In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018: No. 149

BETWEEN:

ATHENE HOLDING LIMITED

Plaintiff

-and-

(1) IMRAN SIDDIQUI
(2) STEPHEN CERNICH
(3) CALDERA HOLDINGS LTD

Defendants

Before: **Hon. Chief Justice Hargun**

Appearances: Mr. Kevin Taylor and Mr. Benjamin McCosker, Walkers, for the Plaintiff
Mr. Alex Potts, QC and Mr. Lewis Preston, Kennedys Chudleigh Ltd, for the Defendants

Date/s of Hearing: **22 February 2019**

Date of Judgment: **15 March 2019**

RULING

Application for recusal on ground of apparent bias; test for apparent bias; previous professional association with a law firm; implied undertaking as to confidentiality; existence of implied undertaking; conditions necessary for the release of such an implied undertaking

INTRODUCTION

1. This is an application by Athene Holdings Ltd ("Athene"), the Plaintiff, seeking an order that Athene be released from its implied confidentiality undertaking and permitted to use in proceedings pending before, the United States District Court for the Southern District of New York and the Supreme Court of the State of New York, County of New York, to which it is a defendant:

    (a) the First Affidavit of Stephen Cernich sworn 1 June 2018, together with its exhibit ("the Cernich Affidavit");
    (b) the Sixth Affidavit of Imran Siddiqui sworn 10 December 2018, together with its exhibit ("the Siddiqui Affidavit"); and
    (c) the Defendants' supplemental submissions filed and dated 10 September 2018 (together "the Documents")

2. The Plaintiff also wishes to argue that in fact the Documents are not subject to a confidentiality undertaking, implied or otherwise, and have made an application to amend the Summons accordingly. As the point has been fully argued, I give leave to file an Amended Summons in the form as annexed to the Summons dated 5 February 2019.

3. As a preliminary issue, the Defendants request that I recuse myself from considering this application on the grounds of apparent bias and/or predetermination. For reasons set out in paragraphs 42 to 96, I do not consider that it is necessary or appropriate to recuse myself from considering this particular application. I deal with my involvement in future applications at paragraphs 98 to 100 below.

APPLICATION RELATING TO IMPLIED UNDERTAKING

Outline of parties' position

4. The Plaintiff argues that, on a proper analysis, the Documents are not subject to the implied undertaking. It is said that such an undertaking to the court is only implied where the documents are obtained as a result of the compulsory process

of the court. In particular no such undertaking is implied where a party produces the affidavits and exhibits voluntarily. The test of compulsion, the Plaintiff argues, is not whether the affidavits and documents are produced pursuant to any court order but only in respect of court orders, the breach of which is a contempt of court. The Plaintiff draws a distinction between orders, the breach of which is a contempt of court and those orders which merely give rise to a default and argues that the principle of compulsion applies only to those orders where the failure to comply results in a contempt of court.

5. In the event that the Court determines, contrary to the Plaintiff's position, that the Documents are subject to the implied undertaking, the Plaintiff submits that the disclosure of the Documents in the US proceedings will facilitate the just and expeditious resolution of those proceedings and that it is in the interests of justice that permission be granted for the use of the Documents for this purpose.

6. The Defendants contend that it is a mischaracterisation of the factual position to assert that they "voluntarily disclosed" the Documents. They rely upon the orders made by the Court dealing with the filing of the affidavit evidence. The Defendants further argue that there may be "special circumstances" which may give rise to an implied undertaking despite the absence of an order, the breach of which results in contempt of court.

7. The Defendants argue that the burden on the Plaintiff in establishing a case for release of the undertaking is a heavy one. It requires the Plaintiff to establish (a) there are special circumstances which constitute "*cogent and persuasive reasons"* for permitting collateral use and (b) the release or modification will not occasion injustice to the Defendants.

Discussion on the existence of the implied undertaking

8. The most common situation where an implied undertaking is imposed on the parties is where the affidavits and documents are produced under compulsion. In this situation, the existence of the undertaking is justified on the basis that a party is forced to disclose its private documents and does not depend upon the information in the affidavit or the documents being confidential. A classic example of the operation of this rule is the implied undertaking in the context of discovery obligations imposed upon the parties. The clearest exposition of the concept of "compulsion" in this context appears in the judgment of Hobhouse J. (as he then was) in *Prudential Assurance Co. Ltd. v Fountain Page Ltd.* [1991] 1 WLR 756, 765:

> *"In litigation a party may be subjected to orders or rules of procedure which require him to do various things or take various steps in the action. It was argued that whenever a party was in this position he was acting under a compulsion which brought the implied undertaking into force. This argument can be attractively developed. It is said that many things in actions are done because a party is ordered or otherwise required to do them. They are required to deliver pleadings, swear and lodge affidavits, call witnesses, or, in the present context, serve advance copies of the evidence upon which he proposes to rely at the trial. In all these situations the practical sanction is similar to that which arises from a failure to give discovery or respond to other orders. The primary sanction that the court imposes is to strike out the claim or the defence. If a party fails to deliver a pleading or to lodge or adduce evidence he will fail to protect his rights and the other party's claims or defences will prevail. The outcome for the litigant is in practical terms the same. However in legal terms this is not correct. There is distinction between orders, the breach of which is a contempt of court and those orders or rules which merely give rise to a default. The principle of compulsion applies to the former category only. This has been made clear in a number of cases*."

The common law position is summarised in *Matthews and Malek, "Disclosure"* (5th edition):

"19.12 At common law the undertaking covers not only the documents disclosed on discovery, but also any other documents disclosed by a party under compulsion of court process. Thus the undertaking has been held to apply to documents produced under a subpoena duces tecum, or under an order made pursuant to s.7 of the Bankers' Books Evidence Act 1879, or for the purposes of detailed assessment of costs, or under the procedure for giving effect to letters of request, as well as affidavits and exhibits produced only because the court has ordered them to be provided by way of discovery of assets pursuant to the asset freezing (Mareva) jurisdiction or search (formerly Anton Pillar) order, or in matrimonial proceedings. The undertaking also extends to information in Lists of Documents given on discovery as well as the documents themselves"

"19.14 The undertaking does not apply to documents voluntarily disclosed, such as affidavits and exhibits put in voluntarily and not by an order of the court in opposition to an application for asset freezing (Mareva) relief, or in support of a strike out application. This is consistent with the rationale of the implied undertaking. In relation to documents voluntarily disclosed, the court has not invaded the privacy of the party; it is the party himself who has destroyed the privacy of documents".

9. English cases post-CPR dealing with the collateral undertaking should be read with care as the English Court of Appeal has held in *SmithKline Beecham plc v Generics (UK) Ltd* [2003] EWCA Civ 1109, that the "compulsion" principle has not survived the introduction of the CPR in England. Post-CPR, the issue in England is not whether the documents were disclosed by compulsion (as was the RSC position) but whether the documents have been "disclosed" in the proceedings within the definition of CPR r 31.2 (See: *Phipson on Evidence* (19th edition) para 27-09).

10. The position in Bermuda is the pre-CPR position and the starting position is to consider whether the document was produced under compulsion (See *Re Lehman*

Re Ltd (ruling: discovery) [2011] Bda LR 56, at [32]; *Trustee N and Others v The Attorney General* [2015] SC (Bda) 50 Com at [46]).

11. However, decided cases do indicate that the implied undertaking may also arise other than by the application of the principle of compulsion. This was recognised by Hobhouse J. in *Prudential Assurance* at 770 B-E:

> *"I accept the submission of Mr. Hamilton that if the London plaintiffs are to succeed on this line of argument it must be by the demonstration of a duty owed to the court, analogous to that owed under the implied undertaking, which derives from the circumstances of the case and in particular as a matter of implication from the relevant rules of court. I consider that this is not only correct in principle but is also in accordance with what was decided by Sir Nicolas Browne-Wilkinson V.C. in Derby & Co. Ltd. v. Weldon (No.2) The Times, 20 October 1988. Prima facie, the use of documents and information in litigation is inconsistent with any such restriction or the reservation of any private law right. However, such restrictions are capable of existing and where they do they derive from rules of procedure or principles of law recognised by the courts as being incidents of such procedure.*
>
> *There is no conceptual difficulty about the reservation of rights of confidentiality or privilege notwithstanding that a document or piece of information has been communicated to another. One can take three examples to illustrate this.*
>
> *First, in private law the concept of breach of confidence is well recognised. It has as its basis a situation where an owner of confidential information parts with it to another on the terms, or in circumstances, which impose a duty of confidence on that other and restrict the use that that other may make of the information. So although that other has gained possession of the confidential information, the original owner has not lost his rights over that information and he can invoke legal and equitable remedies to enforce his rights."*

12. Hobhouse J. appears to recognise that such an analogous implied undertaking may be owed as a result of (a) circumstances of the case; and (b) in particular as a matter of implication from the relevant rules of the court.

13. In *Ace Bermuda Insurance Ltd. v Ford Motor Company* [2016] Bda LR 1, Hellman J. considered the very nature of the claim being pursued may give rise to such an analogous implied term. The proceedings concerned an application for an injunction restraining the defendant from commencing court proceedings in breach of its contractual obligation under an arbitration agreement. In support of the ex parte application for the injunction, the plaintiff exhibited correspondence which included details of the dispute between the parties which was the subject matter of the arbitration agreement. The defendant claimed that by reason of the referring and exhibiting the correspondence at the hearing which was not closed to the public, the plaintiff had lost the right to assert confidentiality with respect to the correspondence and indeed in relation to the previous and pending arbitration. Hellman J. rejected the defendant's contention holding that, "*It would be unconscionable if the defendant could rely on what was prima facie a threatened breach of the arbitration agreement to absolve it from contractual obligations of privacy and confidentiality"* [40].

14. It is also relevant to note in that case that in order to avoid any further arguments relating to potential loss of confidentiality, Hellman J. ordered that the substantive hearing in which the confidential material would be addressed should be in camera but the rest of the hearing should be held in open court [42]. He did not consider that it was necessary to seal the court file in order to preserve confidentiality, given that the file would not be available to members of the public [43].

15. "Special circumstances" may arise, justifying the implied undertaking, when a party is forced to produce sensitive documents, in order to contest jurisdiction, in response to the sensitive material filed by the plaintiff in circumstances where the parties recognise the sensitive nature of the material and have taken steps to preserve the confidentiality. In *Lubrizol Corporation v Esso Petroleum Company Limited* [1993] FSR 53, in a patent infringement action, the plaintiffs had obtained

leave ex parte to join the third defendant to the proceedings and to serve the writ upon it outside the jurisdiction. The plaintiffs' evidence in support of this application referred to documents disclosed on discovery by the first and second defendants. The third defendant had brought an application to set aside the ex parte order. In support of the application the third defendant served an extensive affidavit which exhibited a large number of its internal documents. In the parallel proceedings in the United States and Canada, protective orders had been agreed which preserved the confidentiality of discovery documents. The plaintiff contended that an order should not be made preserving confidentiality given that the third defendant had voluntarily decided to exhibit the document in question. The Court rejected this contention holding that there were special reasons since the parties themselves had clearly considered the documents to be potentially sensitive and had agreed to treat them as such. The third defendant could not in any real sense be said to be a volunteer since once the plaintiffs had served evidence referring to discovery documents it was inevitable that the third defendant would have to rely upon internal documents if it wished to apply to the court to have service set aside.

16. Turning to the facts of the present application, it is to be noted that on 22 May 2018 Hellman J. gave directions in relation to Caldera's application to stay the proceedings on the grounds of *forum non conveniens* and case management. Hellman J. ordered at paragraph 7:

> "*The substantive hearing on 8 June 2018 (and today's hearing) shall be held in camera, save that the parties to these proceedings shall not be prevented by the terms of this Order from notifying such US courts and US arbitral tribunals as may be dealing with pending proceedings involving the parties of the fact of the Bermuda proceedings, and to give such detail thereof as may be appropriate, subject to any other rights or obligations of confidentiality*".

17. The note made by Hellman J. records that *"Further hearing to be in camera and file sealed until determination of FNC".*

18. The Cernich Affidavit was filed on 1 June 2018 following the Order of Hellman J. ordering that Caldera's application for a stay be held in camera. The Cernich Affidavit was filed in support of Caldera's application. In paragraph 42 Mr Cernich stated that "*this Affidavit and its Exhibit are being expressly filed and served on a confidential basis"*.

19. One of the effects of an order directing that the hearing be held in camera is that confidentiality of affidavits and documents filed in relation to that hearing, which would otherwise be lost, is preserved (*Ace Bermuda Insurance Ltd v Ford Motor Company*, [42]). In the circumstances the Cernich Affidavit was filed, in my judgment, subject to the implied undertaking of confidentiality by the parties to the proceedings. This is an example of implied undertaking which "*derives from the circumstances and in particular as a matter of implication from the relevant rules of the court"* (per Hobhouse J. in *Prudential Assurance*, 77B).

20. I turn to consider the application in relation to the Siddiqui Affidavit sworn on 10 December 2018. As an introductory matter, it is to be noted that this affidavit is filed in proceedings where part of the substantive relief sought by the Plaintiff is an order that each of the Defendants be permanently enjoined from using any of the confidential information obtained about Company A or disclosing such information to others. It is clearly in the Plaintiff's interest that the confidentiality of the information is preserved. Unless an implied undertaking is to be imposed on the parties the entire subject matter of the proceedings, the confidential information, is at risk of public disclosure. That would be an unexpected and scandalous result.

21. Second, to respond to the allegations concerning confidential information, as the Defendants contend, it is likely that they will have to disclose private and commercially sensitive information.

22. Third, a significant part of the Siddiqui Affidavit ([3]-[18]) deals with the ongoing Second JAMS Arbitration and in particular issues relating to discovery in that arbitration. By its very nature the pending arbitration proceeding is private and confidential.

23. Fourth, the Siddiqui Affidavit was filed on the basis of expressly reserving the confidentiality of the affidavit.

24. Fifth, the proceedings to date have been held in chambers, where members of the public have not been present.

25. Having regard to all the circumstances and in particular the nature of the underlying proceedings and the fact that the Siddiqui Affidavit deals, to a significant extent, with pending confidential arbitration proceedings, there are, in my judgment, special circumstances which lead the court to hold that the parties must be subject to the implied undertaking that any affidavits and documents filed with the court will not be used for a collateral purpose.

26. In principle, any written submissions made by counsel relying upon the evidence filed by the parties, must stand in the same position for the reasons set out in paragraphs 20 - 25 above. In principle, submissions should not be used for a collateral purpose without the prior permission of the Court.

Discussion on release of the undertaking

27. The practice governing the exercise of the Court's discretion to obtain permission for some other use is explored in the recent judgment of Hildyard J. in *ACL Netherlands BV v Lynch* [2019] EWHC 249:

> *30."Although it was decided (in the House of Lords) before the CPR and thus concerned the implied undertaking which was the precursor of the relevant rules, the leading case in this context, at least as regards the overall approach required of the Court, is still Crest Homes Plc v Marks [1987] AC 829.*
>
> *31.That case made clear that the Court will only release or modify the restrictions where (a) there are special circumstances which constitute "cogent and persuasive reasons" for permitting collateral use and (b) the release or modification will not occasion injustice to the person giving disclosure: ibid. at 859G and 860, per Lord Oliver. Further, the burden is*

on an applicant to persuade the court to lift the restrictions (see 860, again per Lord Oliver). In a later case, Bibby Bulk Carriers v Consulex Ltd [1989] QB 155, Hirst J (at 163C-D) drew on another case in the House of Lords, namely Home Office v Harman [1983] 1 AC 280 at 326, in stating that the burden is a particularly heavy one where the permission is sought by or for the benefit of a person who is not a party to the action in which the documents were disclosed. "

28. Hildyard J. considered that it will usually be difficult, if not impossible, to meet the test:

> *"32. The real question in this case is whether the Applicants have discharged the burden on them of showing both sufficiently "cogent and persuasive reasons" for permitting collateral use, taking into account any injustice to the person giving disclosure, and having regard, in the case of the witness statements sought, to their peculiar status and the understandings on which they can be taken (by virtue of the rules) to have been provided.*
>
> *33. In my view, the burden is such that, in reality, it will usually be difficult, if not impossible, to obtain permission for collateral use (especially in the case of witness statements) except where the Court is persuaded of some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect.*
>
> *34. The most common public policy interest relied on as overriding the public interest in preserving confidentiality and privacy expressed by the rules is the public interest in the investigation and/or prosecution of serious fraud or criminal offences."*

29. The actual facts in the *ACL Netherlands* illustrate the heavy burden assumed by the applicant. The case concerned an application by some of the corporate plaintiffs for permission to provide to the Federal Bureau of Investigation in the

United States (FBI) copies of the documents disclosed by the defendants and the witness statement served in the proceedings. They sought the permission in order to comply with a subpoena issued by the Grand Jury in California. The applicants contended that unless permission was granted there was a serious risk that they could be held in contempt of the US Court. However, Hildyard J. was not persuaded that sufficient "*cogent and persuasive*" reasons in favour of collateral use existed. In particular Hildyard J. held that no evidence had been provided to the court as to why the material was *needed* by the United States Attorney's Office or the Grand Jury (as opposed to being materials which may merely be of some interest to them).

30. A number of cases have emphasised the requirement of "*need*" as opposed to mere interest. In *Sita UK Group Holdings Limited v Andre Paul Serruys* [2009] EWHC 869 (QB) Jack J. stated at [25]:

> *"It is apparent from the cases which I have cited that the Court should not give permission to use or disclose information or documents obtained from another party without a careful examination of the circumstances and need. In short, the disclosure must be properly justified."*

31. To the same effect is the statement by Warby J. in *Barry v Butler* [2015] EWHC 447 (QB) at [59]:

> *"It is not even said that the documents are unnecessary for the investigation, as opposed to merely being of interest*."

32. If the Court is satisfied that there are cogent reasons for permitting collateral use, the Court has to go on and be satisfied that the release will not occasion injustice to the person giving disclosure. The prejudice to the person giving disclosure "*is not an afterthought but a vital factor*" (*ACL Netherlands* [47]).

33. The prejudice to the party disclosing may take various forms including that the documents are placed in a file in foreign proceedings which is open to the public;

that it may become necessary to disclose further documents to provide the proper context which in turn may add to the cost; or that the foreign jurisdiction in which the documents are used may not provide a similar procedure of disclosure so as to make the disclosure unfair (See: *Halcon International Inc. v The Shell Transport and Trading Co.* [1979] RPC 97, 124-125; *Tassilo Bouzel & Schneider (Europe) AG v Intervention Limited* [1991] RPC 43, 50).

The need for disclosure

34. The Plaintiff argues that it needs the Cernich Affidavit in order to advance arguments in support of its Motion to Dismiss filed in the New York proceedings. Specifically, the Plaintiff wishes to draw to the New York Court's attention the alleged contradiction between paragraph 20 of the Cernich Affidavit and paragraphs 25 of the Amended Complaint in the New York proceedings. The specific alleged contradiction that the Plaintiff seeks to show is that while paragraph 20 of the Cernich Affidavit suggests that the Separation Agreement does not encompass any fiduciary obligation, paragraph 25 of the Amended Complaint suggests that the Separation Agreement is broad in scope and *would* include Plaintiff's breach of fiduciary duty claim against Mr Cernich.

35. The Defendants argue that on a proper reading of the relevant parts of the Cernich Affidavit there is in fact no such inconsistency or contradiction. They have referred me to paragraphs 19-21 of the Cernich Affidavit and paragraphs 25 of the Amended complaint. The Defendants assert paragraph 21 of the Cernich Affidavit is merely asserting that New York law applies to any claim the Plaintiff might have and that both sets of paragraphs are, in fact, entirely consistent with one another in asserting that the Separation Agreement binds the Plaintiff.

36. It seems to me that it is debatable whether there is any inconsistency as alleged by the Plaintiff and in the circumstances, the Cernich Affidavit can only be of marginal relevance in the US proceedings. The issue which the US Court has to decide is whether the Separation Agreement covers claims for breach of fiduciary duty. The answer to that question lies in the proper construction of the Separation

Agreement applying New York law, the governing law of that agreement. On this analysis the Plaintiff is unable to discharge the heavy burden that there is a *"need*" for the disclosure of the Cernich Affidavit in the US proceedings.

37. In relation to the Siddiqui Affidavit and the Supplemental Submissions, the Plaintiff argues that it intends to use these documents to demonstrate the alleged extent to which Mr Siddiqui has already advanced argument, in the Bermuda proceedings, in connection with the Advisory Services Agreement ("ASA") and the operation of certain of the Plaintiff's bye-laws. The Plaintiff points out that in the opposition filed by Mr Siddiqui in the New York proceedings, he asserts that this Court's January Ruling did not discuss the ASA's forum provision in circumstances where the Siddiqui Affidavit and Supplemental Submissions specifically draw attention to the forum provision in the ASA.

38. It is not clear to me why precisely there is a need for the Plaintiff to demonstrate the extent to which Mr Siddiqui has already advanced arguments in the Bermuda proceedings to the New York Court. The Ruling, in my view, is self-explanatory in relation to the ASA and the operation of the Plaintiff's bye-laws. At paragraph 91 of the Ruling, I held that the provisions of the ASA have no relevant impact on the binding effect of the exclusive jurisdiction clause in bye-law 84 of Athene's bye laws. The general desire to place this evidence before the US Court would not appear to me to satisfy the heavy burden to demonstrate that there is a "*need"* and that the disclosure is *"necessary"*.

39. Accordingly, I am not satisfied that the Plaintiff has discharged the burden of demonstrating that there are special circumstances which constitute "*cogent and persuasive reasons*" for permitting use of these documents in the US proceedings.

40. I should add that had I been satisfied that there were cogent and persuasive reasons for the need for disclosure, I would have held that in this case I would not have been satisfied that disclosure would not cause any prejudice to the Defendants. The prejudice to the Defendants arises in two ways. First, as the affidavit of Philippe Adler accepts that there is no assurance that, even if all

parties agree, the US Court will grant a Protective Order preserving the confidentiality of the Documents. The risk that these Documents may be disclosed to the public at large is prejudicial to the Defendants. Second, there must be a realistic risk that the filing of these Documents in the US Court may in turn require filing of additional documents and pleadings to give context and appropriate explanations. This is bound to increase costs for the Defendants.

41. In conclusion, I refuse the Plaintiff's application seeking leave of the Court to disclose the Documents referred to in the Summons dated 14 January 2019 to the US Courts.

APPLICATION FOR RECUSAL

42. As a preliminary issue Mr Potts, for the Defendants, made an application that I should recuse myself from hearing this application for release from the implied undertaking on the basis of apparent bias and/or predetermination.

43. In considering this application I remind myself of the test of apparent bias, which I take from the recent judgment of Turner J. in *Charles Thomas Miley v Friends Life Limited* [2017] EWHC 1583, [21-22]:

> *"21. The law relating to apparent bias is uncontroversial and is set out in the defendant's submissions:*
>
> *"The test for apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude there was a "real possibility" that the judge was biased" (Porter v Magill [2002] 2 AC 357)...*
>
> *In Helow v Secretary of State for the Home Department [2008] 1 WLR, Lord Hope described the attributes of the 'fair-minded and informed observer' at paragraphs 1 to 3 of the speeches. These paragraphs include the following extracts:*

> *"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 … 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 … may make it difficult for them to judge the case before them impartially."*

> *"22. At the risk of stating the obvious, any judge who is invited to recuse himself on the ground of apparent bias must be very careful not to allow any personal considerations whatsoever to contaminate his conclusions. Nevertheless, this should not preclude such a judge from acting with the same level of robustness and proportionate scepticism, where this is necessary, as he would approach any other application. To proceed otherwise would be unfairly to prejudice the other side out of an undue sensitivity to the perception that such robustness may be wrongly attributed to the personal feelings of the judge as opposed to the legitimate demands of firm management with the aim of applying the overriding objective."*

44. In *Locabail (UK) Ltd, v Bayfield Propertis Ltd* [2000] QB 451, the Court of Appeal found:

> *"force in observations of the Constitutional Court of South Africa in President of the Republic of South Africa & Others v. South African Rugby Football Union & Others 1999 (7) BCLR (CC) 725 at 753, even though these observations were directed to the reasonable suspicion test:*

"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

45. In relation to predetermination I remind myself of the statement made by Lord Lloyd Jones JSC in *Stubbs v The Queen* [2018] 3 WLR 1638, [15]:

"15. The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. The appearance of bias includes a clear indication of a prematurely closed mind (Amjad v Steadman-Byrne [2007] EWCA Civ 625; [2007] 1 WLR 2484 per Sedley LJ at para 16). The matter was expressed by Longmore LJ in Otkritie International Investment Management Ltd v Urumov [2014] EWCA Civ 1315 (at para 1) in the following terms:

"The concept of bias … extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other

than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case."

46. Mr Potts relies upon a number of factual grounds in support of the recusal application contending that when taken together they represent a credible case for recusal. I deal in turn with these factual grounds.

Plaintiff's association with Conyers

47. Mr Potts contends that the Plaintiff's long commercial association with the law firm of Conyers Dill & Pearman Limited ("Conyers" or "the firm") would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was biased in favour of the Plaintiff.

48. In order to place this submission in context I should set out some background facts:

    (a) I was until my retirement from Conyers on 31 March 2018, a partner in the firm and head of its Bermuda litigation department. From November 2012 to November 2017 I was also the co-chairman of the global firm. (In passing I should note that Mr Potts was employed as an associate for a number of years in the Bermuda litigation department of the firm until January 2012).

    (b) In relation to actions involving clients of Conyers, I have followed the *Guidance for Judicial Conduct for the Judges of the Supreme Court of Bermuda and Magistracy*. Paragraph 73, dealing with conflict of interest arising out of legal practice, provides that *"Judges should disqualify themselves if they served as legal adviser in respect of the controversy in issue when in practice, or if their firm was concerned with the matter while the judge was in practice".*

    (c) I reviewed the Court file in July 2018 and noted that this action was commenced on 3 May 2018, after I had left the firm.

(d) Conyers was not acting for any party in these proceedings.

(e) From the Writ of Summons it was apparent that the registered office of Caldera, the Third Defendant, was the office address of Conyers, indicating that Caldera was likely to be a client of Conyers. At a later date, from the review of the documents I believe, I gathered that the Plaintiff was also likely to be a client of Conyers.

(f) From the emails exhibited to the First Affidavit of Mr McCosker, I gathered that Mr Cernich was also a client of Conyers. The interests of Caldera, Mr Cernich and Mr Siddiqui, the Defendants, are aligned in these proceedings.

(g) Prior to the review of the Court file in this matter in July 2018, I was unaware of any dispute between the Plaintiff and the Defendants and/or Apollo Global Management or its CEO Mr Leon Black.

(h) I have never acted for the Plaintiff or the Defendants in these proceedings and/or Apollo Management or Mr Leon Black.

(i) I have never communicated with or on behalf of the Plaintiff, the Defendants, Apollo Management or Mr Leon Black. To the best of my knowledge, prior to the review of the Court file, I had not come across Athene, Mr Siddiqui, Mr Cernich, Caldera, Apollo or Mr Leon Black and if I did so, they left no lasting impression on me.

49. Assuming the factual situation was that Athene was a client of Conyers but the Defendants had no connection with Conyers, a fair-minded and informed observer is unlikely to conclude that there was a "real possibility" that the judge would be biased in favour of the client of his former firm. But here the former firm is apparently acting effectively for all the parties in these proceedings: Athene, Caldera, Mr Cernich and Mr Siddiqui (indirectly through his shareholding in Caldera). In the circumstances, it is difficult to see how a fair-minded and informed observer could conclude that there was a real possibility that the judge

would be biased in favour of one of the clients of his former firm and against the other clients of his former firm.

50. Mr Potts argues that Athene is a long-standing commercial client of Conyers whilst Caldera is a start-up business and a fair-minded observer has to take into account all relevant facts and circumstances. Mr Potts says that in the circumstances a fair-minded observer may conclude that there was a real possibility that the judge would be biased in favour of the long-standing client of his former firm and against the interests of the recently joined clients of his former firm. In my view, such a submission is unduly cynical and I am firmly of the view that a fair-minded observer would not conclude that there was a real risk that the judge would be biased in favour of the client of his former firm on account of perceived commercial importance of that client to the former firm.

51. In considering what a fair-minded and informed observer may conclude, it is worth noting that no objection whatsoever was taken to my acting as the judge in this matter when I gave directions in July 2018. Mr Potts was fully aware of my past relationship with the firm and the connections of the parties to the same firm. I refer to this fact not in aid of any waiver by Mr Potts' clients but as confirming the view that the factual situation does not support apparent bias. If a fair-minded and informed observer had considered the possibility of real bias in the circumstances, surely this point would have been taken by the Defendants at that time.

52. Furthermore, the Conyers connection was highlighted when Mr McCosker swore his First Affidavit on 20 November 2018 exhibiting the emails between Mr Cernich and Mr Charles Collis, a partner in the insurance/corporate department of the firm, relating to Mr Cernich's instructions to Conyers to incorporate Caldera. Again, the Defendants made no objection that I should recuse myself on the basis that there was a real risk that I might be perceived to be biased in favour of Athene on the basis that Athene was a long-standing client of Conyers.

53. The objection based on apparent bias was taken immediately after I had delivered my Ruling of 14 January, 2019 dismissing the First and Second Defendants'

application to set aside the Order giving leave to serve these proceedings on them outside the jurisdiction.

Discussion in relation to issues of credibility

54. Mr Potts complains that it was wrong for the Judge to deal with issues of credibility at this stage and in particular the statement that *"It appears that Mr Siddiqui was less than frank in his first affidavit in relation to this issue."* The discussion appears at paragraphs 59 – 62 of the Ruling.

55. To place this section of the Ruling in context, I should point out that here the Ruling is dealing with a submission made by Mr Potts that the Court should conclude that there is *no* serious issue to be tried on the merits on the basis that Mr Siddiqui and Mr Cernich have given categorical evidence under oath that they have not done what is alleged against and there is no evidence which contradicts it. At the hearing Mr Potts submitted:

> *Potts: "...Now, in light of that, we have the defendant's evidence, and we've looked at some of it already, but Mr Siddiqui and Mr Cernich are categorical on oath that they have not done what is alleged against them."*
>
> *Judge: "How does the court deal with that issue when Mr Siddiqui says, "I knew nothing about this. I have not taken any confidential information and I am not using it"?"*
>
> *Potts: "Well, you have to accept it at face value because it's plausible. It's entirely consistent with the other available evidence. It's not only plausible; it's consistent with chronology in the sense that he left in 2017, Mr Cernich left in 2016. They didn't incorporate Caldera until July 2017 and they didn't even start any real discussions with Company A at Company A's direct invitation; nothing to do with Athene."*
>
> *Judge: "That's what he says in his affidavit?"*

> *Potts: "Yes, of course, but you have to accept it. You have to accept it for present purposes. Now, not only do you have to accept for present purposes you have to ask yourself, "Well, is there any evidence in reply which contradicts it?" And there isn't…. And there's been no response of evidence whatsoever which one might draw the inference properly that there's nothing to contradict the evidence. The last thing we got out of time and in an inadmissible form is a very simple affidavit from Mr McCosker, an advocate for the plaintiff, who simply exhibits a selection of totally random and irrelevant emails from Mr Siddiqui, on oath, has addressed and fully explained in his affidavit"* (Transcript of hearing on November 28, 2018, pages 15 – 16, emphasis added)

56. In paragraph 59 of the Ruling, I set out the legal position that at this stage of the proceedings I can only reject the Plaintiff's evidence if it is *"inherently improbable or conflicts with contemporaneous documents."*

57. In paragraph 60 of the Ruling, I turn to Mr Potts' submission that there is no evidence which contradicts what Mr Siddiqui and Mr Cernich are saying. Paragraph 60 is dealing and dealing only with the assertion in paragraph 35 of Mr Siddiqui's First Affidavit where he appears to be saying that the idea of incorporating Caldera only materialised after Mr Siddiqui had left Athene on 20 March 2017. Paragraph 35 of Mr Siddiqui's First Affidavit states:

> *"After I had departed from both Athene and Apollo in 2017 (but only afterwards), I also began to develop a business plan of my own. I then decided to join Mr Cernich, and together we founded Caldera Holdings Ltd. As an exempt company in Bermuda. As I have indicated, Caldera was incorporated on 11 July 2017, nearly 4 months after I had ceased acting as a director of Athene, and nearly a month after my resignation at Apollo became effective after a period of gardening leave"* (emphasis added).

58. I further note in paragraph 60 of the Ruling, that Mr Siddiqui's assertion appears to be in conflict with an email which was sent to Mr Siddiqui by Mr Cernich on 27 January 2017, when Mr Siddiqui was still a director of Athene. In that email

Mr Cernich is instructing Conyers to incorporate Caldera. It is in relation to this issue I said that it "*appears*" that Mr Siddiqui was "*less than frank*."

59. Mr Siddiqui in fact deals with the receipt of this particular email in his Fifth Affidavit sworn on 23 November 2018. He admits to receiving this email and the only limited point he makes is that the email does not show that he was "*actively"* involved in the incorporation of Caldera. At paragraph 13c (page 8) Mr Siddiqui says:

> *"I would respectfully point out that the emails do not demonstrate that I was actively involved in the incorporation (or name reservation request) of the Third Defendant, simply because of the fact that Stephen Cernich emailed me on 27 January 2017"* (emphasis added).

60. In the circumstances, in dealing with Mr Potts' submission, it was appropriate to deal with any evidence which appeared to contradict Mr Siddiqui's sworn evidence. Even accepting Mr Siddiqui's qualification that he was not *"actively"* involved in the incorporation of Caldera prior to his departure from Athene, he accepts being sent emails dealing with incorporation of Caldera in January 2017, at a time when he was still a director of Athene and upon the completion of the incorporation process on 11 July 2017, he became a director of and shareholder in that company. He did not disclose this fact in his First Affidavit but instead sought to give the impression that the idea of incorporating Caldera only materialised after Mr Siddiqui had left Athene on 20 March 2017. It is only in relation to this distinct issue that the Ruling states that Mr Siddiqui appears to be less than frank.

61. At the hearing even Mr Potts appeared to see the force of these emails in relation to what Mr Siddiqui had said in his First Affidavit. At the hearing on 29 November 2018, Mr Potts stated at page 97 of the transcript:

> "*The only point I think my learned friend has really try to score was to say, "Well look, some of these emails suggest that you were discussing something with Mr Cernich and others which looks on its face as if it*

might be inconsistent with the paragraph in your first affidavits that you only did these things after you left"

62. Seen in its proper context the treatment of this particular email in paragraph 60 of the Ruling was appropriate in all circumstances.

Supplemental Submissions and the Exclusive Jurisdiction Clause

63. Mr Potts submitted that in relation to the issue whether Bermuda is clearly the appropriate forum, the Court could not simply rely on the finding of Hellman J. in the earlier application by Caldera, but had to carry out its own fresh assessment. Mr Potts submitted:

> *"Your Lordship is required to carry out your own independent assessment of all relevant discretionary considerations bearing in mind that, so far as the First and Second Defendants are concerned, the burden rests as the Plaintiff" (Transcript 28 November, 2018, page 18).*

64. After the hearing, when considering this issue I reviewed the Ruling of Hellman J. where he had held that the exclusive jurisdiction clause contained in bye-law 84 was not binding upon Mr Siddiqui and Mr Cernich. Counsel had confirmed that at that hearing no relevant authorities were shown to Hellman J. in relation to how bye-law provisions can become contractual terms of the engagement of directors and officers of the company. I considered bye-law 84 could be potentially relevant to the issue of appropriate forum but had not received any submissions from counsel in relation to this issue at the hearing. Accordingly, I asked for brief supplemental submissions as follows:

> *"Dear Counsel,*
>
> *I would be grateful for your short submission on the following issue.*
>
> *During argument I was invited to consider afresh, in relation to the present application by the 1st and 2nd Defendants, the issue of forum non*

conveniens and in particular whether Bermuda is the most appropriate forum.

In considering that issue, one relevant consideration is the effectiveness of exclusive jurisdiction clause appearing in Article 84 of Athene's Bye Laws.

The issue was considered by Hellman J. in his ruling at paragraphs 23 – 25. During argument I enquired whether Hellman J. was referred to relevant authority in relation to this issue and it appears that he was not. When I refer to English authority, I had in mind Globalink Telecommunications v Wilbury [2002] EWHC 1988 at paragraph 30, John v Price Waterhouse [2001] EWHC Ch 391 at paragraph 26, which had been followed in Bermuda in Peiris v Daniels [2015] BDA LR7 at paragraphs 41 and 42.

It appears that since the ruling of Hellman J., Mr Siddiqui has filed further evidence expressly relying on Bye Law 56.1 (Director and Officer Indemnity) and Bye Law 57 (Business Opportunities) (Siddiqui's 4th Affidavit sworn on 16 November 2018 at paragraph 9 (b) and Siddiqui's 5th Affidavit sworn on 23 November 2018 at paragraph 13 (b) (iii).

I invite brief submissions by close of business on Monday, December 10, in relation to the issue whether the court is entitled to consider afresh the effectiveness of the exclusive jurisdiction clause in these applications by the 1st and 2nd Defendants and, if so, the relevance of the authorities mentioned above and the fact of reliance upon Bye Law 56 and 57 by Mr Siddiqui".

65. No objection was taken by either Counsel to the request for supplemental submissions and the request was duly complied with. Mr Potts duly provided the supplemental submission (11 pages) ending with the offer that the "*Defendants would be happy to provide further assistance as the Court may require".*

66. In addition, even though the hearing had ended, Mr Potts' submissions were accompanied by a further 7 page affidavit of Mr Siddiqui sworn on 10 December 2018 and exhibiting the Advisory Services Agreement.

67. In his submissions Mr Potts made the point that for purposes of leave to serve out of the jurisdiction application, the Plaintiff had not relied upon bye-law 84 containing the exclusive jurisdiction clause. I accepted that in that case bye-law 84 could not be relied upon for purposes of Order 11 gateway, but could still be relevant in considering the separate issue whether, assuming an Order 11 jurisdictional basis exists, Bermuda is clearly the convenient forum.

68. Cases cited in paragraph 86 of the Ruling show that *"relatively little may be required to incorporate the articles by implication."* Bye-law provisions dealing with indemnification of directors are readily incorporated as contractual terms because they are for the benefit of the directors.

69. I also took the view that as Mr Siddiqui himself appears to rely upon certain provisions of the bye-laws, he could only be doing so on the basis that he could contractually enforce those provisions. I took the view that if Mr Siddiqui's position is that he can enforce some of the bye-law provisions then, in principle, all the bye-law provisions dealing with rights and obligations of the directors and officers ought to be enforceable.

70. Mr Potts complains that it was wrong for the Court to hold that Mr Siddiqui *"accepts"* the terms of the bye-laws are enforceable against him. In relation to this submission reference should be made to Mr Siddiqui's affidavit evidence and Mr Potts' own submissions made at the hearing.

71. In paragraph 9(b) of his Fourth Affidavit Mr Siddiqui states:

> *"I sincerely believe that any fiduciary duties that I might be alleged to have owed to Athene (or any statutory duties that I might be alleged to have owed to Athene under section 97 of the Companies Act 1981, as purportedly now relied upon in the Amended Specially Endorsed Writ of Summons) are expressly limited in time to the period of my directorship,*

and expressly limited in scope as a result of the fact that I was an Apollo-nominated director (including, but not only, as a result of the express wording of Bye-Law 56 and Bye-Law 57.1 of the Ninth Amended and Restated Bye-Laws of Athene Holding Ltd., as adopted on November 14, 2016 (the "Bye-Laws") (emphasis added).

72. In paragraph 13 b. iii. of his Fifth Affidavit Mr Siddiqui states:

"At the time these emails appear to have been sent and received, I was still an Apollo nominated director of Athene Holding Ltd. (although I resigned shortly thereafter, on 13 March 2017 with effect from 20 March 2017). Any duties that I might have owed to Athene Holding Ltd. at the time were circumscribed by virtue of my relationship with Apollo, and by virtue of the circumstances of my appointment as an Apollo nominated director, as Athene Holding Ltd's own Bye-Laws recognise" (emphasis added).

73. In the supplemental submissions Mr Potts submitted:

"7. The First and Second Defendants do not take issue with the proposition that some of the Plaintiff's Bye-Laws' provisions, as amended from time to time, are likely to be relevant – to some extent – to the totality of the disputes between the Plaintiff and the First and Second Defendants (and other interested or related parties)". (emphasis in the original)

"8. Indeed, the First and Second Defendants point out and submit that (in addition to the many other points that undermine the Plaintiff's own allegations, and which the First and Second Defendants will be entitled to rely upon by way of defences and counterclaims, if these proceedings move forward, contrary what without prejudice to the Defendants' current applications and submissions, and subject to the Defendants' rights of appeal) the Plaintiff's Bye-Laws' own express provisions with respect to indemnification and exculpation (Bye-law 56), as well as business opportunities (Bye-law 57), make the Plaintiff's alleged claims against the

First and Second Defendants for alleged breaches of fiduciary or statutory duties legally unsustainable (even on the assumption that Bermuda law is applied to such claims), absent properly particularised (and appropriately evidenced) allegations of fraud and dishonesty." (emphasis added).

74. On the basis of the above statements in the affidavits of Mr Siddiqui and the written supplemental submissions of Mr Potts, it is reasonably clear that Mr Siddiqui is asserting that he is entitled to enforce against Athene bye-laws 56 and 57. Assuming bye-laws 56 and 57 have been incorporated as contractual terms in the engagement of Mr Siddiqui and Mr Cernich, it is difficult to see why in principle bye-law 84 should be treated differently.

75. Mr Potts also complains that the reference and reliance on the bye-laws was merely in the context of an alternative case. As I understand, this contention, it is said that the Defendants' primary case is that no relevant fiduciary duties were owed by Mr Siddiqui and Mr Cernich. But if such duties were owed by them, bye-law 56 (indemnification and exculpation) would make such a claim unsustainable. However, even on this alternative basis of putting the case, reference to bye-law 56 only makes sense on the basis that it is accepted by Mr Siddiqui and Mr Cernich, that it has been incorporated as a contractual term and that they are contractually entitled to enforce it.

76 It is readily accepted that the parties may disagree with the Court's analysis relating to the incorporation of bye-law 84 and the exclusive jurisdiction clause. However, to contend that it is evidence of apparent bias appears to be unreasonable in the circumstances.

Refusal to give leave to appeal the Ruling of Hellman J.

77. Mr Potts argues that given the Court has held that Hellman J's decision was wrong in certain respects the refusal to give leave against that decision supports this contention of apparent bias.

79. This contention advanced by Mr Potts may be based on a misunderstanding of the issues on which the Court has differed from Hellman J.

80. I took the view that bye-law 84 was binding on Mr Siddiqui and Mr Cernich and as a result they were bound by the exclusive jurisdiction clause. This was an *additional* reason why Bermuda was clearly the appropriate forum. I did not disagree with Hellman J. that even in the absence of the exclusive jurisdiction clause, Bermuda was the appropriate forum. At paragraph 95 of the Ruling, dealing with appropriate forum, I stated *"I would have taken that view even in the absence of the exclusive jurisdiction clause".*

81. Likewise the Court's ruling in relation to corporate opportunity was an *additional* ground for holding that there was a sustainable claim against the Defendants. Hellman J. had held that the factual allegation at the root of the Statement of Claim was that Mr Siddiqui and Mr Cernich were misusing confidential information to acquire Company A and they were using Caldera, their agent or nominee, for that purpose [28]. I agreed with that analysis in my Ruling as an additional basis for holding that there was a serious issue to be tried on the merits (see paragraphs 63 – 66 of the Ruling).

82. Accordingly, the points on which I differ from Hellman J. constitute additional reasons for upholding his ruling and do not cast doubt on his reasoning for the conclusion he came to.

Directions hearing for release of implied undertaking

83. Mr Potts also relies on the exchanges at the directions hearing for the application by the Plaintiff to be released from the implied undertaking, the Ruling on which appears at paragraphs 4 to 43. Mr Potts says that this is evidence of apparent bias. In particular, he relies on my statement that it was a "small application"; the fact that I stated that the other side were contending that the application was urgent; and the fact that I stated that the other side was contending that they wanted to use Mr Cernich's affidavit filed in the Bermuda proceedings to show that he was taking an inconsistent position in Bermuda and in the New York proceedings.

84. In the end I gave directions so as to allow Mr Potts' clients to file evidence (as he had requested) and set the matter down for a hearing after the expiry of three weeks.

85. At the conclusion of this directions hearing, Mr Potts asked for costs on the basis that what the Court had ordered was precisely what he had proposed in correspondence (transcript, hearing 17 January 2019, page 45). In the circumstances it is unreasonable to contend that this is evidence of apparent bias.

Separation Agreement with Mr Cernich

86. Mr Potts contends that the Court's determination that the Separation Agreement did not release Mr Cernich in relation to claims against him was in error and again is evidence of apparent bias.

87. The release in question appears at paragraph 8 of the Agreement and is over two pages. I note that the last sentence on the second page does indeed set out a limited release which I appear to have overlooked. The release is limited in that it is expressly provided *"that the Company is not releasing you from or with respect to, and the foregoing release by the Company does not include, any claim arising out of…intentionally wrongful… Conduct by you"* (emphasis added). The precise meaning of this qualification is a matter of construction by reference to New York law. However, the pleaded conduct in relation to the wrongful use of confidential information and prior agreement to remove confidential information would appear to be expressly excluded by the last wording in the last sentence of paragraph 8. The same analysis would appear to apply in relation to the conduct aimed at diverting corporate opportunity (subject to the maturity point).

88. In the circumstances the limited release contained in paragraph 8 of the Separation Agreement may not be material in the context of the Plaintiff's pleaded case. No doubt this will be a matter to be considered by the Court of Appeal, assuming leave to appeal is given.

Ruling on corporate opportunity

89. Mr Potts complains that the Court erred in holding that the relevant corporate opportunity was sufficiently "mature" for the relevant rule apply and he says that holding is again evidence of apparent bias.

90. Whether a particular corporate opportunity is mature (or tangible) is clearly a fact sensitive issue which may depend upon what actions had been taken by the company in relation to that opportunity. It may also depend upon the nature of the corporate opportunity itself and whether the opportunity was being actively pursued by the company at the time the relevant directors resigned. As the decision in *Recovery Partners v Rukhadze & Ors* [2018] EWHC 2918 [60-61] recognises, this is a developing area of the law and not susceptible to fixed rules to be applied in all cases.

91. To place the discussion on corporate opportunity in context, its relevance lies in considering whether there is a serious issue on the merits. The corporate opportunity claim is in addition to the two other claims based upon wrongful use of confidential information (Ruling paragraphs 63 – 66) and prior agreement to divert confidential information (Ruling paragraph 67 – 69).

92. The Plaintiff's pleaded case is that Mr Siddiqui and Mr Cernich was spearheading the relevant negotiations on behalf of the Plaintiff for the acquisition of Company A. On 18 February 2016, the Plaintiff pleads, Mr Cernich delivered a presentation to 22 of the most senior officers of Athene, including Mr Siddiqui regarding the potential acquisition of Company A. That pleaded case is affirmed by sworn affidavit evidence. It is a matter for the Court of Appeal, assuming leave is given, to rule whether the conclusion that there was a serious issue to be tried in relation to the corporate opportunity claim was correct having regard to the pleaded case and having regard to the affidavit evidence. However, it is unreasonable, in my view, to assert that the decision is evidence of apparent bias.

Other points

93. Mr Potts complains that there were too many interventions by the Court. The questioning by the Court needs to be considered in the context of the legal

submissions made by Mr Potts. In relation to fiduciary duties, Mr Potts case was that Mr Siddiqui and Mr Cernich were in no different position than mere employees. They owed fiduciary duties whilst they were in office but after they had resigned, they were free to compete for the very corporate opportunity which, on the Plaintiff's pleaded case, they had been pursuing on behalf of the Plaintiff. This position clearly needed clarification by reference to the pleadings and relevant law.

94. Mr Potts also argued forcefully that Athene could and should pursue its claims in the pending arbitration proceedings in the US despite the fact that Athene was not a party to any relevant arbitration agreement. He relied upon section 7 and 8 of the UNCITRAL Model Law on International Commercial Arbitration, the Bermuda International Conciliation and Arbitration Act 1993 and the Court's inherent jurisdiction in circumstances where none of the material appeared to support his position that the Plaintiff should be required to participate in a pending arbitration proceeding in the US. He cited and read *Roussel-Uclaf* [1978] I Lloyd's Rep 505, in support of his position that "*claiming through or under*" should be given a wide ambit, despite the fact that the English Court of Appeal had held in *The Mayor and Commonality and Citizens of the City of London* [2008] EWCA 1283, that the case was wrongly decided and should not be followed. Again, it was necessary for the Court to clarify the legal position in light of Mr Potts' legal submissions.

95. Throughout the hearing I assured Counsel that I had not taken any view on these points but the points needed to be clarified. In this regard, the transcript provided by the Defendants regrettably contains errors. One such error appears at the transcript of the hearing on 28 September 2018 at pages 24-25.

> Potts: "*There's been ample opportunity for evidence to be put in, and there was absolutely no evidence of this before Mr Justice Hellman on the ex parte application. So while your Lordship is taking notes you should of course be rather objective"*
>
> Judge: *"I have taken a view"*

The Court Smart recording for the morning of 28 November 2018 in fact records me as saying: *"I haven't taken a view"* (10.15.30). I would be grateful if errors such as these can be corrected.

Conclusion on recusal

96. Having considered all the points made by Mr Potts, I took the view that a fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the judge was biased, and accordingly I declined to accede to Mr Potts' request that I recuse myself from considering the application for releasing the implied undertaking.

Going forward

97. At the hearing on 22 February 2019, Mr Potts confirmed that his clients' primary position was that all disputes between the parties should be resolved in the courts or in arbitration in the United States. However, Mr Potts advised that if a trial of this action does take place in Bermuda, in order to test the Conyers emails relied upon by the Plaintiff, Mr Charles Collis of Conyers will be a necessary witness. Mr Potts said that there was a real possibility of "*people from Conyers giving evidence*".

98. As I indicated at the hearing, if there was a real possibility that one of my former partners would be giving evidence in relation to controversial issues, I would necessarily have to consider carefully my position as the trial judge. It seems to me that if there is a real possibility that Mr Collis will be called as a witness in relation to disputed facts, it would not be appropriate for me to hear that evidence and make a determination. In the circumstances, I would direct trial of this matter the allocated to another judge of the Commercial Court.

99. As I will not be the trial judge it is appropriate that, as a matter of case management, any further applications in this action should be heard by the judge who is likely to be the trial judge of this action, assuming the Defendants' jurisdictional challenges are unsuccessful.

100. I will hear parties in relation to the issue of costs, if they so wish.

Dated this 15 of March 2019

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Narinder K Hargun

Chief Justice