IN THE MATTER OF THE TRADE MARKS ACT 1994

AND IN THE MATTER OF UK TRADE MARK APPLICATION NO. 3084505
IN THE NAME OF YOUDAN TROPHY LTD

AND IN THE MATTER OF OPPOSITION NO. 404010 BY HALLAM FOOTBALL CLUB

AND IN THE MATTER OF AN APPEAL TO THE APPOINTED PERSON
FROM THE DECISION OF LOUISE WHITE DATED 19TH OCTOBER 2016

DECISION ON RECUSAL APPLICATION

1. On 4 December 2014, Youdan Trophy Ltd ("the Applicant") applied to register a device mark which contained the name Youdan Trophy in respect of "Organization of soccer games" in Class 41. The application was opposed on the basis of section 5(4)(a) of the Act by Hallam Football Club ("the Club") an unincorporated association which claimed to have earlier unregistered rights in the mark Youdan Cup.

2. The opposition was filed on behalf of the Club by professional advisers (Calder Harris Limited, since dissolved) but by the time the matter came on for hearing before the IPO, on 27 July 2016, Dr Scott Loveluck, a member of the Club's IP Committee, had taken over conduct of the opposition on behalf of the Club. A number of witness statements were filed on behalf of the Club. The Applicant's TM8 was filed by its director Mr Waugh, but the company subsequently instructed solicitors who by the time of the hearing before the IPO were Nabarro LLP.

3. On 19 October 2016, Ms Louise White, the Hearing Officer for the Registrar, handed down a decision (BL/O/488/16) in which she rejected the Club's opposition to the Youdan Trophy application.

4. The Club filed an appeal against Ms White's decision which was in due course allocated to me for hearing in my capacity as one of the Appointed Persons.

5. The appeal was set down for hearing on 12 May 2017. By the morning of the appeal three problems had become apparent, as a result of which the hearing had to be treated (as I explain below) as a directions hearing.

6. First, there was an issue as to the scope of the appeal. The TM55 dated 15 November 2016 was submitted to the IPO as a .pdf attachment to an email. In the body of the form, the reasons for the appeal were stated to be:

> "The Hearing Officer made a distinct and material error of principle, not in accordance with settled Case Law, in respect of the above-stated Opposition Proceedings. The Decision at First Instance was clearly wrong. Please see the attached Statement of Grounds in respect of the detailed Grounds of Appeal."

A two page document setting out the Statement of Grounds was attached to the version of the TM55 which was provided to me and to the Applicant. Strangely, however, those two pages contained two short paragraphs of legible text, followed by about a page and a half of the letter è repeated over and over again.

7. The Applicant asked the IPO whether that was the correct form of the TM55 by e-mail in December 2016. The IPO responded that it was. Those e-mails unfortunately were not copied to the Club. Dr Loveluck apparently became aware of this issue only shortly before the hearing. He sent me an e-mail on 11 May (copied to the Applicant's solicitor, Mr Webb, of whom more below) complaining that he had not been copied in to the correspondence in December. He said that the IPO had been working from a corrupt version of the Grounds of Appeal and attached a copy of a 14 page document which set out a far broader basis of appeal. Dr Loveluck told me at the hearing that it was the longer version of the Grounds that had been filed with the TM55. He said that he had spoken to Mr Colombo at the IPO, who had said that he would ask the IPO's IT department to try to see whether the file submitted with the TM55 had been corrupted, as Dr Loveluck thought. The result of that inquiry was awaited shortly after 12 May.

8. I decided at the hearing that unless the result of the inquiry showed that the longer version of the document had been filed (and had been corrupted), the Club would

have to apply to the IPO for an extension of time to lodge the fuller version of its Grounds of Appeal. I was later informed by Mr Colombo that the inquiries were inconclusive. In accordance with my directions, the Club applied for, and has recently been granted, an extension of time to lodge the wider appeal.

9. Secondly, Dr Loveluck took issue with the representation of the Applicant at the appeal hearing. At the time of the hearing before Ms White the Applicant had instructed Nabarro LLP to act as its solicitors. As I understand it, the solicitor having conduct of the file was Mr Oscar Webb, whilst the Applicant was represented at the hearing below by Mr Ashley Roughton of counsel. Mr Webb continues to have conduct of the matter for the Applicant in relation to the appeal, now instructing Mr Michael Hicks of counsel.

10. On (I believe) 1 May 2017, Nabarro LLP entered into a three-way merger with CMS Cameron McKenna and Olswang, to create a new firm called CMS Cameron McKenna Nabarro Olswang LLP. I do not know when Dr Loveluck learned of the merger of those three firms, but I can see that his e-mail of 11 May was sent to Mr Webb at his new e-mail address "@ccms-cmno.com." However, either later that day or on 12 May (the hearing before me being listed for 2 pm), Dr Loveluck came to the conclusion that he was not entitled to communicate with Mr Webb or CMS Cameron McKenna Nabarro Olswang LLP about the appeal. He referred me to Rule 60 of the Trade Mark Rules which provides that a newly appointed agent must file Form TM33 with the IPO and he relied upon sub-rule (4) which provides that any act required or authorised by the Act in connection with any procedure relating to a trade mark may not be done by or to the newly appointed agent until on or after the date on which the Form is filed. Dr Loveluck had apparently telephoned the IPO and had been told that there was no form on the file. As a result, Dr Loveluck had not sent a copy of his lengthy skeleton argument to Mr Webb, but had, he told me, delivered a hard copy by hand to the offices of Nabarro LLP that same morning. The skeleton had not come to the attention of Mr Webb, and neither he nor Mr Hicks had had an opportunity to read the skeleton argument.

11. When this matter was raised before me, I invited Mr Webb to telephone his office to enquire whether a change of agent form had been filed. He informed me that he had spoken to the partner in charge and had been told that the appropriate form had indeed been filed. In all the circumstances, I did not accede to Dr Loveluck's submission that I should not hear Mr Hicks, although I did order that a copy of the form should be served by the Applicant upon the Club. I have since been informed by the UKIPO that a TM33 was not required, as in such cases the UKIPO will action a global name change on the written request from the parties. That was done and the global change was made with effect from 12 May 2017.

12. The third problem which was discussed at the hearing before me arose out of the fact that Applicant's counsel, Mr Hicks, is a member of Hogarth Chambers, as am I. I mentioned this to Dr Loveluck and ascertained from Mr Hicks that payment of his fees did not depend upon the outcome of the appeal. After some discussion at the hearing, I gave the Club seven days to decide whether it wished to ask me to recuse myself from hearing the appeal, and to give its reasons for making that application for recusal. The Club did ask me to recuse myself, and I deal with the application for recusal below.

13. All of the issues mentioned above (and especially the need to settle the scope of the appeal) had to be resolved before the appeal could be heard. This led me to conclude that there could be no substantive hearing of the appeal on 12 May and that the hearing that day could potentially deal only with case management directions, necessary for the future conduct of the appeal.

14. I indicated that I wished to give some directions to deal with each of those issues, and was satisfied that the objection taken by Dr Loveluck was only to me dealing with the substantive appeal, for despite both his provisional views on recusal and his views about the representation of the Applicant, Dr Loveluck agreed to directions being given by me on 12 May with a view to progressing the substantive appeal. Dr Loveluck also expressly agreed to the issue of recusal being dealt with on the basis of written submissions rather than a hearing. I am grateful to both parties for the cooperative

attitude they adopted in relation to the necessary directions. I subsequently issued an Order setting out detailed directions.

15. In accordance with the Order, the Club made an application for recusal, providing me with detailed written submissions on 19 May 2017.[1] Those submissions stated that it was unreasonable to expect the Club to familiarise itself with a new area of law in so short a time, and it reserved the right to make further submissions in response to those of the Applicant. The Applicant filed submissions in answer dated 26 May 2017, to which the Club replied in further submissions of 2 June 2017.[2]

16. I can summarise the main points raised by the Club in both rounds of its submissions broadly as follows:

    a. that it was being placed in the unenviable position of having to argue bias on the part of the person who will judge its pleadings; this was inherently unfair and prejudicial to the Club;

    b. that it was vitally important for full disclosure of various facts be made by the Applicant/Appointed Person so as to enable the Club to understand the position, in particular the Club wished to know about

        i. the security of documents in the possession of the Appointed Person which could/should not be seen by counsel for the Applicant (such as documents annotated by the Appointed Person), and generally as to the security arrangements adopted in Hogarth Chambers, as to which Dr Loveluck posed a number of detailed questions,

        ii. any financial interest which the Appointed Person had as a result of Mr Hicks acting as counsel for the Applicant, including details of the

[1] Dr Loveluck complained in his written submissions that he thought he only needed to indicate the Club's intention to seek a recusal within 7 days from the 12 May. Dr Loveluck has hearing difficulties, but arrangements were made at the hearing which enabled him to take a full part in the proceedings, and the transcript shows that he agreed to put in writing the reasons why he thought I should recuse myself by 19th May. It also shows that he agreed to (and indeed was keen to) deal with the recusal application on paper rather than require me to hold a separate hearing, to save him travelling back to London.

[2] My Order had not provided for reply submissions, but the Applicant did not object to the reply submissions filed by the Club, and I have taken them into account in this decision. They are dated 2 July but were emailed to me on 2 June.

financial arrangements made between members of Hogarth Chambers,[3] and

iii. details of cases in which Mr Hicks had "worked alongside" the Appointed Person or had appeared in front of the Appointed Person;

c. that the relationship between Mr Hicks and the Appointed Person, as members of the same Chambers, suggested that advice may have been sought or given between them as to similar cases, including advice as to how to win an appeal to the Appointed Person;

d. that there was no reason why a different Appointed Person could not hear the case, given that the substance of the appeal had yet to be considered and this would avoid any issue about apparent bias;

e. that my willingness to accept Mr Webb's oral assurance that the change of agent form had been filed at the IPO and to hear Mr Hicks on 12 May, without there being any "hard evidence" to support that claim, gave the appearance of bias, given the pre-existing connection between counsel and the Appointed Person; and

f. that the fact that there is no appeal from the decision of an Appointed Person is another reason for recusal.

17. The Applicant's position was in brief that the application was for recusal on the basis of apparent bias, based upon the fact that its counsel and the Appointed Person are members of the same chambers, and that this fact did not amount to a sufficient ground to require me to recuse myself from hearing the substantive appeal.

The law on recusal for apparent bias

18. Both parties referred me to a number of authorities on recusal. Dr Loveluck complained that none of those authorities was of direct relevance, because none

[3] The specific questions asked by the Club included whether Mr Hicks was instructed on the basis of a Conditional Fee Agreement and for details of his remuneration. In its written submissions, the Applicant confirmed that (as stated at the hearing) Mr Hicks was not acting under a CFA and the members of Hogarth Chambers have no direct financial interest in the outcome of the appeal.

related to the position of an Appointed Person. However, in my judgment the same rules as to recusal apply to all those sitting in a judicial capacity, and whether upon a full or part time basis. To take but one example of many, the case of *Lawal v Northern Spirit* [2003] ICR 856, cited by Dr Loveluck, was an appeal from the Employment Appeal Tribunal. Moreover, in paragraph 3 of *Locabail (UK) Ltd v Bayfield Properties* [2000] QB 451 it was explained that references in the judgment of the Court of Appeal to a "judge" embraced "every judicial decision maker, whether judge, lay justice or juror." The principles relating to perceived bias (relating to one of the Registrar's Hearing Officers rather than an Appointed Person) were also discussed by Mr Geoffrey Hobbs QC sitting as the Appointed Person in *Munroe's trade mark application* [2009] RPC 16. I have no doubt that the same principles concerning recusal apply to the Appointed Persons under the 1994 Act. I therefore reject Dr Loveluck's submission that the body of case-law relating to the principles of recusal does not apply equally to the Appointed Persons and to the application made to me by the Club.

19. First, it is necessary to identify the kind of bias alleged to exist. Four kinds of bias were identified by Arnold J in *Resolution Chemicals Limited v H. Lundbeck A/S*, [2013] EWHC 3160 (Pat), at [37]-[38]. I think that it is common ground between the parties in this case that the issue raised by the Club falls into the category of 'bias which is apparent following inquiry.' The test for this is, in summary,

> "whether a fair minded and informed observer would conclude, on the facts, that there existed a real possibility of bias: see *Porter* v *Magill* [2002] UKHL 67, [2002] 2 AC 513; *Helow* v *Secretary of State for the Home Department* [2008] UKHL 62, [2008] 1 WLR 2416." (*per* Davis LJ in *Shaw v Kovac* [2017] EWCA Civ 1028, 18 July 2017, at [14]).

20. In *Helow v Secretary of State for the Home Department and another* [2008] UKHL 62, [2008] 1 W.L.R. 2416, Lord Rodger of Earlsferry said:

> "14. The legal test to be applied in cases of apparent bias is to be found in the speech of my noble and learned friend, Lord Hope of Craighead, in *Porter v Magill* [2002] 2 AC 357, 494 h:

> "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."

It is equally well established that the fair-minded observer is not unduly sensitive or suspicious: *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53, per Kirby J."

21. Lord Hope said, in the same case:

> "1. The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word "he"), she has attributes which many of us might struggle to attain to.
>
> 2. The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in *Johnson v Johnson* (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
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> 3. Then there is the attribute that the observer is "informed". It makes the point that, before she takes a balanced approach to any information she is

given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

22. *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 1515, [2014] 1 W.L.R. 1943 was an appeal from a decision of Arnold J. He had declined to recuse himself from hearing a patent trial in which one of the expert witnesses was known to him, having been his research supervisor in Part II of the judge's undergraduate degree studies. Arnold J's decision was upheld by the Court of Appeal. Sir Terence Etherton C said:

> "35 The following principles relevant to this application are clear. First, the test of apparent bias is whether the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased: *Porter v Magill* [2002] AC 357, para 103 (Lord Hope of Craighead). There is no difference between the common law test of bias and the requirements of an independent and impartial tribunal under article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"): *Lawal v Northern Spirit Ltd* [2003] ICR 856, para 14 (Lord Steyn). Secondly, underlying both article 6 of the Convention and the common law principles is the fundamental consideration 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, 259. Thirdly, the fair-minded and informed observer is not unduly sensitive or suspicious, but neither is he or she complacent: *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, para 2 (Lord Hope). Fourthly, the facts and context are critical. Each case turns on an intense focus on the essential facts of the case: *Man O' War Station Ltd v Auckland City Council (formerly Waiheke County Council)* [2002] UKPC 28 at [11] (Lord Steyn). Fifthly, if the fair-minded and informed observer would conclude that there

is a real possibility that the tribunal will be biased, the judge is automatically disqualified from hearing the case. The decision to recuse in those circumstances is not a discretionary case management decision reached by weighing various relevant factors in the balance. Considerations of inconvenience, cost and delay are irrelevant: *AWG Group Ltd v Morrison* [2006] 1 WLR 1163, para 6 (Mummery LJ).

36 In addition to those well-established points of principle, I would add the following observations. The test is "a real possibility" of bias, whether subconscious or otherwise. Lundbeck's skeleton argument describes that test as "a necessarily low threshold". While the test is certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of "any possibility" but of a "real" possibility of bias.

37 As Lord Steyn observed in *Lawal's* case [2003] ICR 856, para 15, analogies may sometimes be of assistance. On the other hand, they must be viewed with care and caution. Cases of subconscious bias ultimately turn on the particular facts of the case. An analogy will only have value if the factual situation is sufficiently comparable to enable a compelling link to be made with the case in hand.

38 Mummery LJ in the *AWG Group case* [2006] 1 WLR 1163, para 9 has pointed to the practical difference between an objection to the judge based on facts discovered during the course of, or only at the end of, the hearing and a situation, such as the present one, where the objection is taken before the hearing has begun. In the latter situation, as Mummery LJ observed, there is scope for the sensible application of the precautionary principle, that is to say prudence naturally leans on the side of being safe rather than sorry. Indeed, as was observed in *Locabail (UK) v Bayfield Properties* [2000] QB 451, para 16, judges routinely take care to disqualify themselves in advance of any hearing in any case where a personal interest could be thought to arise. The judge himself said at para 50 of his judgment that he has a strong inclination to accede to an application to recuse himself without further ado. The test, however, remains the same whether the objection of bias or apparent bias is made before or after a trial.

39 The precautionary principle is a sensible one in view of the obvious practical complications if there is an appeal from a refusal to recuse or if there is a challenge made on the basis of apparent or actual bias at the end of the case. The overriding objective that justice should be seen to be done and of the need to maintain the confidence of society in general, and of the parties in particular, in the administration of justice also promote a disposition of a judge to accede to a recusal application when it is made by a party's legal advisors.

40 It is important, none the less, to distinguish between a pragmatic precautionary approach and the application of the test itself. If a fair-minded and informed observer, having considered the facts, would not conclude that there is a real possibility that the tribunal will be biased, then the objection to the judge must fail even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done. The increasing pressure on limited judicial resources, aptly reflected in the present case in the shortage of judges suited to try this complex patent action, may mean that the easy option of voluntary recusal, irrespective of the strict application of the legal test, may from time to time have limited scope. *Watts v Watts* [2015] EWCA Civ 1297.

41 … it is conventional for applications for recusal on the basis of apparent bias to be heard by the very judge in question. Neither side before us commented on the appropriateness of that convention.

42 As the judge noted, Patten LJ said in *In re L-B (Children)* [2011] FLR 889 , para 22 that a judge faced with a recusal application on the ground of apparent bias should "explain in sufficient detail the scale and content of the professional and other relationship which is challenged on the application". It is plainly consistent with the policy underlying article 6.1 of the Convention and common law principles that, on such an application, the judge should provide to the parties relevant information. Such information, however, should not go beyond what is strictly necessary for a fair adjudication of the recusal application.

…

> 46 I entirely accept that neither the judicial oath to "do right by all manner of people, after the law and usages of this realm, without fear or favour, affection or ill-will" nor judicial experience and training, including the pervasive and persistent ethos of the independence of the judiciary, can wholly insulate even the most rigorous and fair-minded judge from subconscious bias. The fair-minded observer would be aware of that possibility: *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416, para 2 (Lord Hope). That is not to say, however, that the fair-minded and informed observer would wholly discount the matters of judicial training, experience and ethos. Taken to their logical conclusion, Mr Gordon's submission and reliance on Lawal's case would preclude a judge from hearing a case in which his former pupil master or regular instructing solicitors were acting for one of the parties, or a deputy High Court judge from ever hearing a case in which a more senior member of his or her chambers was acting for one of the parties."

23. In *Watts v Watts* [2015] EWCA Civ 1297, a Deputy High Court Judge had been invited to recuse herself from hearing a trial on the basis of apparent bias. The basis of the application was that she was engaged as a barrister in a case in which she was leading counsel for one of the parties to the case she was to hear. It was said that this gave rise to a legitimate concern that the judge would favour that party in deciding the case. The judge refused to recuse herself and the Court of Appeal upheld her decision. Sales LJ said:

> "17 On the appeal, Mr McLarnon criticised the judge on three grounds: (i) for the paucity of information provided by her about her involvement with Mr Holland; (ii) for announcing her ruling at the commencement of the hearing but only giving her reasons at the end of it; and (iii) for the decision not to recuse herself, which he maintained was unlawful because of the appearance of bias which he submitted she presented in the circumstances. I deal with these in turn.

18 In relation to ground (i), Mr McLarnon relied in particular on the following guidance. In *Davidson v Scottish Ministers* Lord Bingham said at [19] that where a judge discloses matters which would or might provide the basis for a reasonable apprehension of lack of impartiality, "It is very important that proper disclosure should be made …, first, because it gives the parties an opportunity to object and, secondly, because the judge shows, by disclosure, that he or she has nothing to hide and is fully conscious of the factors which might be apprehended to influence his or her judgment." Similarly, in *Jones v DAS Legal Expenses Insurance Co*. [2003] EWCA Civ 1071 at [35] this court emphasised that where a judge becomes aware of circumstances which might give rise to an appearance of bias and a real as opposed to fanciful objection being taken by a notional fair-minded observer and an application for recusal might be made, "The judge should make every effort in the time available to clarify what his interest is which gives rise to this conflict so that the full facts can be placed before the parties."

19 Mr McLarnon submitted that provision of full material in this sort of situation is particularly important because parties are not permitted to question the judge about the position, and so are not able to seek and obtain the full facts if they are not disclosed by the judge of her own volition at the outset. In that regard, Mr McLarnon referred to *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, CA, in which at p. 472A-B the court said "The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists." Mr McLarnon further submitted that the inadequacy of the disclosure by the judge serves to reinforce his main ground of appeal, that she presented an objective appearance of bias.

20 I do not agree with Mr McLarnon's criticism of the extent of disclosure made by the judge. The disclosure required to be given is of the material facts, not

every background detail: see *Resolution Chemicals* at [42]. The judge did disclose the material facts. Armed with this information, Mr McLarnon was fully equipped to make the relevant application. No further disclosure was required."

21 Mr McLarnon submitted that the disclosure was inadequate because it did not reveal the subject matter of the litigation in which Mr Holland and the judge were instructed, so it was possible that the judge might have an interest in giving a ruling in the present case which might assist them in that other case. Additional disclosure should have been given to allay any such fears.

22 This argument proves too much. I cannot accept it. The notional fair-minded and informed observer, knowing the professional standards applied by part time judges drawn from the legal profession, would understand that any deputy judge who found that she was being asked to try a case in relation to subject matter where there was a real risk that her ruling in the case (which would of course acquire a degree of authority as the ruling of a court) might have a bearing on the arguments to be advanced in other ongoing litigation in which she was involved as counsel, would immediately for that reason recuse herself. In such a case it would be clear that her interest as a barrister would conflict with her duty as a judge and, since that would be clear, it would be obvious that she could be expected to identify such a conflict and then act ethically and in accordance with her professional obligations by recusing herself. This would be so whether or not she happened to be instructed along with another counsel in the case, and whether or not that counsel was now appearing as counsel in the case in which she was to sit as a deputy judge. A part time judge does not have to reveal details of every ongoing piece of litigation in which she is professionally involved as counsel in order to allay suspicion whether any of them concern subject matter which overlaps with the case to be tried by her. On the contrary, the notional fair-minded and informed observer would not consider that there is any real risk that there is any such conflict of interest, since if there were the deputy judge could naturally be expected

to identify the problem and recuse herself without more. The addition of the extra feature that the deputy judge might be leading other barristers in such other ongoing litigation does not change this analysis.

…

28 Finally I turn to ground (iii) and the main substance of the appellant's case. I would dismiss the appeal for the following reasons, which essentially reflect the reasons given by the judge below:

i) The notional fair-minded and informed observer would know about the professional standards applicable to practising members of the Bar and to barristers who serve as part-time deputy judges and would understand that those standards are part of a legal culture in which ethical behaviour is expected and high ethical standards are achieved, reinforced by fears of severe criticism by peers and potential disciplinary action if they are departed from: *Taylor v Lawrence* [2001] EWCA Civ 119 , [33]-[36]; *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] QB 528 , [61]-[63]. These aspects of the legal culture of the Bench and legal professionals are not undermined by the fact that some litigation is now funded by means of CFAs;

ii) The notional fair-minded and informed observer would understand that a part-time judge's approach to the case she is trying and to her relationships with other professionals will be governed by these professional standards. There is no reason to think that a judge would allow her professional training and ethics to be overridden by a concern not to upset a junior counsel she is leading in other litigation. Moreover, the judge would know that the junior counsel would himself understand that she is bound by strict professional standards, and hence would have no expectation that she would do anything other than act in accordance with them. So the judge would not expect any disgruntlement or difficulty to arise in her relationship with the junior counsel even if she makes a decision adverse to him in the case she is trying. Accordingly, 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;

iii) There is a danger in cases of this kind of multiplying reference to authority in the hope of finding analogies on which to found arguments one way or the other, and we were presented with a plethora of authorities to address what is really quite a simple matter. However, it may be observed that a number of authorities indicate strongly that it could not be said that there is any objectionable connection between the judge and counsel for the respondent sister in this case. In The *Gypsy Council v United Kingdom* (2002) 35 EHRR CD 96 the European Court of Human Rights dismissed as manifestly ill-founded an argument that Article 6 (right to a fair trial) was infringed on grounds of appearance of bias where a part-time deputy judge in a case involving gypsies on one side and a public authority on the other was a barrister in practice (David Pannick QC) who had been instructed as counsel for the government in numerous cases before the Court of Human Rights involving gypsies, in which he had argued that public authorities had not infringed the rights of gypsies: p. 101. The deputy judge in that case remained in practice and might hope to be so instructed by the government again, but still it was clear that no appearance of bias arose. In *Laker Airways Inc v FLS Aerospace Ltd* [2000] 1 WLR 113, Rix J dismissed an application to remove an arbitrator on grounds that "circumstances exist that give rise to justifiable doubts as to his impartiality" (section 24 of the Arbitration Act 1996) where the arbitrator was a QC practising in the same chambers as counsel for one of the parties in the arbitration. It is true that the judge directed himself by reference to the then current standard for assessing an appearance of bias set out in *R v Gough* [1993] AC 646, which was adjusted in *Porter v Magill* to bring it into line with the test under Article 6, but I do not think that is significant for the analysis in the case. The position is underlined by *Smith v Kvaerner Cementation Foundations* Ltd [2006] EWCA Civ 242; [2007] 1 WLR 370. In that case, a personal injury claim was tried by a practising barrister and part-time judge sitting as a recorder, who was the head of

the chambers to which both counsel for the claimant and counsel for the defendant belonged and who had also acted for the defendant or associated companies in the past and might do so in the future. This court rejected the suggestion that an appearance of bias arose by reason of the connection between the recorder and counsel through being members of the same chambers: [17]-[19]; it was only because the recorder regarded himself as having an on-going barrister-client relationship with the defendant that this court held he should have recused himself. Similarly, in *Resolution Chemicals* at [46] this court referred to the idea that the reasoning in *Lawal* "would preclude a judge from hearing a case in which his former pupil master or regular instructing solicitors were acting for one of the parties, or a deputy High Court judge from ever hearing a case in which a more senior member of his or her chambers was acting for one of the parties" as something which it regarded as obviously untenable;

iv) As both the *Taylor v Lawrence* judgments and these other decisions indicate, relationships between members of the Bar, or between members of the Bar and their clients, can be much closer than that between the deputy judge and counsel for the respondent in the present case, yet because the relationships are mediated through known professional standards no appearance of bias arises."

24. Sales LJ referred to *Taylor v Lawrence* [2001] EWCA Civ 119, where the solicitors for one party had drafted the judge's will. Chadwick LJ had said:

"33. In my view, no fair-minded observer would reach the conclusion that a judge would so far forget or disregard the obligations imposed by his judicial oath as to allow himself, consciously or unconsciously, to be influenced by the fact that one of the parties before him was represented by solicitors with whom he was himself dealing on a wholly unrelated matter. It is a matter of everyday experience that judges are acquainted, in one capacity or another, with those who appear before them as solicitors or advocates. That is a matter of which an informed observer would be well aware. The informed observer would be well aware, also, that judges, solicitors and advocates

> can be expected to recognise that it is a matter of paramount importance that the public should retain confidence in the administration of justice; and to recognise that they are required to conduct themselves accordingly. But judges, solicitors and advocates are entitled to expect from a fair-minded and informed observer a corresponding recognition that they will endeavour to be true to their judicial oath and to the standards set by their respective professional codes. It is not to be assumed, without cogent evidence to the contrary, that a judge's acquaintanceship, whether social or professional, with those conducting litigation before him in a professional capacity will lead him to reach a decision in that litigation that he would not otherwise reach on the evidence and the arguments."

Applying the law to this case

25. Dr Loveluck has informed me that he and other members of the Club's IP Sub-Committee are concerned that my professional connection with Mr Hicks shows that there is a real possibility that I will be biased in favour of Mr Hicks' client. He has also, as I have said above, asked for a great deal more information about that professional connection than has been provided either by the Applicant or myself, suggesting that the Club cannot assess the reality of the risk of bias without knowing, for instance, all the details of the arrangements made to protect the security of documents kept in chambers.

26. Dr Loveluck's first concern was that I would hear the recusal application. In the judgment of Arnold J in *Lundbeck* [2013] EWHC 3160 (Pat), he said:

> "51 … I wondered whether I should direct that the application should be heard by another judge. After all, it might be said that it is difficult for me objectively to assess the impact of my own connection with Prof Baldwin on the fair-minded and informed observer. It is clear from the case law, however, that it is conventional for such applications to be heard by the judge in question. I presume that the reason for this is the one identified by Patten LJ in L-B."

27. It is therefore clear that I must decide the recusal point. Moreover, I must do so despite my immediate reaction to it being that I should simply agree to step down from the appeal and allow another Appointed Person to hear it. Arnold J dealt with this point too in *Lundbeck:*

> "50 … I share the reaction of Wright J in *Berkeley Administration Inc v McClelland* [1990] FSR 565 at 571 to an application to recuse oneself, namely a strong inclination to accede to it without further ado. It is clear from the authorities, however, that, just as it is my duty to recuse myself if the application is well-founded, it is also my duty to hear the trial of this claim if the application is not well-founded."

It is clear, therefore, that it is my duty to consider the merits of the claim for recusal.

28. The fact that the party seeking recusal, even if a litigant in person, may be left dissatisfied by a decision not to recuse oneself is not a reason to accede to a request for recusal. The authorities I have mentioned above show, as Arnold J put it, that just as it is my duty to recuse myself if the application is well-founded, it is my duty to hear the appeal if the application is not well-founded. That is also clear from paragraph 40 of the judgment of Sir Terence Etherton on appeal in the same case: "the objection to the judge must fail even if that leaves the applicant dissatisfied and bearing a sense that justice will not or may not be done." In addition, Davis LJ said recently in *Shaw v Kovac* at [25]:

> "The law is clear. The test is objective. The outcome cannot be determined by the subjective views or wishes of the objecting party. This was, as I have said, conceded by Mr Berkley: albeit it was in truth difficult not to gain the impression from some of the remarks which he made in the course of oral argument that in reality that *was* the real basis of the objection. But any inclination to defer to the individual sensibilities of individual parties cannot of itself justify, let alone require, a judge in recusing himself or herself. As stated by Chadwick LJ in *Triodos Bank NV* v *Dobbs* [2005] EWCA Civ 486 (and cited in *Otkritie* at paragraph 27):

> "7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the 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) we would soon reach the position 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…"

29. Dr Loveluck's next points related to the extent of the information which he felt should have been disclosed to him about my professional connection with Mr Hicks. He was informed at the hearing on 12 May that

    a. Mr Hicks and I are members of the same chambers;
    b. We are colleagues but not partners;
    c. Mr Hicks was not acting pursuant to a Conditional Fee Agreement or similar arrangement; and
    d. I had no interest, financial or otherwise, as to whether Mr Hicks' client won or lost the appeal

30. In addition to those explanations, it is clear from the cases I have cited above that I should take into account factors which would be deemed to be known to the notional fair-minded and informed observer. Such an observer would know that members of barristers' chambers are not partners and have no detailed knowledge of[4] or direct financial interest in each other's practices, although they will share some common

[4] See *Locabail* at paragraph 20.

chambers' expenses. In particular, the relevant observer will know that, in a standard case, that is to say a case which is not subject to a Conditional Fee Agreement or similar arrangement, barristers will be paid the same fee regardless of the result of the case, so that they and their colleagues have no financial interest in the outcome of the case.

31. The notional fair-minded and informed observer would know that the professional standards applied by part-time judges drawn from the legal profession include a duty to avoid conflicts of interest. There is guidance for fee paid judicial office holders from the Lord Chancellor, dated March 2015, as to the issues of conflict of interest, conduct and discipline which provides in particular:

> "3. Fee paid office holders must ensure that while holding judicial office they conduct themselves in a manner consistent with the authority and standing their office requires. They must not, in any capacity, engage in activity which might undermine, or be reasonably thought to undermine, their judicial independence. The governing principle is that no person should sit in a judicial capacity in any circumstances, which would lead an objective onlooker with knowledge of all the material facts to reasonably suspect that the person might be biased.
>
> …
>
> 7. As a general principle, a fee-paid office holder should not sit, or appear before a court or tribunal, if they are liable to be embarrassed in their judicial or professional capacity by doing so.
>
> 8. Fee paid judicial office holders should:
>
> I. not sit on a case if they have, or are perceived to have, a personal, professional or pecuniary interest in that case; or if any businesses or practices of which they are members in any capacity have such an interest.
>
> II. comply with the existing case law governing pecuniary or other interests in deciding whether to declare an interest in, or to stand down from, a particular case. …"

For the reasons given above, I do not have a personal, professional or pecuniary interest in this appeal, nor am I a member of a business which has such an interest, as Mr Hicks and I are not in business together.

32. Such an observer would also know of the professional standards imposed upon barristers in private practice. These include, in particular, a duty to maintain standards of honesty, integrity and independence, and a duty to ensure that proper arrangements are made and followed in chambers for the management of conflicts of interest and for ensuring the confidentiality of clients' affairs. Members of chambers and their staff have to act in accordance with those obligations. Seeking to gain access without consent to instructions or other confidential information relating to the opposing party's case, or confidential information relating to another member of chambers, would amount to serious misconduct on the part of a barrister.

33. The fair-minded and informed observer would also appreciate that this is a trade mark appeal, and in this specialist field many of the participants are well known to each other, whether barristers, solicitors or trade mark attorneys.

34. In the circumstances, and bearing in mind paragraph 42 of Sir Terence Etherton's judgment in *Lundbeck*, I do not consider that the Club's requests for further detailed information of the kinds mentioned above were justified. In my judgment, the Club had been provided with the relevant information necessary for it to decide whether to ask me to recuse myself, and the further details sought go well beyond what is strictly necessary for a fair adjudication of the recusal application.

35. The essence of the application for recusal is that Mr Hicks is a member of Hogarth Chambers, from which I also practise. The authorities show that this is not a reason for a judge to recuse himself from hearing a case. That appears from *Watts v Watts* and from paragraph 46 of Sir Terence Etherton's judgment in *Lundbeck*, as well as *Birmingham City Council v Yardley* [2004] EWCA Civ 1756 and *Smith v Kvaerner*

Cementation Foundations Ltd [2006] EWCA Civ 242, [2007] 1 W.L.R. 370 in which Lord Phillips CJ said:

> "17 We can understand why Mr Speaight did not contend that the mere fact that counsel and the recorder were in the same chambers of itself gave rise to an appearance of bias. Judges in this jurisdiction, whether full time or part time, frequently have present or past close professional connections with those who appear before them and it has long been recognised that this, of itself, creates no risk of bias nor, to those with experience of our system, any appearance of bias-see e g *Nye Saunders & Partners v Alan E Bristow (1987) 37 BLR 92* ; *Laker Airways Inc v FLS Aerospace Ltd [2000] 1 WLR 113* ; *Taylor v Lawrence [2003] QB 528* and *Birmingham City Council v Yardley [2004] EWCA Civ 1756*. At the same time we can see the force of Mr Speaight's submission that changes in the way that some chambers fund their expenses and the fact that counsel can now act under a conditional fee agreement mean that, in some cases at least, there may be grounds for arguing that a recorder should not sit in a case in which one or more of the advocates are members of his chambers. Indeed we understand that the Bar Council is currently considering the implications of conditional fee agreements in this context.
>
> 18 As Mr Speaight conceded, however, the special considerations to which he drew attention do not apply on the facts of the case before us. Accordingly there is no need for us to pursue further the suggestion that an appearance of bias arose simply from the fact that the recorder and the counsel before him were in the same chambers.

36. In *Flynn v Warrior Square Recoveries Limited* [2013] EWCA Civ 917, at [9], Rimer LJ described an application for recusal on this basis as "a non-runner." See also *Azumi Ltd v Zuma's Choice Pet Products Ltd* [2017] EWHC 45 (IPEC).

37. The test is not one of "any possibility" but of a "real" possibility of bias and I consider that the fair-minded and informed observer would conclude that the fact that Mr Hicks and I practise from the same chambers does not lead to a real possibility of bias.

38. Dr Loveluck submitted that apparent bias was also shown by my agreeing to hear Mr Hicks at the hearing on 12 May, despite the lack of 'hard evidence' that a change of agent form had been filed at the UKIPO. As I have explained above, I did not consider the merits of Dr Loveluck's contentions as to the impact of Rule 60, nor did Mr Hicks address me on that point. Instead, I asked counsel to make inquiries as to whether the form had been filed, and invited his instructing solicitor to telephone his office to ascertain the position. I was then told that the form had been filed. I had no reason to doubt what I was told, even if it was possible (in the light of Dr Loveluck's conversation with someone at the UKIPO) that the form had not yet reached the appropriate file. In the circumstances, I was prepared to hear Mr Hicks, to the extent that was necessary, as the hearing was broadly ineffective because of the doubts as to its scope.

39. Dr Loveluck suggested that the "impetus" for my willingness to hear Mr Hicks was due to our pre-existing relationship. I do not accept that the manner in which I dealt with the change of agent problem indicated any bias towards Mr Hicks' client whatsoever. I consider that any judge faced with a technical objection of this kind would have sought clarification from the affected party's solicitors as to the facts upon which the objection was based, and would have accepted an explanation provided to him by a solicitor. Moreover, as the substantive appeal hearing was not able to proceed in any event on 12 May, no advantage was given to Mr Hicks' client by my acceptance of the explanation given to me. On the contrary, treating Mr Webb and Mr Hicks as representing the Applicant for the purposes of the hearing on 12 May had the beneficial effect of enabling practical directions to be given to both parties to progress the substantive hearing of the appeal.

40. I consider that all of these facts would have been clear to the notional fair-minded and informed observer, and the way in which I dealt with the matter would have been seen as standard practical case management, rather than as indicative of a real possibility of bias in favour of Mr Hicks or the Applicant.

41. For these reasons, I do not consider that I am obliged to recuse myself from hearing the substantive appeal in this matter.

42. Dr Loveluck has suggested that the fact that there is no direct appeal from the Appointed Person means that I should recuse myself. I do not agree. The decision to appeal to the Appointed Person rather than to the High Court was made by the Club, and it must take the consequences of its own choice of forum. Moreover, whilst there is no appeal (as such) from the Appointed Person, control may be exercised over them, in an appropriate case, by means of an application for judicial review. In the circumstances, I do not consider that this is a reason not to make a recusal decision, nor is it a reason why I should recuse myself from hearing the appeal.

43. For all these reasons, had it been possible to hold the substantive hearing of the appeal on 12 May, I would not have recused myself from hearing it. However, that hearing became a directions hearing only, as I have explained. Due to the issues about the scope of the appeal, no date has yet been fixed for the appeal to be heard, and were the appeal to be heard by any other Appointed Person this issue about apparent bias would not arise, as no other Appointed Person practises from the same chambers as Mr Hicks. In those circumstances, it seems to me it remains open to me to adopt the precautionary principle identified by Mummery LJ in *AWG Group Ltd (formerly Anglian Water Plc) v Morrison* [2006] EWCA Civ 6; [2006] 1 W.L.R. 1163, where he said at [9]:

> "9 Most of the leading authorities were appeals arising from hearings that had already taken place or were under way and an objection to the judge was based on facts discovered during the course of, or only after the end of, the hearing. Although this is a different case, as the hearing has not yet started, the same principle applies. Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle. If, as here, the court has to predict what might happen if the hearing goes ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising, prudence naturally leans on the side of being safe rather than sorry."

44. Applying the 'precautionary principle,' given the circumstances of this case, and notwithstanding my clear view that I do not need to do so, I propose to recuse myself from hearing the substantive appeal.

45. The parties will be contacted in due course for arrangements to be made for the substantive appeal to be heard by another Appointed Person.

Amanda Michaels
The Appointed Person
27 July 2017

Dr Scott Loveluck appeared on behalf of the Appellant

Mr Michael Hicks, instructed by CMS Cameron McKenna Nabarro Olswang LLP, appeared for the Respondent