# RECUSAL OF JUDGES IN CIVIL LITIGATION

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This note considers the basis on which a judge in civil litigation might be recused (withdrawn) from a case and some aspects of the procedure.

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## SCOPE OF THIS NOTE

This note deals with the circumstances in which judges will be recused (that is, withdrawn) from hearing a case on the ground of bias. It does not deal with issues of judicial conduct more generally, or with the principles that apply where a party wishes to appeal because they think that proceedings have been conducted unfairly.

## GROUNDS FOR RECUSAL

The basic principle is that a court or tribunal hearing a case must be impartial and that justice "should not only be done, but should manifestly and undoubtedly be seen to be done" (*R v Sussex Justices, ex p McCarthy [1924] 1 KB 256, at page 259*). A judge will not be impartial if, for example, they have a direct financial interest in the outcome of the case. In such cases, a judge will automatically be disqualified from hearing a case: the fact of the interest alone is sufficient. So too if it can be positively demonstrated that the judge is biased in favour of a particular party, known as "actual bias".

The principle extends beyond direct interests in the outcome or positive evidence that the judge is biased in favour of one side, however. If in some other way the judge's conduct or behaviour gives rise to a suspicion that they are not impartial, then the judge will also be disqualified from hearing the case. Not all such suspicions justify the recusal of a judge; the suspicion must be objectively justified by reference to the concept of the "fair-minded and informed observer". If such an observer would consider that there was a real possibility that the judge was biased, then the judge must recuse themself. This is known as "apparent bias". Most cases in this area are in respect of allegations of apparent bias rather than of there being actual bias or a personal interest in the outcome of the case.

The prejudice to the administration of justice and delays that arise from a successful recusal application are not relevant factors when determining whether the application should be allowed. If the test for the relevant category of bias is established then the judge must not hear the case, irrespective of any resulting inconvenience. The decision whether or not to recuse is not a discretionary case management decision. The Court of Appeal said in *Morrison v AWG Group Ltd [2006] EWCA Civ 6*, when dealing with an allegation of apparent bias, that such issues:

> "are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having." (Paragraph 29.)

Where there is "real ground for doubt" about the ability of the judge to try the matter objectively, then that doubt should result in recusal (*Locabail v Bayfield [2000] QB 451, at paragraph 25*). However, there must be a sufficient basis for such doubt: "To insist upon sitting when there is real ground for doubt does a disservice to the critic: to recuse oneself because one is too ready to admit real ground for doubt does a disservice to the critic's opponents." (*Ghadami v Bloomfield and others [2016] EWHC 1448 (Ch), at paragraph 17.*)

A recusal application should not, therefore, be allowed simply because the judge considers it preferable not to hear the case. In *Triodos Bank NV v Dobbs [2001] EWCA Civ 468*, Chadwick LJ made the following points:

- It is always tempting for a judge against whom criticisms are made to say that they would prefer not to hear further proceedings in which the critic is involved. This is tempting because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against them.
- Rightly or wrongly, a litigant who does not have confidence in the judge who hears their case will feel that, if they lose, they have in some way been discriminated against. But it is important for a judge to resist the temptation to recuse themself simply because it would be more comfortable to do so.
- If judges were to recuse themselves whenever a litigant (whether it be a represented litigant or a litigant in person) criticised them (which sometimes happens not infrequently), a position would soon be reached in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases.

(*Paragraph 7.*)

In *Man O'War Station Ltd v Auckland City Council [2002] UKPC 28*, it was stated that: "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance," and there should therefore be "an intense focus on the essential facts of the case" (*paragraph 11*).

## ACTUAL BIAS

Bias is an attitude of mind that prevents the judge from making an objective determination of the issues that they have to resolve (*Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700, at paragraph 37*).

Actual bias arises where a judge's decision is affected by prejudice towards or against one of the parties to litigation. Instances of actual bias being demonstrated are rare. As the Court of Appeal noted in *Locabail v Bayfield [2000] QB 451*, proof of actual bias is rare, as the law does not allow for the questioning of judges about extraneous influences affecting their mind. Litigants are protected from this practical difficulty by being able to apply for recusal using the lower standard applicable to the test of apparent bias. This requires them to show a real danger of bias, without requiring them to show that such bias actually exists. (*Paragraph 3.*)

## INTEREST OR PRESUMED BIAS

A judge will be disqualified from hearing a case in which they have a direct interest in the outcome. This applies not just to financial interests but also where the judge's decision will result in the promotion of a cause in which the judge is personally involved.

Several cases have established that where a judge has a direct pecuniary or proprietary interest in the outcome of a case, they are automatically disqualified, whether or not that interest gives rise to a reasonable apprehension of bias (*Dimes v Proprietors of Grand Junction Canal (1852) 3 HL Cas 759; Re Medicaments and Related Classes of Goods (No 2) [2001] 1 WLR 700, at paragraph 40; R v Bow Street Metropolitan Stipendiary Magistrate and others, ex p Pinochet (No 2) [2000] 1 AC 119, Lord Browne-Wilkinson at page 134; and Locabail, at paragraphs 4-9.*) It was stated in *Pinochet (No 2)* that the rationale of this rule is that an individual cannot be a judge in their own cause. That being so, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties (*Pinochet (No 2), at page 135*).

The question is not whether the judge has some link with the party involved in a cause before the judge, but whether the outcome of that cause could, realistically, affect the judge's interest (*Locabail, at paragraph 8*). It needs to be more than a "tenuous connection" (*paragraph 50*). The impugned interest must be "direct and certain, and not remote or contingent" (*R v Manchester, Sheffield and Lincolnshire Railway Co (1867) LR 2 QB 336, at page 339*).

The principal modern authority on recusal on the grounds of interest is *Pinochet (No 2)*. Historically, the House of Lords had held that a judge was automatically disqualified from sitting in a case whenever they had a pecuniary or proprietary interest in the outcome (*Dimes*). In *Pinochet (No 2)*, the House of Lords extended the ambit of the principle to cover "a non-pecuniary interest to achieve a particular result". In that case, Lord Hoffmann held an unpaid directorship of a company controlled by Amnesty International. Amnesty International had appeared before the House of Lords to support Spain's request to extradite General Pinochet, which had been granted by a majority (including Lord Hoffmann). Although the judge could not be regarded as having been a party to the appeal himself, he was involved in the promotion of the same causes in the same organisation as was a party to the proceedings.

For a subsequent application of *Pinochet (No 2)*, see *Northamptonshire District Council v Secretary of State for Communities and Local Government [2012] EWHC 4377 (Admin)*. Underhill J considered himself bound by *Pinochet (No 2)* to hold that he was automatically disqualified from hearing the case due to his membership of the National Trust, which was a party to the proceedings before him.

Where the interest test is met, automatic disqualification follows. Whether the interest had, or would have, any effect on the judge is irrelevant; in effect, there is a presumption of bias and the judge must recuse themself so that justice is not only done, but also seen to be done. This also means that the judge's own ignorance of their interest in the outcome of the proceedings is immaterial. By contrast, where apparent bias is concerned, the judge's actual knowledge or lack of knowledge of the matters said to give rise to such bias is relevant, since a person's mind cannot be affected by facts of which they are ignorant (on this point, see *Locabail, at paragraphs 18 and 55*).

In *Locabail*, the Court of Appeal accepted that disqualification for interest was subject to a *de minimis* principle, so that if the judge's interest was so small as to be incapable of affecting their decision, automatic disqualification would not apply, although any doubt should be resolved in favour of disqualification (*paragraph 10*).

This principle does not extend to preventing a judge who suffers from a particular medical condition or disability hearing a case involving that condition or disability, or to, for example, a woman judge hearing a sex discrimination claim brought by a woman (*Baker v Quantum Clothing Group [2009] EWCA Civ 566, at paragraph 33*).

In cases where the interest on the part of the judge is said to derive from the interest of a spouse, partner or family member, the link must be so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge themself (*Locabail, at paragraph 10* and *Jones v DAS Legal Expenses Insurance Co Ltd [2003] EWCA Civ 1071, at paragraph 18*). The fair-minded observer does not assume that the interests of spouses are indistinguishable. They are not. The test to be applied where there is a familial connection appears to be the same in presumed and apparent bias cases.

## APPARENT BIAS

The test for whether there is apparent bias is that set out by Lord Hope of Craighead in *Porter v Magill [2002] 2 AC 357*:

> "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."

Several important clarifications have been made in relation to this statement of principle:

- In *Helow v Secretary of State for the Home Department [2008] UKHL 62*, the House of Lords clarified that the fair-minded and informed observer "is neither complacent nor unduly sensitive or suspicious" (*paragraph 39*) and that they are someone who takes a balanced approach to any information they are given, takes the trouble to inform themself on all matters that are relevant, is "the sort of person who takes the trouble to read the text of an article as well as the headlines" and is able to put information into its overall social, political or geographical context (paragraph 3). Such a person reserves judgment until they have seen and understood both sides of the argument.
- The position of the fair-minded and informed observer is not to be confused with that of the person making the allegation of bias; such a litigant lacks the objectivity which is the characteristic of the fair-minded and informed observer (*Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz [2016] EWCA Civ 556, at paragraph 69*). Nor is the opinion of the fair-minded and informed observer to be equated with the presumed or actual views of practising lawyers (*Sengupta v General Medical Council [2002] EWCA Civ 1104, at paragraphs 10-11*).
- In *Resolution Chemicals Ltd v H Lundbeck A/C [2013] EWCA Civ 1515*, the Court of Appeal emphasised that there must be a real possibility of bias; although the standard of probability does not have to be reached, the test is not whether there is "any possibility" of bias (*paragraph 36*).
- In *Lawal v Northern Spirit [2003] UKHL 35*, it was stated that the possibility of bias can in this respect be of subconscious bias (paragraph 2), something confirmed by the Court of Appeal in Resolution Chemicals: "The test is 'a real possibility' of bias, whether subconscious or otherwise." (*Paragraph 36*.)
- The relevant facts that are to be taken as known to the fair-minded and informed observer are not limited to those which are in the public domain (*Virdi v Law Society [2010] EWCA Civ 100, at paragraphs 42-49*).
- The matters that will be considered by the fair-minded and informed observer include any explanation given by the judge as to their knowledge or appreciation of the relevant circumstances, the issue being not whether such explanation is to accepted or rejected but whether there is a real possibility of bias notwithstanding the explanation. This may be of particular relevance when a decision in relation to recusal is being reviewed on appeal (*Howell and others v Lees-Millais and others [2007] EWCA Civ 720, at paragraph 7*).

The fact that a judge has previously dealt with other aspects of the litigation in respect of which the application for recusal is made, or that the judge has previously (whether in the same case or another case) found the evidence of one of the parties or a witness to be unreliable, is not of itself sufficient to give rise to apparent bias on the part of that judge. Examples of this include:

- In *Locabail v Bayfield [2000] QB 451*, the Court of Appeal held that "The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection." (Page 480.)
- In *Otkritie International Investment Management Ltd and others v Urumov [2014] EWCA Civ 1315*, the Court of Appeal held that the general rule was that a judge hearing an application, or a trial, which relied on that judge's own previous findings (such as a post-trial application to commit for contempt) should not recuse themself unless they consider that either:
  - they genuinely cannot give one or other party a fair hearing; or
  - that a fair-minded and informed observer would conclude that there was a real possibility that they would not do so.

(*Paragraph 13.*)

In *Shaw v Kovac [2017] EWCA Civ 1028*, the Court of Appeal held that the fact that the appellant did not wish to have two judges sitting on her appeal who had previously been involved in decisions that were adverse to her could not, without more, result in recusal (*paragraph 25*).

In *Stubbs v The Queen [2018] UKPC 30*, the Privy Council held that prior involvement by a judge in the course of the litigation will only give rise to apparent bias where it "might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made." (*Paragraph 16*.)

**Findings of apparent bias**

Each case will turn on its own particular facts. The decisions discussed below should be treated as examples, not precedents. Nor is this a comprehensive list of such cases.

- In *Lawal*, it was held that where counsel appearing before a three-member panel of the Employment Appeal Tribunal (comprising a judge and two lay members) had previously sat as a fee-paid judge of the same tribunal on a panel including one or both of the lay members before whom he was appearing, the test for apparent bias on the part of the lay members was established.
- In *Morrison v AWG Group Ltd [2006] EWCA Civ 6*, the Court of Appeal held that the trial judge should be recused on the ground of apparent bias where he had known one of the non-executive directors of the defendant company for 30 years; this was so even where, in the light of the judge's disclosure of the connection, the defendant had abandoned its intention to call the director as a witness at the trial and decided to call other members of its audit committee, of which the director was the chair. If the conduct of the other members of the committee was put in issue during the trial, then the judge would be in a similar position to that which he would have been in had the director been called. However, it is clear that the issue in this respect is highly fact-sensitive; in *R (Shaw) v HM Coroner [2013] EWHC 386 (Admin)*, the Divisional Court rejected a challenge to the decision of an assistant deputy coroner not to recuse himself where he was a personal friend of the chief executive of the hospital in which the deceased had died. The chief executive was not being called to give evidence at the inquest, his own actions and those of the hospital's management were not in issue, and the inquest was concerned with the alleged failings of medical staff (*paragraph 45*).
- In *Steadman-Byrne v Amjad [2007] EWCA Civ 625*, the Court of Appeal held that apparent bias was established where the trial judge had, in comments made to both counsel in his chambers at the conclusion of the claimant's case, demonstrated the premature formation of a concluded view in the claimant's favour, even before the defendant had given evidence.
- In *El-Farargy v El-Farargy and others [2007] EWCA Civ 1149*, the Court of Appeal held that apparent bias was established where the trial judge had made "thoroughly bad jokes" during the trial which, although not intended to be racist, would "inevitably be perceived to be racially offensive jokes" and which were mocking and disparaging of one of the parties. The court held that the judge had crossed the line between what was tolerable and what was impermissible; the comments made by the judge "gave an appearance to the fair-minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey."
- In *Mengiste v Endowment Fund for the Rehabilitation of Tigray and others [2013] EWCA Civ 1003*, the Court of Appeal held that the trial judge should have recused himself from determining a wasted costs application against the claimant's solicitors where the judge had in the trial judgment made unnecessary criticisms of the solicitors expressed in absolute terms which failed to leave open the possibility of him considering an explanation, despite not having heard evidence or submissions from the solicitors.
- In *Re Q [2014] EWCA Civ 918*, a Family law case, the Court of Appeal held that there is a line between "robust active case management" and "premature adjudication" (*paragraph 54*). It held that the particular comments made by the judge at a case management hearing, several months before the final hearing which was conducted by him, had demonstrated the real possibility of bias; that is, that the judge had prematurely formed a concluded view about the outcome of the case.
- In *Re C [2020] EWCA Civ 987*, also a Family case, the judge had been conducting a "hybrid" trial, with some parties present in the courtroom and others appearing over a video-link. While hearing evidence from one of the parties, the judge closed the lid of her laptop computer and returned to her chambers. The computer did not, however, shut down and the video-link remained live. The parties and their lawyers then overheard a private conversation between the judge and her clerk in which the judge criticised the witness for pretending to have a cough and trying "every trick in the book" to avoid answering difficult questions. The allegation that the cough was a pretence had not been put to the witness. The Court of Appeal overturned the judge's refusal to recuse herself, holding that the comments were more than a mere expression of frustration and that the fair-minded and informed observer would conclude, in the light of these remarks being made during the course of the witness's evidence, that there was a real possibility that the judge was biased.

### Rejection of arguments of apparent bias

The decisions discussed below should also be treated as examples, not precedents. Again, this is not a comprehensive list of such cases.

- In *Taylor v Lawrence [2002] EWCA Civ 90*, the Court of Appeal rejected the argument of apparent bias where the trial judge was, in his private capacity, a client of a firm of solicitors representing one of the parties and had not been sent a bill by the firm for the small amount of work that it had done.
- In *Jones v DAS Legal Expenses Insurance Co Ltd [2003] EWCA Civ 1071*, the Court of Appeal held that neither presumed nor apparent bias was established where the judicial member of the employment tribunal was married to a barrister who had occasionally done work for the respondent insurer and was, both individually and through his chambers, a member of its panel of advocates.
- In *Smith v Kvaerner Cementation Foundations Ltd [2006] EWCA Civ 242*, the Court of Appeal rejected the proposition that the appearance of bias was established where the trial judge was a practising barrister who was the head of the chambers of which counsel appearing before him was a member (the court however upheld the objection to the judge sitting on the separate ground that he had at the time of the trial been acting in ongoing litigation for companies in the defendant's group, and held that there had been no valid waiver in respect of this by the claimant). However, in *Zuma's Choice Pet Products Ltd v Azumi Ltd [2017] EWCA Civ 2133*, the Court of Appeal stated that it might, depending on the facts, be appropriate for a part-time judge to recuse themself from hearing a case in which misconduct allegations were being made against an advocate from their own chambers (*paragraph 44*).
- In *Ablyazov v JSC BTA Bank [2012] EWCA Civ 1551*, the Court of Appeal rejected an argument of apparent bias based on the trial judge having heard, before the trial, a committal application in which he found a number of contempts proven and sentenced one of the parties to 22 months' imprisonment.
- In *Welch v Welch [2015] EWHC 2622 (Fam)*, Holman J refused permission to appeal against a district judge's refusal to recuse himself on the basis of having spoken at seminars and attended legal events with counsel who had previously been acting for one of the parties. Holman J stated that, if every time a judge had had some passing encounter, social or otherwise, with a specialist barrister in a specialist field the judge had to recuse themself, there would be few cases that could be effectively heard (*paragraph 10*).
- In *R (Hewitt) v Denbighshire Magistrates' Court [2015] EWHC 2956 (Admin)*, a criminal case, a district judge had convicted the defendant, a wildlife campaigner and hunt monitor, of assaulting a hunt worker. The defendant argued that the judge was apparently biased because seven years previously, when a solicitor, he had represented a different worker at the same hunt who had been charged with an offence under the Hunting Act 2004. This argument was rejected by the High Court.
- In *Watts v Watts [2015] EWCA Civ 1297*, the Court of Appeal upheld a deputy High Court judge's refusal to recuse herself from a case in which the barrister for one of the parties was her junior in a different and unrelated ongoing case. The court held that given the professional standards applicable to judges and barristers, "the idea that the judge would adjust her behaviour as judge to avoid upsetting the junior counsel is far-fetched indeed. The notional fair-minded and informed observer would not consider that there was any genuine possibility of this occurring." (*Paragraph 28.*) The relationship was mediated through "known professional standards", resulting in there being no appearance of bias.
- In *Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz [2016] EWCA Civ 556*, the Court of Appeal criticised the trial judge's "shocking" and "disgraceful" conduct in writing a letter to the head of a barristers' chambers criticising a newspaper article written about the judge by a member of the chambers. In the letter, the judge had stated that he would no longer support the chambers and that he did not wish to be "associated" with the chambers. The Court of Appeal held that the fair-minded and informed observer would not conclude, without more, that there was a real possibility of bias on the part of the judge when hearing cases in which one of the parties was represented by a member of the chambers (*paragraph 74*).
- In *Bubbles & Wine Ltd v Lusha [2018] EWCA Civ 468*, a judge had had a conversation in his chambers at the conclusion of a trial (following which closing submissions were to be made in writing) with one of the advocates about an unrelated personal matter. During this meeting, the judge went on to express some provisional opinions about the merits of the case and asked that they be passed on to the other advocate to assist both parties with their closing submissions. The Court of Appeal described the judge's conduct in having such a meeting before the case had been concluded, and then making the comments that he did, as "wrong-headed". However, apparent bias was not established because the judge did not invite submissions from one party in the absence of the other; he expressly stated that the views expressed by him were provisional, and he stated that his comments were for the assistance of both parties, requesting that they be passed on to the other party's advocate.

- In *Broughal v Walsh Brothers Builders Ltd and another [2018] EWCA Civ 1610*, the Court of Appeal, after an extensive review of the authorities, confirmed that a judge who refuses permission to appeal on the papers is not automatically disqualified from hearing the substantive appeal, or any oral renewal of the application for permission. The judge would however be disqualified on the ground of apparent bias if, when refusing permission on the papers, they had expressed their views in such a way as to indicate to any fair-minded lay observer that they had reached a concluded view and are unlikely to be open to further argument (*paragraph 35*).
- In *R v Roberts and others [2018] EWCA Crim 2739*, the Court of Appeal rejected the proposition advanced by the appellants, who had been convicted of unlawful conduct at protests against the extraction of shale gas (known as "fracking") at a site in Lancashire, that a public statement supporting fracking made by the trial judge's sister in an open letter to the County Council gave rise to apparent bias on the part of the judge, stating: "public support expressed for or against a cause by a sibling or child would be unlikely to give rise to any concern in any reasonable objective observer." (*Paragraph 16*.)
- In *Bates v Post Office [2019] EWHC 871 (QB)*, the managing judge trying lengthy group litigation rejected an application to recuse himself on the basis of findings he had made in a judgment at the end of one of the phases of the litigation which were alleged by one of the parties to show that he had pre-judged issues due to be determined at a subsequent stage.
- In *R (United Cabbies Group (London) Ltd) v Westminster Magistrates' Court [2019] EWHC 409 (Admin)*, the Divisional Court rejected the argument that there had been a positive duty on the district judge, who had been unaware that a client of her husband's consultancy business was an investor in the parent company of one of the parties to the litigation before her, to make inquiry of her husband to check if he had any potentially disqualifying interest and that her failure to do so gave rise to a case of apparent bias. The question in relation to apparent bias was one of the judge's actual knowledge, not of what the judge might have reasonably been expected to have known. There was, in any event, no basis to disqualify the district judge based on what the Divisional Court described as this "tenuous connection". (*Paragraphs 42-47*.)
- In *Akers and others v Kirkland Ltd and others [2019] EWHC 2176 (QB)*, Waksman J held that a district judge ought not to have recused himself from dealing with a detailed assessment of costs in a situation where counsel, whose fees were claimed on the bill of costs, had recently been appointed to the District Bench at a neighbouring court. He said: "It is not unknown for judges to have to deal with costs of solicitors or barristers, who have now gone on to the bench. The fair-minded observer would surely expect both parties to act professionally in the sense that the costs judge would assess in the normal way, without regard to the identity of the lawyer involved." (*Paragraph 58*.)
- In *Ameyaw v McGoldrick [2020] EWHC 1787 (QB)*, the judge rejected an application to recuse herself for apparent bias based on her former membership of the same chambers as the defendant's barrister and the fact that she had been one of his pupil supervisors (*paragraphs 20-26*).
- In *W (Children: Reopening: Recusal) [2020] EWCA Civ 1685*, the Court of Appeal rejected the proposition that a district judge conducting private law children proceedings should be recused because the judge's son was member of the same hockey club as one of the parties and the two of them were also connected on social media. This was "the sort of happenstance community tie that should be disclosed to parties by a judge who is aware of it, but would not ordinarily lead the reasonable and informed observer to conclude that the judge could not try the case fairly." (*Paragraph 40*.)

## RECUSAL: PROCEDURAL ISSUES

### Recusal of judge's own motion

A judge may decide to recuse themself even without an application being made by a litigant. In Locabail, the Court of Appeal noted that judges routinely take care to disqualify themselves, in advance of any hearing, in any case where a personal interest could be thought to arise (*paragraph 16*). It is, however, important to distinguish between the application of what has been described as a "pragmatic, precautionary approach" and the test itself (*Resolution Chemicals Ltd, at paragraph 40*).

### Making an application for recusal

An application to recuse a judge on the ground of bias should be made as soon as the grounds to make it are known.

In *El-Farargy v El-Farargy [2007] EWCA Civ 1149*, the Court of Appeal suggested that if circumstances permit, an informal approach should first be made to the judge whose recusal is sought, for example by letter making the complaint and inviting recusal (*paragraph 32*). However, when a formal application for recusal is made, then it should comply with the procedural requirements of CPR 23 (*Miley v Friends Life Ltd [2017] EWHC 1583 (QB), at paragraph 25*).

There should be properly arguable grounds for the objection to the judge; a recusal application is not a vehicle by which a litigant can attempt to select the judge that they want to hear their case (*Triodos Bank NV, at paragraph 7*).

A recusal application should not be delayed for tactical reasons; a litigant cannot seek to have "the best of both worlds" by waiting to see if they will be successful in the litigation once they have become aware of the facts that give rise to a complaint of bias, only raising the point once they have lost. The law does not permit a litigant to do this (*Locabail, at paragraphs 68-70*). A litigant has a duty to speak, once they become aware of such matters, if they are to sustain an objection on the ground of bias (Ablyazov, at paragraph 89). As the Court of Appeal held in *Baker*: "It is not open to a party which thinks it has grounds for asking for recusal to take a leisurely approach to raising the objection. Applications for recusal go to the heart of the administration of justice and must be raised as soon as is practicable." (*Paragraph 6.*). In *BMF Assets No 1 Ltd and others v Sanne Group plc and others [2022] EWHC 140 (Ch)*, an application for recusal of the judge managing the litigation was refused on the ground of inexcusable delay alone (*paragraph 142*), where it had been made two days before a hearing which had been listed before the judge several months in advance, and where the matters giving rise to the application had occurred between two and 11 months beforehand.

### Who should hear the application for recusal?

It is not the case that only the judge whose recusal is sought can hear an application for recusal. Although that may often be the case, there is no principle that such an application cannot be made to another judge. In some circumstances, that would be the more appropriate course. (*El Farargy at paragraph 32 and Dorman and others v Clinton Devon Farms Partnership [2019] EWHC 2988 (QB), at paragraph 104.*)

Nor is a decision on a recusal application a vehicle for the judge whose recusal is sought to provide additional reasoning or explanation for the matters on which the application is based (*Dorman, at paragraph 106*).

### How will applications proceed?

Decisions on recusal are fact-sensitive. The first stage is therefore to establish the facts. Doing so will enable:

- The parties to make submissions.
- The judge to make an informed decision.
- A reviewing court to assess the correctness of that decision.

A judge should disclose to the parties sufficient information to enable a fair hearing of the recusal application, but there should not be unnecessarily wide disclosure, which could give rise to speculative arguments (*Resolution Chemicals Ltd, at paragraph 42*). The reviewing court may receive a written statement from the judge, setting out what they knew at any relevant time. It will not be bound to accept that statement at face value, but will often have no hesitation in doing so. (*W (Children: Re-opening: Recusal) [2020] EWCA Civ 1685, at paragraphs 29-35* and the cases cited there.)

When considering a recusal application based on more than one issue, the matters raised should be considered separately and also in combination (*Dorman, at paragraph 107*).

### Waiver

Even if the test for bias is met, it is open to a party to waive any objection in respect of bias. However, to be effective such waiver must be:

- Clear and unequivocal.
- Voluntary.
- Made with full knowledge of the facts.

(*Jones v DAS Legal Expenses Insurance Co Ltd [2003] EWCA Civ 1071, at paragraph 31.*)

This does not, however, mean that a party is entitled to disclosure of every fact that they may want to know. It is only disclosure of those facts that the party needs to know in order to make an informed decision on waiver that is required. (*Jones, at paragraph 36 and Bhardwaj v FDA and others [2016] EWCA Civ 800, at paragraph 76*. See also *R (Shaw) v HM Coroner [2013] EWHC 386 (Admin), at paragraphs 55-56: "It is the nature of the case that matters, not the detail."*)

Nor need any waiver be express in order to be valid (*Locabail, at paragraphs 68-70; Ablyazov, at paragraph 89* and *Birmingham City Council v Yardley [2004] EWCA Civ 1756, at paragraphs 29-30* where the judge had disclosed certain matters at the beginning of the trial and asked if there was, as a result of those matters, any objection to him continuing to sit; the Court of Appeal held that there had been a waiver by the appellant, who had failed to object at that time).

**Appeal**

It is open to the parties to appeal both against a refusal to recuse, and against a decision allowing an application for recusal. Permission to appeal can be sought from the judge who has dealt with the recusal application. In *Otkritie International News Investment Ltd and others v Urumov [2014] EWCA Civ 1315,* the Court of Appeal allowed an appeal against the trial judge's decision to recuse himself from hearing a post-trial contempt of court application (*paragraphs 23-25*). The appellate court will make its own assessment of the relevant circumstances rather than considering whether the decision on the recusal application was one which the judge was entitled to reach (see, for example, *Resolution Chemicals Ltd, at paragraph 41*).