Ref. BL-2018-001918
Neutral Citation No: [2022] EWHC 3539 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROEPRTY COURTS OF ENGLAND AND WALES
(CHANCERY DIVISION)

7 Rolls Buildings
Fetter Lane
London

Before THE HONOURABLE MRS JUSTICE JOANNA SMITH DBE

BETWEEN:

JASWINDER SINGH BAHIA

Claimant

- and -

(1) INDERDEEP SINGH SIDHU
(as Personal Representative of the Estate of TARA SINGH SIDHU)
(2) A STAR LIQUORMART LIMITED

Defendants

AND BETWEEN:

(1) INDERDEEP SINGH SIDHU
(as Personal Representative of the Estate of TARA SINGH SIDHU
(2) SATPAL KAUR SIDHU
(in her personal capacity and as Personal Representative of the Estate of TARA SINGH SIDHU)

Part 20 Claimants

-and-

(1) JASWINDER SINGH BAHIA
(2) BALBIR KAUR BAHIA

Part 20 Defendants

MR R TEMMINK KC and MR G BUTTIMORE appeared on behalf of the Claimant/Part 20 Defendants
MR E LEVEY KC appeared on behalf of the Defendants/Part 20 Claimants

JUDGMENT
20th OCTOBER 2022
(AS APPROVED)

MRS JUSTICE JOANNA SMITH:

1. At this directions hearing following a trial of the action, which took place in the spring of this year, the claimant invites me to give directions for the hearing of his contempt application dated 31st May 2022 ("**the Application**").

2. The Application arises by reason of findings I made in my judgment ([2022] EWHC 875 (Ch) ("**the Judgment**")) about the conduct of the first defendant, Mr Inderdeep Sidhu (referred to in the Judgment as "Andy").

3. In response to the claimant's request for directions, the first defendant applies by notice dated 24th August 2022 for an order that I recuse myself from hearing the Application on the grounds that there would be an appearance of bias were I to do so. In particular this is said to arise by reason (1) of the findings I made in the Judgment and/or (2) the overlap between the issues that arise in the Application and the issues in respect of which findings have already been made by me in the Judgment. There is no suggestion of actual bias.

Background

4. I need not go into the history of the action in any detail as it is set out in full in the Judgment. For present purposes, suffice to say that the trial concerned a long running and bitterly contested partnership dispute. At the trial, the court was required to deal with eleven inquiries into the affairs of two partnerships many of which concerned disputes over the ownership and management of various properties. A key piece of evidence in the trial was a diary ("**the Diary**") which the claimant said had been completed by him recording rental payments from various of the properties, but which he alleged had subsequently been altered by the defendants.

5. The first defendant gave evidence at the trial and I dealt with that evidence in paragraphs 57 to 65 of the Judgment. I found in no uncertain terms that he was a thoroughly dishonest witness. In paragraph 58, I said this:

"Andy was cross examined over four days and during the course of that process I formed the clear view that he was a thoroughly dishonest witness, whose aim was to manipulate evidence in his favour and to deflect the court's attention from his own activities. Mr Temmink's closing submissions described his evidence as 'dreadful: untruthful, inconsistent, argumentative, manipulative and misleading'. I agree. Even Mr Clarke recognised in his closing submissions that Andy had been 'prolix and argumentative'."

6. At paragraphs 345 to 350 of the Judgment, I dealt with the issue of the Diary. At paragraphs 348 to 350 I said this:

"I have no doubt that the Diary has been altered and tampered with by the Sidhus (and in all likelihood by Andy) in order to seek to downplay the Sidhus' involvement in the collection of rent at 44A and 48A King Street and thereby to try to entangle Mr Bahia in a narrative that turns on only the Bahias appreciating that the rental figures contained in the property accounts were wrong. At the time the Diary was disclosed to the Bahias' solicitors by the Sidhus, it seems that the Sidhus were not aware that the Bahias had in fact retained a photocopy of the Diary and so did not realise that any changes they made to the Diary would be readily identified. They have been caught red-handed in a lie. Changes to the Diary include:

(i) The name 'Sidhu' has been changed into numbers to create the misleading impression that more rent [has] been collected from the tenants than was actually the case;
(ii) The name 'Sidhu' has been crossed out;
(iii) The name 'Sidhu' has been rubbed out so as to leave blank entries;
(iv) Pages containing expenses have been removed from the Diary;
(v) One half of a page has been removed and stuck on top of another page so as to conceal expenses. The remaining half of the torn page has been removed entirely along with the opposite page also containing a list of expenses;
(vi) Between the disclosure by the Sidhus of a copy of the Diary on 8 March 2019 and the inspection of the original undertaken on 16 May 2019, the Diary was further deliberately altered insofar as further entries (for March 2006, on the page for 26 December) have been rubbed out, with the result that there is a hole in the paper. The Diary was in the custody of the Sidhus during this period.
(vii) Pages containing Andy's name have been removed so as to conceal his involvement and knowledge of the tenants and the use of rent collected.

[349] Andy sought in his written evidence to underplay the changes made to the Diary, suggesting that he had made entries only in pencil and for his own purposes. He was forced to accept that 'it looks like there were alterations made to the Diary in between [Mr Bahia] having photocopied it and me finding [it]', but he denied any knowledge of how these had occurred. He accepted that a hole had appeared in the 30 December 2002 page whilst the Diary was in his possession but again said that he did not know how this happened. I find that this was all just a rather desperate attempt on Andy's part to conceal what he had done.

[350] I agree with Mr Temmink that this is a serious and deliberate deceit designed to falsify evidence in these proceedings. Andy lied about his actions when giving evidence and persisted in presenting what is a knowingly false claim to the court. In his written evidence Andy insisted that neither he, nor Mr Sidhu, had managed or collected cash rents from the residential accommodation at 44A King Street from late 2004/early 2005, but that this was done by Mr Bahia or Hardeep. This was patently untrue, as the documentary evidence to which I have referred and the evidence of Mr Saini clearly establishes (aside from Mr Bahia's own evidence)."

7. I pause to observe that, although I made no finding that the Diary had certainly been altered and tampered with by the first defendant, I did express the view that in all likelihood this was his doing. There is no appeal from the Judgment.

The Contempt Application

8. The nature of the contempt on which the claimant relies is identified in his application as follows:

> "Tampering with a Diary (as defined in the accompanying affidavit) with the intention of interfering with the administration of justice and making related false statements in documents signed with a statement of truth and under oath. Namely:
>
> (i) Tampering with the Diary with the intention of interfering with the administration of justice, by:
> (a) changing the name 'Sidhu' into numbers;
> (b) crossing out the name 'Sidhu';
> (c) rubbing out the name 'Sidhu';
> (d) removing pages;
> (e) cutting one page and sticking it on top of another;
> (f) causing what appears to be water damage to pages in order to obscure the content;
> (g) creating a hole in a page to obscure the information therein.
>
> (ii) Making false statements about the Diary without an honest belief in their truth in the Defendant's Fourth Witness Statement dated 17 December 2021 (verified by a Statement of Truth)."

9. In the supporting affidavit of Mr Rajesh Pabla, my observations at paragraphs 58 to 61 of the Judgment about the evidence of the first defendant are said to form important background to the Application and are set out in full. At paragraph 16, Mr Pabla explains that "[t]he key allegations in this application concern Andy's attempts to mislead the court by tampering with the diary". He goes on to explain that the first allegation is of tampering with the Diary with the intention of interfering with the administration of justice and that the second (related) allegation is of making false statements about the Diary without an honest belief in their truth. These statements are said to have been made both in the first defendant's oral evidence and in his witness statements. At paragraph 44 the affidavit sets out in full my conclusions about the Diary at paragraphs 347 to 350 of the Judgment, underlining certain passages for emphasis.

The Recusal Application

The Law

10. I was referred to a number of authorities on the circumstances in which a Judge should properly take the step of recusing herself. I did not understand there to be any serious dispute between the parties as to the relevant principles. The general rule is that a Judge should not recuse herself unless she either considers that she 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 she would not do so (see *Otkritie v. Urumov* [2014] EWHC 1323 at [13]).

11. Doing my best to draw the authorities to which I have been referred together in so far as they are relevant to the circumstances of this case, the following propositions appear to me to emerge:

(1) In the absence of special circumstances, there is no difficulty in the trial Judge hearing both the application for permission to bring proceedings for contempt and, if permission is granted, the proceedings themselves. On the contrary, the trial Judge is likely to be best placed to hear both. The only circumstances in which that would not be the case would be where there was an apparent bias on the part of the Judge (see *Summers v. Fairclough* [2012] UKSC 26 at [59] per Lord Clarke).

(2) Apparent bias will arise where "a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (see *Porter v. Magill* [2002] 2 AC 357 at [103] per Lord Hope).

(3) The characteristics of the fair-minded and informed observer were identified in *Helow v. Secretary of State* [2008] UKHL 62 at [2], [3], [14] and [39]. Put shortly, the fair-minded observer is not unduly sensitive or unduly suspicious. 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 objectivity which is the characteristic of the fair-minded and informed observer. (see *Harb v. HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2016] EWCA Civ 556 at [69]).

(4) The question of whether apparent bias arises in any given case is "extremely fact sensitive". This is emphasised in many of the cases but see *Otkritie* at [13] and *Locabail (UK) Ltd v. Bayfield Properties* [2000] QB 451 at [25]. There must be a real possibility or real danger of bias; the test is not one of "any possibility" of bias (see *Resolution Chemicals v. Lundbeck* [2013] EWCA Civ 1515 at [36]).

(5) The mere fact that a Judge earlier in the same case or in a previous case has commented adversely on a party or witness or found the evidence of a party or witness to be unreliable will not, without more, found a sustainable objection (see *Locabail* at [25] and *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551 at [69]).

(6) However, a real danger of bias might well be thought to arise if the credibility of an individual were an issue to be decided by the Judge and she had, in a previous case, rejected the evidence of that individual in such outspoken terms as to throw doubt on her ability to approach such person's evidence with an open mind on a later occasion, or if, on any question at issue in the proceedings before her, the Judge had expressed views in such

extreme and unbalanced terms as to throw doubt on her ability to try the issue with an objective judicial mind (see *Locabail* at [25]). The apprehension in such a situation is that the Judge will approach the case with a closed mind in the sense that she has pre-judged the issue (see *Sengupta v. Holmes* [2002] EWCA Civ 1104 at [30] to [31]).

(7) Relevant to the fact sensitive analysis is the extent to which there is an overlap between the issues that have already been decided and the issues that arise in the contempt application. The possibility of apparent bias may arise where the Judge has expressed a final and concluded view on the same issue as arises in the application (see *Zuma's Choice Pet Products Limited v Azumi Limited* [2017] EWCA Civ 2133 at [30]) or where a Judge has presided at a first instance trial, roundly concluded on the facts after hearing hotly disputed evidence that one party lacks all merit and is then listed to sit on the appeal (see *Sengupta* at [32]). This is because, as Laws LJ said in *Sengupta*, "He has committed himself to a view of the facts which he himself had the responsibility to decide".

(8) Whilst the answer one way or another in most cases will be obvious, if there is any real ground for doubt, that doubt should be resolved in favour of recusal (*Locabail* at [25]).

12. Reading the authorities, there appears to me to be a degree of tension between (i) those that espouse the principle of apparent bias arising where a judge has, acting entirely properly, given her forthright views on a party's credibility (see *Sengupta*); and (ii) those in which the view is expressed that there is little or no difference between the situation of the Judge who made findings at trial in the ordinary conduct of her office (i.e. without acting intemperately or unjudicially) and the situation of a second Judge who would inevitably have regard to that judgment. All that the first Judge has done is carry out her judicial assessment of the litigation before her (i.e. she has not pre-judged by reference to extraneous matters or predilections or preferences (see *Ablyazov* at [69] to [70])).

13. On reflection, it may be that the difference concerns the issues in respect of which the Judge has expressed her concluded view. There is obviously more danger of apparent bias if concluded views on the merits or the honesty of an individual have been expressed by the Judge in relation to issues which subsequently arise - say on a committal application - than there would be if there is very little overlap between the issues. Certainly this approach appears to be consistent with the points made in the authorities as to overlap.

Discussion

14. On behalf of the claimant, Mr Temmink KC indicated that he was neutral as to the recusal application but he drew my attention to points which, in his submission, the court needed to bear in mind. The court is most grateful for his assistance.

15. In his skeleton, Mr Temmink took a procedural point at the outset that the recusal application is a collateral attack on my unappealed order of 26th April 2022. However, further to some discussion during the hearing, he did not pursue that particular argument and I would have rejected it in any event.

16. The first defendant identifies two grounds for the recusal application and Mr Levey KC, on behalf of the first defendant, addressed me on both grounds orally. Having carefully

considered the authorities and listened to the arguments, I consider that the grounds he identifies are made out in the particular factual circumstances of this case.

17. First, in my judgment there is a very substantial overlap between the issues that I determined in the trial and the issues arising in the contempt Application. At trial I determined that it was likely that the first defendant tampered with the Diary and that his evidence was dishonest - the very question that is to be determined on the contempt Application.

18. The burden of proof on the contempt Application will be different, as Mr Temmink rightly points out, but the Judge will be called upon to consider exactly the same issues in relation to the Diary and the first defendant's evidence that I considered in the Judgment, albeit that he or she will need to be satisfied beyond reasonable doubt. I note that in *Ablyazov* the question of overlap was considered by reference to the issues arising in the case (see [72]) with the Court of Appeal in that case determining that the overlap was relatively small. That is not the case here, in my judgment; the Judge on the committal Application will be deciding the same question as arose at trial, albeit to a higher standard of proof.

19. Accordingly, I accept Mr Levey's submissions that if I were to hear the contempt Application I would be dealing with largely the same issues in circumstances where I have already expressed a very clear view on those issues. I consider that the fair-minded observer might very well consider that, in such circumstances, there would be a danger that I have pre-judged the outcome of the contempt Application and that I am approaching it with a closed mind. I agree with Mr Levey that in such a situation there is a distinction to be drawn between the trial Judge and a second Judge approaching the matter with the benefit of the Judgment, but not the baggage connected to the trial.

20. The first ground is enough to persuade me that I should recuse myself. However, Mr Levey also argues (as a second point) that I expressed myself in the Judgment in "extreme" terms. He does not criticise me for the way in which I expressed my views, but he does say (correctly) that my decision was forthrightly expressed.

21. On its own I am less convinced that this ground would be sufficient to persuade me to recuse myself. It seems to me that this point engages the tension in the cases to which I have already referred. Mr Levey does not suggest that I was intemperate or unjudicial or vituperative - some of the terms used in the cases - in my Judgment and I do not accept that expressing a clear view on the issues in the case or making a clear finding as to an individual's credibility will be enough on its own to engage the doctrine of apparent bias; *Ablyazov* suggests the contrary.

22. However, as is clear from the authorities, every case must be determined on its own facts and here the combination of my forthright determination with the substantial overlap I have referred to already seems to me to render it entirely right and proper that I should recuse myself. At best, I consider there to be a real ground for doubt over whether a fair-minded observer would consider it possible for me to approach the issues that arise on the contempt application fairly and impartially. Where there is a real ground for doubt the matter must, as I have already said, be determined in favour of recusal.

23. Furthermore, however, having sat through the cross examination of the first defendant at trial, I find it rather difficult to see that I can conscientiously put myself back into the state of mind where I have no preconceptions about the merits of the case (see *Sengupta* at [33]).

24. I accept Mr Levey's submissions that once there is an appearance of bias in relation to the main committal Application that must inevitably pervade the application for permission owing to the perceived potential for the earlier decision on permission to be clouded by views already expressed on the issues arising in the Application.

25. In all the circumstances I have outlined, the contempt Application, including the application for permission, must be dealt with by a Judge who will consider the matter with fresh eyes and I shall accordingly recuse myself from hearing that Application.

This transcript has been approved by the Judge