp v Citco (BVI) Ltd and another**.¹⁵

[19] This point has been considered by our legislature. The **Charging Orders Act 2020**¹⁶ allows the Court to make charging orders over assets in which the judgment debtor has an "interest". "Interest" is defined in section 2 as meaning:

"any direct or indirect legal, beneficial or equitable interest in the ownership of property, including without limiting the foregoing, whether property is (a) held in a debtor's own name or otherwise, or (b) is solely or jointly held by a debtor, or (c) where a debtor has the power, directly or indirectly, to dispose of or deal with property as if it were his or her own, or (d) where a debtor owns share in any company or other legal entity which in turn directly or indirectly owns share in a company incorporated within the Territory..."

[20] The purpose of the Act was described by Mr. Baba Aziz, the Attorney-General, during the Bill's passing through the House of Assembly as follows:

"[S]ome judgment debtors seek to avoid the enforcement of judgments of the High Court. This Bill is intended to confer jurisdiction on the court to make orders imposing a charge on assets which are directly or indirectly owned or *controlled* by a judgment debtor. This includes where assets or shares are held in layered corporate structures which are ultimately beneficially owned by a debtor. The enactment of this Bill will demonstrate that the Territory is not a haven for recalcitrant debtors and those who would seek to evade justice by means of in part the use of asset protection structures." (My emphasis.)

This statement is admissible when interpreting the Act: **Interpretation Act**¹⁷ section 42.

¹⁴ See *Re Duomatic Ltd* [1969] 2 Ch 365 and *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258 at 280 ("a company is bound, in a matter which is intra vires and not fraudulent, by the unanimous agreement of its members"), approved by the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at 506.

¹⁵ [2020] UKPC 21 at para [47].

¹⁶ No 5 of 2020, Laws of the Virgin Islands.

¹⁷ Cap 136, Laws of the Virgin Islands.

[21] As Barry Leon and Dancia Penn OBE QC, in one of the first commentaries on the new Act, explain:¹⁸

“In the BVI, the lack of a direct remedy for judgment and award creditors against asset protection structures led to an anomaly. Under [the] **Chabra** extended freezing order jurisdiction,¹⁹ assets under the direct or indirect control of a defendant could be frozen if there was an asset flight risk. Control included the power to procure the sale of an asset not held in a defendant’s name. Thus, pursuant to **Chabra** jurisdiction, the assets of a corporate defendant’s subsidiary could potentially be frozen.

However, come enforcement, judgement and award creditors encountered difficulties due to layered asset protection structures. Enforcement remedies often did not extend as far as asset preservation remedies, leaving judgment and award creditors sometimes unable to enforce their judgement or award against frozen assets.”

[22] They conclude that the wide definition of “interest” in section 2:

“ensures that where a judgement debtor has used a layered asset protection structure to try immunise assets beneficially owned by the debtor from enforcement, courts may disregard the structure and reach down through corporate layers to enforce the judgment or award against assets in the BVI.”

[23] A key issue when this issue of construction comes to be decided is whether a debtor’s “power, directly or indirectly, to dispose of or deal with property as if it were his or her own” is limited to a *legal* power or whether it extends to a *de facto* power. When a debtor has a legal power, it was already possible to appoint an equitable receiver to exercise the power in order for a judgment creditor to execute against the assets which are the subject of the power: **Tasurruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd.**²⁰ However, where assets were merely in the *de facto* control of the judgment debtor, it was only possible to obtain an interim appointment of an equitable receiver, not to obtain a

¹⁸ BVI takes Significant Steps to Enforce Court Judgments and Arbitration Awards, IFC Review, 12th August 2020, <https://www.ifcreview.com/articles/2020/august/bvi-takes-significant-steps-to-enforce-court-judgments-and-arbitration-awards/> accessed 17th October 2020.

¹⁹ See TSB Private Bank International SA v Chabra [1992] 1 WLR 231.

²⁰ [2011] UKPC 17, [2012] 1 WLR 1721.

final order: see the general discussion in **VTB Bank v Micros Ltd and another**.²¹

[24] In the light of the Attorney-General's comments, in my judgment it is strongly arguable that the 2020 Act now allows execution against assets over which the judgment debtor has *de facto* control to use as his or her own, whether as a company director or as the beneficiary of a discretionary trust, where the trustee in practice always follows the beneficiary's directions.

[25] Accordingly, I do not accept Mr. Fay QC's point 2.b. A company director can potentially have *de facto* control of company assets. It is a question of fact. If as a matter of fact Mr. Qin had control of the assets, points 2.c and 2.d fall away. The transfer to Ms. Liu would merely be part of Mr. Qin's dissipation of assets under his *de facto* control. No basis for recusal is shown in my judgment.

The risk of dissipation

[26] Mr. Fay QC criticised my finding that there was solid evidence of dissipation.

“At para [51] [of the August judgment]: ‘The timing of the transfer is solid evidence in my judgment of Mr. Qin actively dissipating his assets. Coupled with the good arguable case that he is a dishonest man, in my judgment there is a real risk that assets will disappear.’

1. In fact, the evidence demonstrated that the discussions concerning the transfer of the shares commenced in late 2017, and that it was done after taking tax advice from Jason Wong.

a. The learned judge's finding that such transfer was ‘solid evidence of Mr. Qin actively dissipating his assets, notwithstanding that the Loan Agreement was not entered into until 26 June 2018, again demonstrates bias and/or partiality on behalf of the learned judge.

b. Reference is made below to the learned judge's summary dismissal at para [50] of the relevance of the evidence of the New York accountant that advised on the transfer.

c. For the reasons identified above, there was and is no basis and/or admissible evidence upon which the learned judge could have fairly concluded that the first defendant was a dishonest man (or even that there was an arguable case that he was a

²¹ BVIHC (COM) 2018/0067 (determined 23rd January 2020) at paras [22]ff.

dishonest man). The fact that the learned judge did so conclude demonstrates a bias or partiality.”

- [27] If there is anything in this point, then it should have been the subject of an appeal. There was evidence that by late 2017 Mr. Qin must have known he was facing financial difficulties. The critical date, however, is the date of the transfer. That was merely days before the collapse of Mr. Qin’s business empire. I have dealt with the evidence of dishonesty arising from the 2010 judgment already. In my judgment, there is no proper ground for recusal.

Sham

- [28] Mr. Fay QC’s penultimate point was in relation to my holding in relation to the sham argument.

“At paragraphs 55: ‘Here, however, there is some evidence to support [a case that the deed of gift is a sham]. Firstly, if this was an attempt at dissipation, then it may be possible to infer that the deed of gift was not the true expression of the parties’ intentions. Secondly, the signature of Mr. Qin and Ms. Liu on the deed of trust were both witnessed by Emma, rather than some independent person. This raises the question of how seriously the parties took the making of the deed. Thirdly, there may be an issue with the formal validity of the deed... This may as a matter of Hong Kong law, render the deed invalid. Fourthly, Mr. Qin has continued to visit New York. There is no evidence of current matrimonial difficulties, so he presumably stays at Applegreen Drive, which in any event is the family home.’

1. Each of these four items comprise speculation by the learned judge, and matters which were not canvassed at the hearing save in respect of:

- a. the second point in respect of which there was evidence, ignored by the learned judge, that Eric Hu of Squire Patton Boggs had specifically told Emma that she could witness the deed;
- b. the fourth point in respect of which there was no evidence or suggestion that the matrimonial difficulties had been resolved.
- c. the claimant did not suggest that the first defendant was resident at or staying at the Applegreen property, and neither of the K2 reports commissioned by the claimant suggested or even hinted that the first defendant was staying at the Applegreen property.

If those suggestions had been made, then the first defendant would have addressed them.

2. If, the learned judge thought it appropriate to speculate as to factual matters then he ought to have given the parties the opportunity to be heard on the same. His failure to do so, and his tendency to only speculate on matters in such a way as to prejudice the defendants and favour the claimant suggests and/or gives the impression of bias and/or partiality on the part of the learned judge.”

[29] Again, in my judgment these are matters for an appeal, not a recusal application. Mr. Temmink QC dealt with the transfers at paras [35]ff of his skeleton for the June hearing and referred in oral argument to the alleged “cosy family arrangement”. As to Mr. Fay’s points: 1.a, I did not suggest that Emma could not witness the deed of gift as a matter of law. It is the inference to be drawn from choosing her as the witness to which I alluded. 1.b is tendentious: the making of the gift was said to be the means of resolving the alleged matrimonial difficulties. Mr. Qin did not present any evidence that the matrimonial difficulties were ongoing or that the gift did not resolve the matrimonial difficulties, so 1.b is a not unreasonable inference from that silence. The deed was signed during what appears to have been a family holiday in Greece. As to 1.c, there was no dispute that Applegreen Drive was the family home. If there were no matrimonial difficulties, it is a reasonable assumption Mr. Qin would stay there to see his wife and children when he was in New York. These points do not in my judgment give rise to a reasonable fear of bias on my part.

Mr. Fay QC’s last point

[30] Mr. Fay QC’s last point was this:

“At para [83] [of the August judgment], the learned judge found as a fact, notwithstanding that the hearing was an *inter partes* interlocutory hearing with (as the learned judge accepted incomplete evidence and) no cross examination that ‘...the property was indeed offered at a fire sale price in April 2019’.

i. It was not appropriate for the learned judge to make such a finding, and he did not need to do so in order to make the order he clearly wished to make — the learned judge only needed to consider whether there was a good arguable case that the property was offered at a fire sale.

ii. The finding was against the weight of the evidence, and the judge’s approach to the K2 report (wrongly described by the judge as the K2

evidence) was strikingly different to his approach to the evidence of the lawyer that advised on the share transfer.

1. The fact that the learned judge did make such a finding (irrespective of whether it was against the weight of the evidence) again demonstrates a bias and/or partiality on behalf of the judge.

2. In order to make such finding, the learned judge refused to consider the affidavit filed by King Fame after the hearing but before judgment was delivered which evidenced that the property had not been offered for sale.

3. The learned judge failed to consider why, if as he speculated the property had been offered at a fire sale price, it had not been sold. The fact that it had not been sold at a fire sale price strongly suggests that it was not offered at such a price.

iii. Moreover, a comparison between the approach of the learned judge to evidence relating to valuation/sale price adduced by the claimant, and the evidence which the second defendant sought to adduce by way of the affidavit of Nicholas Brooks demonstrates a bias or partiality against the defendants.

1. At para [100] of his judgment, the learned judge referred to the extract for the realtor.com website exhibited by Mr. Brookes and said 'it apparently shows an estimated value of Applegreen Drive. However, insofar as the true value of Applegreen Drive [is relevant], the Court would usually expect expert valuation evidence rather than the notoriously unreliable figures which real estate websites can generate.'

2. In contra distinction to those comments, at para [83] of his judgment he relies on exactly the same 'notoriously unreliable figures which real estate websites can generate' in order to find that the property had been offered for sale at one of the two figures contended for by K2 (based entirely, and solely, on K2's review of the real estate agent website)."

[31] In making point i, Mr. Fay QC overlooks what I said at para [82] of my August judgment:

"The Court is normally reluctant to resolve this type of dispute on affidavit evidence without cross-examination. However, here it is said that the Court was deliberately misled. If that allegation is established, then it has a very material impact on the Court's decision whether to discharge the *ex parte* injunction and whether to reimpose an injunction following the discharge... I therefore consider that I have to do the best I can on the evidence adduced by the parties."

- [32] Whether the figure on the realtor.com website was an offer price or an estimate of value is a binary question. If it was the latter, then I was misled when the claimant obtained its *ex parte* injunction. That would then have led to various issues about whether the gravity of the misrepresentation should have resulted in an immediate discharge of the injunction, whether the injunction should be reimposed and various other points. If it was the former, none of these issues arose. In these circumstances, it was in my judgment necessary to resolve this question of fact as best I could on the evidence available at the June hearing. That is what I did.
- [33] Mr. Fay QC's submission that these matters should have been determined on a "good arguable case" basis is incorrect in my judgment. If I determined both sides had good arguable cases, there would be no principled basis on which to decide whether I had been misled or not at the *ex parte* hearing. Schrödinger's cat has no place in the civil courtroom. The authorities on the discharge of *ex parte* injunctions require the issue of misrepresentation to be determined one way or the other.
- [34] The suggestion that I adopted this procedure in order "to make the order [I] clearly wished to make" is a nonsense. Once I decided the facts had to be determined, I determined the facts. Only then did I consider what order to make in the light of my factual conclusions.
- [35] Point ii is an appeal point, not a point on recusal. As to ii.2, I did not refuse to consider the affidavit. As I said in paras [97]ff of my August judgment, if Mr. Qin wanted to introduce new evidence after the circulation of my draft judgment, he should have issued (as I invited him to) an application for that purpose, so that the other parties could comment on whether the evidence should be admitted and, if it was admitted, adduce evidence in answer. No application was issued.
- [36] Point iii.2 is comparing apples and pears. An offer price on a webpage will come from some source, such as a feed from a selling agent. In other words, it will be an exact figure independently generated from external data. By contrast, an

estimated value will be generated by an algorithm internal to the web-provider. Such algorithms are never going to be as good as live expert valuers. In any event, the rights and wrongs of these points could have been argued out, if Mr. Qin had issued an application as he had been invited to. They were wholly subsidiary, given that I did not allow the new evidence in.

[37] Again, this ground for recusal is not in my judgment made out.

Conclusion

[38] Accordingly, in my judgment none of the grounds advanced by Mr. Fay QC for my recusing myself are made out. Nothing in my judgment would “lead a fair-minded and informed observer to conclude that there was a real possibility... that [I] was biased.” I refuse Mr. Qin’s application. For completeness, I should add that in the light of my conclusion on the substantive recusal application, I have not had to consider issues of delay and waiver.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar