

Neutral Citation Number: [2022] EWHC 302 (Ch)

Case No: FL-2020-000023

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
FINANCIAL LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 February 2022

Before :

Mr Justice Miles

Between :

Business Mortgage Finance 4 Plc and others
- and -
Rizwan Hussain

Claimant

Defendant

Anna Dilnot QC and Alexander Riddiford (instructed by **Simmons & Simmons LLP**) for
the **Claimant**

Alex Haines (instructed by **Janes Solicitors**) for the **Defendant**

Hearing dates: **8th February 2022**

APPROVED JUDGMENT

Mr Justice Miles:

1. Mr Hussain applies for me to recuse myself in relation to these committal proceedings; alternatively that I stay the trial pending an application to the Court of Appeal. The intention to make an application was first notified on 25 January 2022 and a draft application was provided on 26 January 2022. Mr Hussain is subject to a GCRO. It was not until 31 January 2022 that he applied under that GCRO for permission to make the application. It was then dealt with by Mr Justice Leech, who gave permission on the basis that the claimants' solicitors had suggested that I should address the substance of the application, given that the background was of some complexity and I was in any event going to be dealing with the trial shortly thereafter. Mr Justice Leech said that he had formed the provisional view that the application was totally without merit and, but for the solicitors for the claimants' suggestion, would have dismissed it. The application was then issued on 1 February, the day before the trial was due to commence on 2 February. Previously Mr Hussain had said that he was going to attend the trial and was going to appear in person.
2. The application is supported primarily by Mr Hussain's second witness statement, although he has also referred to a number of other witness statements, including his third. I have carefully considered his evidence and his written submissions in support of the recusal application. He is represented before me by counsel, but Mr Hussain's instructions are not to present oral submissions in support of the application but to invite the court to deal with it on the papers. Mr Hussain says in his written submissions that the claimants have no interest in the recusal application and should not be heard. I disagree. Given the circumstances where I am embarking on the trial and the application was issued so shortly before the trial, the claimants have a real interest in the application. If it was necessary to move the case to another judge, there would be substantial delay. So the claimants are interested and entitled to make submissions on the application.
3. This is the second recusal application in respect of these committal proceedings. An earlier one was made in the name of a company called BMF Assets, which sought my recusal from all proceedings concerning the issuers and a number of other parties including this committal application. I dismissed that application on 26 January 2022 in a judgment reported at [2022] EWHC 140 (Ch) ("the first recusal judgment").
4. Mr Hussain says in his witness statement that he only became aware of that judgment when it was provided to him by his personal assistant on about 26 January 2022. That is not easy to accept. The application made by BMF Assets was partly in respect of the committal proceedings and Mr Hussain would have had a very anxious interest in the outcome of the application. Moreover, it is striking that the passages concerning the legal principles set out in Mr Hussain's present written submissions are very similar, if not identical, to the submissions made by BMF Assets and it seems obvious that they are by the same author.
5. The application is made on the basis of apparent and not actual bias.
6. The legal principles are not in dispute. They were set out in the first recusal judgment at [138] to [140] as follows:

138. The legal principles were summarised in *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468 at [17]-[19] and I shall not repeat the whole passage. The ultimate

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. The fair-minded and informed observer is not unduly sensitive and suspicious but neither is he or she complacent. The facts and context are critical to any recusal application. The fair-minded and informed observer is not to be confused with the person raising the complaint of apparent bias and the test ensures that there is this measure of detachment.

139. I also note the observation of Floyd LJ in *Zuma's Choice Pet Products Ltd v Azumi* [2017] EWCA Civ 2133 at [29] that the mere fact that a judge has decided applications in the past adversely to a litigant is not generally a reason for that judge to recuse himself at further hearings. If that were the case the same judge could not make two successive interim decisions in a case without risking accusations of bias. It would make it impossible for there to be a designated judge assigned to complex cases with multiple interim applications. The fair minded and informed observer does not assume that because a judge has taken an adverse view of a previous application or applications, that he or she will have pre-judged, or will not fairly deal with, all future applications.

140. Ms Cooke also referred me to *Miley v Friends Life Ltd* [2017] EWHC 1583 (QB) at [27] where Turner J cited *Baker v Quantum Clothing Group* [2009] EWCA Civ 566 for the proposition that recusal applications should be made promptly and may be dismissed if there is inordinate and inexcusable delay in raising the point; such applications go to the heart of the administration of justice and must be raised as soon as reasonably practicable.

7. As explained in that last paragraph recusal proceedings must be brought promptly. I consider that there has been inordinate and unexplained delay in relation to the grounds of recusal which predate 26 January 2022; in particular, ground 1 and parts of ground 2 concern events in January and February 2021. For the same reasons that I gave in the first recusal judgment, I consider that the delay in raising those grounds has been inordinate and inexcusable and that is of itself sufficient for the dismissal of those grounds. But in case I am wrong on that, I will address the merits of those grounds together with the events relied on arising since 26 January 2022.
8. Before turning to the specific grounds, think it also important to repeat what I said in the first recusal judgment about the forensic context. These are also apposite here. For convenience I set them out again here:

145. First, the matters complained about must be seen in the forensic context. The BMF securitisations have been addressed in a large number of judgments of my own and other judges. As explained in the substantive part of this judgment there have been 26 separate cases about the BMF securitisations. Since 2019 there have been numerous steps taken by third parties, all of whom have been found to be strangers to the structures, to interfere with their business and affairs.

146. In every case to date the Sanne Directors have been successful in establishing that the third parties have acted without any lawful authority. In July 2020 Birss J gave judgment in the *Oyekoya* case [2020] EWHC 1910 (Ch) striking out numerous cases

brought against the Sanne Parties and others and described them as totally without merit. He used appropriately robust language at [53]: 'This is part of a long-running absurd series of actions by Mr Hussain, Mr Oyekoya and their associates, relating to the Issuers. It appears to have no merit at all and to have caused an enormous amount of costs and trouble to the defendants. I gather that a very large amount of costs have been run up dealing with these individuals, none of which has been paid.'

147. I conducted a full review of the steps taken against the BMF securitisations by early 2021 and summarised the history thus far in a passage of my February 2021 judgment titled *Business Mortgage Finance 4 Plc & Ors v Rizwan Hussain & Ors* [2021] EWHC 171 (Ch) at [252]:

“The Defendants have targeted these securitisation structures relentlessly. One or other of them have pretended to occupy the roles of directors of the Issuers, trustees for the noteholders, receivers of the underlying assets, Servicers, advisers to the Issuers, and other positions. They purported (in their assumed role of directors) to forfeit the shares held by BMFH in the Issuers and sell them to Highbury. They managed to change important company filings at Companies House and made misleading announcements to investors over the RNS. None of this is legitimate. The Defendants have never occupied any of these roles. They are, for legal purposes, strangers to the Securitisations. The reasons they have given for their actions are spurious. The corporate assault has been going on for the best part of two years, in the teeth of earlier orders of the courts and the Claimants' reasoned protests. It must now stop....”

148. As will be apparent from my substantive judgment above (which needs to be read to understand what follows) things have not ceased. There have been a series of further attempts to interfere with the business and affairs of the BMF securitisations. I have again concluded that none of the steps taken has any legal validity. The main argument relied on by Mr Artemiou and his related parties is that the De Facto Directors became directors by serving notices saying that they were willing to act as and assume the responsibility of directors. That is, as I have explained, legally absurd.

149. The evidence shows that the companies have unrecovered costs of £3m, which will fall ultimately on noteholders.

150. It is a theme of the Submissions that I have conflated the pre-February 2021 events (concerning Mr Hussain) with the later events and have simply assumed (on the basis of prejudice) that the later events must be invalid. That is wrong. I have considered the later events separately and on their own merits. The fact that I have once again concluded that the later events do not affect the ability of the Sanne Directors to conduct the affairs of the BMF companies does not mean that I reached that conclusion as a result of a biased or prejudiced attitude. Nonetheless any judge is bound to notice that the later events cannot be taken in isolation from the history since 2019.

151. Secondly, a large number of the complaints in the Submissions concern what is said to be my approach to the credibility of witnesses. I shall return to the detail below. But it should be observed that none of the hearings about which complaint is made involved oral witness evidence. The 3 February 2021 hearing was part of a Part 8 claim where there was no live evidence. The second hearing in September 2021 was a directions

hearing concerning the committal proceedings. The third hearing in November 2021 was the application BMF Assets made for an interim injunction.

152. I also note that even in a case where a judge had made adverse findings about a litigant's credibility (on a committal application) he was not recused from hearing the trial (see *Zuma's Choice* at [29]). But that is not this case.

153. As a related point, the Submissions at [21] and [22] say that the judge must avoid being over-interventionist as this may give the appearance of entering the arena. The cases cited show that there is a difference between the court's often proactive approach to submissions on the one hand and the course of oral evidence on the other.

154. Thirdly, I note that the application and Submissions have been submitted by BMF Assets. But the application seeks wide ranging relief, concerning all connected proceedings. There is no application by any of the other parties to the proceedings I have addressed in the substantive judgment above. The Submissions state at [2] that it is supported by the BMF Claimants. However for the detailed reasons given in the substantive judgment above the true directors of those companies are and have at the material times been the Sanne Directors. They oppose the recusal application. It follows that the application should be treated as being made by BMF Assets alone. Nobody from BMF Assets or any of the other entities appeared to support it. Nor did Mr Hussain.

9. Against that background I turn to the specific grounds of recusal advanced by Mr Hussain. These are summarised in paragraph 20 of his written submissions and are fully elaborated in his second witness statement.
10. Ground 1 concerns the hearing of January 2021 giving rise to the injunction. Mr Hussain alleges that there were errors of procedure and law in respect of the hearings, including not considering fairness to both parties, and that that leads to the conclusion that a reasonable observer would regard me as disqualified from taking a fair view of the case.
11. I have already said that the application is far too late in relation to these matters. That is sufficient to dispose of this ground. But, in any event, ground 1 appears to me to be without merit. I addressed the complaints about the procedure leading up to my decision to continue the trial without the presence of Mr Hussain in [159] of the first recusal judgment as follows:

159. Paragraph 25 addresses Limb 1. Sub-para 25.a. concerns (as I read it) the events of 18 January 2021. This was the first day of the Pt. 8 trial in cases FL-2020-000023 and CR-2020-003605. Mr Hussain was in prison serving a sentence for contempt of court. He sought an adjournment of the entire trial until a date after his release (in March 2021). I refused that application and gave detailed reasons in [108] to [121]. A reader of this judgment is assumed to be familiar with those passages (reported at [2022] EWHC 171 (Ch)). My explanation to Mr Hussain that he should be brief at that stage was (as the context shows) merely to explain that he was not expected at that stage to address the full merits of his defence, and he understood this. He then made fairly substantial submissions in support of his application for an adjournment. He did not suggest that he had been rushed or unable to make all the points he wished to make. I addressed them in detail in my judgment. The passage now highlighted in italics (concerning the historical appointment of the directors) is described as 'an incredible statement to make'. I am

unable to agree with this. Birss J had already decided in the Oyekoya case in July 2020 that the attempt to assert that the Sanne Directors had been replaced by new directors was not only unsustainable but was totally without merit and had described the actions of Mr Hussain as absurd. Moreover the Sanne Directors had been conducting the business of the BMF companies for years and were recorded as the only directors at Companies House. There was no realistic basis on which it could be argued that they had not been properly appointed. The real complaint appears to me to be that I decided against Mr Hussain on the merits.

12. The same reasoning applies here.
13. As regards the allegation that I made errors in relation to the merits, Mr Hussain's route was to appeal. The fact that a litigant disagrees with the outcome of a hearing and the reasoning in a judgment is not a ground for recusal. Mr Hussain in fact very recently applied for permission to apply out of time to appeal against my February 2021 judgment and the application was dismissed by Lord Justice Newey. He dismissed it on the basis that he was not prepared to extend time for the appeal but also recorded that he considered the merits of the application to be very weak at best. There is nothing in ground 1.
14. Ground 2 concerns my judgment dated 26 January 2022 concerning the recusal application by BMF Assets. As I understand this complaint, it concerns the response I gave to the argument raised by BMF Assets about Article 23(c) of the articles of association of the Issuers. I explained that I considered that argument to be groundless. I also explained that I had not specifically addressed it in any detail in my February 2021 judgment because a judgment is not required to address every point, good or bad. (I did in fact address it briefly in the February 2021 judgment.) I also explained that Mr Hussain had not appeared at the January hearing because he had chosen not to do so and had therefore not advanced the argument in any detail.
15. Mr Hussain points out that he did refer to Article 23(c) during that part of the hearing where he sought an adjournment and that I had made certain comments about it. I have re-read those passages and continue to reach the same conclusion that the arguments based on Article 23(c) of the issuers' articles are entirely without merit. In this regard, I repeat what I said in my first recusal judgment at [190] to [194]:

190. I should also address a point made in Artemiou 4 at [18]-[25]. It is said that an appearance of bias arises from the fact that my February 2021 judgment did not specifically address Article 23(c) of the Articles of Association of the Issuers. The argument (which had been referred to in earlier correspondence) concerns the steps taken by Mr Hussain and others to procure the alleged sale of the shares in the Issuers to Highbury in July 2020. The alleged sale depended on the supposed incoming directors of Issuers (Mr Hussain, Mr Kalia, Mr Oyekoya, Mr Singh, CSEL and PLL, see [56] of the February 2021 judgment) taking steps to forfeit the Issuers' shares and then dispose of them to Highbury (ibid. at [72]—[73]) (thereby displacing BMFH). Artemiou 4 appears to contend that: (a) there was a valid statutory declaration signed by one of the (alleged) new directors (Mr Kalia), and (b) where there such a declaration, title to forfeited shares cannot be affected by an irregularity or invalidity of the proceedings connected with the forfeiture or disposal.

191. I did not expressly refer to Art 23(c) in my February 2021 judgment. A judge is not required to address every conceivable point that has ever been raised, however groundless it may be. It will also be remembered that Highbury, which was a defendant to the Part 8 claim, did not appear at the trial. Nor did Mr Kalia. None of the defendants appeared (save for Mr Hussain who made an unsuccessful application to adjourn). So none of the defendants came to court to advance this point.

192. But in my judgment the argument is unfounded. It cannot be the case that an utter outsider, with no standing or authority to act as a director of a company - who is indeed in legal terms a complete stranger to it - can sign a statutory declaration which will have effect pursuant to Art 23(c). That article allows an actual director or secretary to provide a statutory declaration, which then has the consequence that a buyer of the shares is not affected by internal irregularities or invalidities in the proceedings by which the shares were forfeited. It is to my mind clear that the article cannot sensibly be read as applying where the forfeiture and disposal is procured and carried out by complete strangers to the company, acting without any authority or status from the company. To do so would (absurdly) allow a shareholder to be displaced and disenfranchised by acts of third parties who have nothing to do with the company. I found in my February judgment that Mr Kalia (like the other incomers) was a legal stranger to the Issuers and that he had never been made a director. He had no right or authority to act for the Issuers and therefore had no authority to make a statutory declaration as a director.

193. Hence, there are two answers to this complaint: nobody appeared at the trial to advance a submission based on Art 32(c) [sc. 23(c)] ; and the argument is groundless. The fact that I did not expressly refer to it in the judgement would not lead a fair-minded and informed observer to think I was biased.

194. I have already addressed the point in sub-para 27.d. earlier in this judgment. I do not think it has any substance for this recusal application.

16. I recorded in [191] of the first recusal judgment that I had not expressly referred to Art 23(c). I did in fact address the argument briefly but without specifying the article by number. In any case the same reasoning applies here. Nothing that has been said by Mr Hussain has caused me to revise those conclusions. I also record again that this point has been available to Mr Hussain since I gave judgment in February 2021 and it is far too late now to be seeking to rely upon it as a ground for recusal. In substance, this is a disagreement about the merits of arguments and this is not something which would lead a well-informed and fair-minded observer to consider there was any risk of bias.

17. Ground 3 concerns the events of the without notice bench warrant application on 26 January 2022. Although that application was originally made without notice, in fact Mr Hussain did appear at the hearing and made submissions. As I understand this ground of complaint, Mr Hussain says that I was wrong seriously to entertain the application by the claimants and I ought to have dismissed it at once without argument. What I actually did was listen to submissions from both the claimants and Mr Hussain. I then gave a judgment dismissing the application. Mr Hussain's complaint is groundless: the suggestion is that I should have dismissed it outright at the outset and that would not accord with a proper judicial approach. Indeed it would have been a cause for objection by the claimants had I done so.

18. Mr Hussain complaint about "palpable emotion from the judge". I do not accept that there is any reality in this complaint. I listened to submissions from Mr Hussain and I dismissed the application. I therefore made a decision in his favour. Nobody could think this shows bias against him. I asked Mr Hussain for details of his whereabouts and, although he was somewhat reluctant, he eventually provided them. I dismissed the application on the basis of his assurances that he would attend the trial. Of course Mr Hussain has, in the event, gone back on those assurances and has not appeared. I see absolutely nothing in this ground of complaint to justify me stepping down from hearing the current trial.
19. Ground 4 concerns what is alleged to be a failure of procedure concerning directions given on 27 September 2021, when I ordered that the hearing of the committal application should take place at the same time as what is called the "service application", namely an application by the claimants for retrospective permission to proceed with the application despite the original injunction not having been personally served upon Mr Hussain.
20. The reason I agreed with the claimants' suggestion that the two issues should be dealt with together is that there is an obvious overlap between them. One of the issues on the substantive hearing is whether Mr Hussain knew of the injunction and that will also be relevant to any decision of the court to dispense with personal service of the order. Moreover, it can be seen from other authorities that judges hearing the trials committal applications have given retrospective relief of the kind being sought in the service application. I have not yet heard the service application and will have to deal with it as the trial continues. But I continue to consider that it was sensible to make the order I did.
21. Mr Hussain's complaints here fall under two heads. First, he says that the procedural decision that the two matters should be heard at the same time interferes with his rights of silence and in effect compels him to give evidence at a hearing where the committal application is in play. The second concerns the absence in the order of 27 September of any right to put in evidence concerning only the service application.
22. I do not think there is anything in the first point. He is not being required to give evidence concerning the committal application and his rights of silence are not in any way being infringed or interfered with. It is a matter for Mr Hussain to decide whether to give evidence on the committal application and even before he failed to appear at the trial he indicated that he intends to rely on his right of silence. He has not indeed served any witness statement on the substance of the matter in relation to the committal application as required by my order of 27 September 2021.
23. If Mr Hussain did wish to give evidence in relation only to the service application and not the substance committal application, the court would provide procedural safeguards to ensure that his evidence and any cross-examination was restricted to that issue. The claimants' counsel confirmed that there would be no objection to that course. His rights are not therefore being infringed. I do not consider there is anything in the first point.
24. The second point has no merit. It is right that the order of 27 September 2021 did not specifically give Mr Hussain liberty to put in evidence for the service application but it was always open to him to do so. The claimants could not have objected and (if needed) a simple variation of the order would have been made. Mr Hussain does not suggest that he in fact wished to put in evidence on the service application. He has put in evidence in support of a

number of interlocutory applications without any order of the court but not on service. That is his choice.

25. In para 24 of his written submissions Mr Hussain turns to a different point. He refers to the decision of the Court of Appeal in *Re K* [2014] EWCA Civ 905 and specifically a comment of Lord Justice McFarlane at [78] that the difficulty had arisen in that case because the judge who heard the committal proceedings had delivered a coercive message in earlier hearings and had done so in emphatic terms. Mr Hussain suggests that the language used in my decision of February 2021 was critical and robust and deprecating against the defendant. There is nothing in this point. As to the language used, it is appropriate where a court reaches firm views to express itself in suitably clear and muscular language. Indeed what I said there echoed words used by other judges in other hearings, where the steps taken by Mr Hussain and others were called legally absurd or spurious. I referred to what had happened as a corporate assault; and that appears to me to be a fair description of the many steps that had been taken by Mr Hussain and his associates up to February 2021 in relation to the issuers. This complaint bears no similarity to *Re K*. In that case the concern was that the judge had said, using very robust language, that the alleged contemnor was already in breach of the relevant orders of the court and could expect to be imprisoned. There is nothing analogous in the present case. The language that I used in the February 2021 judgment explained the reasons why I was granting an injunction. It had nothing to do with any suggestion that the injunction had been breached.
26. I do not consider, standing back and considering the matters raised by Mr Hussain in the round, that a fair-minded, properly informed observer would consider that there is a risk that I am unable to conduct the trial of the committal proceedings fairly and impartially. The application is dismissed and I also certify that the application is totally without merit.
27. Mr Hussain applies in the alternative for an order that the court should stay the committal proceedings pending an appeal to the Court of Appeal. I am not prepared to do this. I do not think there is any real prospect of permission to appeal being granted by the Court of Appeal. It seems to me that the recusal application being totally without merit, the Court of Appeal would dismiss any application for permission. A stay would disrupt a trial which has been in the court's diary for a long time and would therefore prejudice the claimants and other court users.