UCP Plc v Nectrus Ltd

Court
Court of Appeal (Civil Division)

2022 WL 02654984

Neutral Citation Number: *[2022] EWCA Civ 949*

Appeal Numbers: CA-2020-000025-B, CA-2020-000071-B,

and CA-2020-000094-B

Case No: CL-2017-000542

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QBD)

Royal Courts of Justice, Strand

London WC2A 2LL

Date: 11/07/2022

Before:

SIR GEOFFREY VOS, MASTER OF THE ROLLS

LORD JUSTICE UNDERHILL, VICE PRESIDENT OF THE COURT OF APPEAL (CIVIL DIVISION)

and

LORD JUSTICE LEWISON
B E T W E E N
UCP PLC
Claimant/Respondent
and

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NECTRUS LIMITED
Defendant/Applicant
Huw Davies QC and Felix Wardle (instructed by **Skadden, Arps, Slate, Meagher & Flom (UK) LLP**) appeared on behalf of the **Claimant/Respondent** (UCP).

Paul McGrath QC, Andrew Legg, and Edward Blakeney (instructed by **Hugh Cartwright & Amin**) appeared on behalf of the **Defendant/Applicant** (Nectrus)

Hearing date: 30 June 2022

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JUDGMENT

Sir Geoffrey Vos Master of the Rolls, Lord Justice Underhill and Lord Justice Lewison:

Introduction

1. This case raises issues about the circumstances in which judges should accede to an application to recuse themselves, and the process adopted in the Court of Appeal when parties apply to set aside permission to appeal and, separately, to re-open the final refusal of permission to appeal under CPR Part 52.30.

2. In the briefest outline, UCP brought these proceedings against Nectrus for breach of an investment management agreement. UCP claimed the losses it had suffered, in effect, resulting from the diminution in value of its shares in its subsidiary, Candor. After the quantum trial, on 29 November 2019, Sir Michael Burton, sitting as a High Court Judge, gave judgment awarding UCP some £7.8 million in damages, rejecting Nectrus' defence that the loss claimed was not recoverable by UCP as it was reflective loss that only Candor could recover. The most significant fact for present purposes is that UCP had sold Candor to a third party at a reduced value between the losses being incurred and the commencement of the proceedings.

3. Nectrus applied for permission to appeal Sir Michael's decision. On 29 May 2020, Lord Justice Flaux (the judge), as he then was, granted permission to appeal the reflective loss decision on a single ground (called Ground 2). The "information for or directions to the parties" on the permission to appeal (PTA) form read: "[w]hen the judgment(s) of the Supreme Court [from the Court of Appeal's decision in *Marex v Sevilleja [2019] QB 173* (*Marex CA*)] have been handed down, the matter is to be referred back to me [the judge] for further directions. As will be apparent from the Reasons, the grant of permission to appeal on Ground 2 is a contingent one". The judge's written reasons included the following:

On the basis of the law as it stands set out in my judgment in [*Marex CA*], it is arguable that the judge [Sir Michael Burton] erred in not concluding that UCP was precluded from recovery by the reflective loss principle. Whether my judgment does correctly state the law will depend upon the outcome of the appeal to the Supreme Court from that decision. Unfortunately the judgment(s) of the Supreme Court have not yet been handed down, so it seems appropriate to grant permission to appeal on Ground 2 on the contingent basis that the matter is referred back to me for further consideration when the judgment(s) of the Supreme Court have been handed down.

4. It seems clear that the judge's decision on this permission to appeal application (the PTA decision) was to grant permission, whilst directing that, once the Supreme Court had dealt with the appeal from *Marex CA*, the papers were to be returned to him to consider making further directions. Whilst it would have been open to the judge to grant permission to appeal subject to conditions under Part 52.6(2)(b), it does not appear that that is what he did.

5. Following the PTA decision, the Supreme Court's decision in *Marex v. Sevilleja [2020] UKSC 31*, *[2021] AC 39* (*Marex SC*) was handed down on 15 July 2020, reversing *Marex CA*. On 17 July 2020, Nectrus' solicitors wrote to the Civil Appeals Office (the 17 July letter) saying: "[f]ollowing [*Marex SC*], we write to request that permission to appeal now be confirmed unconditionally". The 17 July letter explained why Nectrus said that *Marex SC* supported its case on appeal, and argued that UCP's appeal in the same case should be stayed pending the resolution of its own appeal. It invited the Court of Appeal to "remove the contingent basis of its grant of permission to appeal", and to stay UCP's appeal. The 17 July letter concluded "[i]n

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the alternative, if the Court of Appeal would like further submissions from Nectrus or both parties on the issue of [reflective loss] before revisiting its decision to grant contingent permission to appeal, Nectrus asks the Court to make directions accordingly".

6. UCP's solicitors quickly informed the Civil Appeals Office that the parties were not in agreement, and wrote substantively on 21 July 2020 (the 21 July letter). The 21 July letter requested the "converse" of Nectrus' request "that permission to appeal now be confirmed unconditionally", namely that "permission to appeal now be refused on the basis of [*Marex SC*]". Having addressed the possibility of directions for further argument, the 21 July letter reiterated its request that Nectrus should be refused permission to appeal, concluding: "[a]lternatively, if the Court is not minded to adopt that course, the Court is requested to provide directions for the filing of further argument by the parties".

7. Thus, after the 17 and 21 July letters, the judge was faced with conflicting requests. Neither the parties nor the judge mentioned CPR Part 52.18 which provides that the appeal court may only set aside permission to appeal or vary the conditions upon which an appeal may be brought "where there is a compelling reason for doing so".

8. In the event, the judge decided the matter on paper on 24 July 2020 (the second PTA decision) as follows:

Decision: This application has been referred back to me at my direction to consider whether permission to appeal on Ground 2 should still be granted in the light of [*Marex SC*]. I consider that permission to appeal on Ground 2 should now be refused.

Reasons 1. In view of the limitation placed by the majority of the Supreme Court who considered that the rule against "reflective loss" should be maintained but only to the extent recognised by the Court of Appeal in *Prudential Assurance v. Newman Industries (No 2) [1982] Ch 204* [*Prudential*] where the claim in question was by a shareholder, I consider that the judge in the present case was right to conclude that the rule did not preclude the claim by UCP in the present case. 2. Given the reasoning and conclusion of the Supreme Court, Ground 2 is not arguable.

9. On 28 July 2020, Nectrus' solicitors wrote to the Civil Appeals Office saying that they considered that the second PTA decision was made on the judge's own initiative and that they intended to apply to set it aside under CPR Part 3.3(5). They sought an extension of the 7-day time limit for such an application, expiring on 31 July 2020, under CPR Part 3.3(6)(b), and said that they also intended to apply in the alternative under CPR Part 52.30 to re-open the refusal of permission to appeal. On 30 July 2020, the Civil Appeals Office emailed Nectrus' solicitors saying that the judge had directed that "any application [was] to be served by 4 pm on 31 July and he will if necessary deal with [it] before going on vacation". That direction manifestly applied to both intended applications.

10. Nectrus then applied on 31 July 2020 for the second PTA decision to be set aside under CPR Part 3.3(5) as an order made on the court's own initiative. On 3 August 2020, the Civil Appeals Office informed the parties by email that the judge had directed that the second PTA decision "was not made on his own initiative, but in response to [the 17 July letter]" to which UCP had responded. The email indicated that the application under CPR Part 3.3(5) would not be issued on the basis that it was not appropriate, and directed Nectrus to apply under CPR Part 52.30 if it wished to set aside the second PTA decision.

11. Ultimately, on 28 September 2020, Nectrus applied to re-open Nectrus' appeal under CPR Part 52.30 and to set aside the second PTA decision (the first Part 52.30 application), requesting on the form that the application be heard by a judge other than Flaux LJ. The skeleton argument accompanying the application argued at [24]-[26] for the judge's recusal on the basis of criticism levelled at the procedure the judge had adopted as to submissions and the CPR Part 3.3(5) application. Nectrus relied also on *Zuma's Choice Pet Products Ltd v. Azumi Limited [2017] EWCA Civ 2133* (*Zuma's Choice*), where the Court of Appeal had said at [29]-[30] that a recusal might be appropriate where "in the past the judge has expressed a final, concluded view on the same issue as arises in the application".

12. On 1 October 2020, Nectrus' solicitors emailed the court reminding it that Nectrus was seeking that its first Part 52.30 application be considered by a judge other than Flaux LJ. On 2 October 2020, the Civil Appeals Office emailed to say that: "[a] Lord or Lady Justice as a professional judge will have no difficulty changing his or her mind if grounds are shown - typically, new material or arguments - justifying such a reconsideration. If the Lord or Lady Justice is of the opinion that he or she cannot fairly determine the application, it will be referred to another judge". On 5 October 2020, Nectrus' solicitors emailed the Civil Appeals Office noting the position and saying that Nectrus "will of course respect the decision of whichever Lord or Lady

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Justice of Appeal is asked to determine [its] application". On 3 November 2020, the Civil Appeals Office emailed Nectrus' solicitors saying that the judge had "directed that the application to re-open shall be listed at an oral hearing before him, on notice to [UCP]".

13. The judge held a substantive oral hearing of the first CPR Part 52.30 application on 13 January 2021 and delivered a reserved judgment and order on 21 January 2021 (the first Part 52.30 decision) in which he refused permission to re-open the second PTA decision by dismissing the application. Nectrus contended that the judge behaved in an inappropriately hostile manner towards Nectrus at that hearing, but ultimately did not place much weight on this contention. The judge rejected the argument that the integrity of the litigation process had been fatally undermined. He relied on the fact that the 17 July letter had nowhere specifically asked for the opportunity to file further submissions and on Nectrus' delay. The judge also held, having considered *Marex SC* and the decision of the Cayman Islands Court of Appeal in *Primeo Fund v. Bank of Bermuda (Cayman) Ltd*, 13 June 2019, CICA (Civil) Appeal No 21 of 2017 (*Primeo CICA*), that the rule against reflective loss should be assessed when the claim is made rather than when the loss was sustained, and that Nectrus' appeal on the point was unarguable. Accordingly, the judge dismissed the first Part 52.30 application.

14. On 11 November 2021, Nectrus applied again under CPR Part 52.30 (the second Part 52.30 application) to set aside both the second PTA decision and the first Part 52.30 decision. It became clear in the course of argument that the application was intended to be a rolled-up hearing of both (a) the application for permission to re-open the final determination contained in the second PTA decision under CPR Part 52.30(4), and (b) the application to re-open that decision if permission were granted. Mr Huw Davies QC, leading counsel for UCP, accepted that he was prepared to deal with both, despite the fact that the distinction had not previously been expressly drawn.

15. The second Part 52.30 application followed some three months after the decision of the Privy Council on 9 August 2021 in *Primeo Fund v. Bank of Bermuda [2021] UKPC 22* (*Primeo PC*), reversing *Primeo CICA*. *Primeo PC* decided expressly at [61] that the judge had been wrong to decide that *Marex SC* meant that Nectrus' appeal was unarguable. Indeed, *Primeo PC* decided that the question of whether a claim was barred by the reflective loss principle had to be judged at the time when the cause of action accrued and not when the proceedings were initiated. In theory, therefore, UCP's claim would have been barred by the reflective loss principle as it had not sold Candor when its cause of action arose. We can assume for the purposes of this judgment, without deciding, that the decision in *Primeo PC* makes it likely that Nectrus would succeed in its reflective loss arguments, if it were now to be permitted to appeal Sir Michael's decision.

16. Mr Paul McGrath QC, leading counsel for Nectrus, put the case rather differently in oral argument from what had appeared in previous leading counsel's written submissions. He submitted, in essence, that the first question for the court was whether the judge's conduct leading up to the first Part 52.30 application was affected by apparent bias. Actual bias was not alleged. If there were apparent bias, then the first Part 52.30 decision would have to be disregarded or set aside for the purposes of the consideration of the second Part 52.30 application. That is how Nectrus sought to overcome CPR Part 52.30(7) which provides that "[t]here is no right of appeal or review from the decision of the judge on the application for permission [under CPR Part 52.30(4)], which is final". At this first stage of his argument, Mr McGrath relied upon 4 elements of apparent bias as follows:

i) The judge's refusal to call for or permit full submissions before determining the second PTA application.

ii) The judge's refusal to permit or extend time for the issue of an application to be made under CPR Part 3.3(5).

iii) The judge's imposition on 30 July 2020 of a time limit expiring on 31 July 2020 for the issue of an application under CPR Part 52.30.

iv) The fact that the judge had already finally decided the substantive point on the application of *Marex SC* to Nectrus' appeal in the second PTA decision, so that his mind was closed to the contrary argument.

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In these circumstances, Mr McGrath submitted that the judge ought to have acceded to Nectrus' request to recuse himself from hearing the first Part 52.30 application.

17. The second stage of Mr McGrath's argument was based upon the well-established principles applicable to CPR Part 52.30 applications. He submitted that CPR Part 52.30(1) was directly applicable because: (a) it was necessary to re-open the second PTA decision in order to avoid real injustice, (b) the circumstances were exceptional and made that appropriate, and (c) there was no alternative effective remedy. He said that the tests adumbrated in a series of recent cases were satisfied (see the summary of the law at [57]-[64] in *Municipio de Mariana and v. BHP Group plc [2021] EWCA Civ 1156* , *[2022] 1 WLR 919* Practice Note (*Municipio de Mariana*)). In essence, Mr McGrath submitted that the integrity of the second PTA application had been critically undermined, and that there was a real possibility that an erroneous result had been arrived at. The very high hurdle that needed to be surmounted had indeed been reached.

18. Mr Davies did not contest the legal principles on which Nectrus relied. He argued that it was entirely acceptable for a judge who had decided a case on paper to resolve a challenge to that decision (see, for example, *Bubbles & Wine Ltd v. Lusha [2018] EWCA Civ 468* per Leggatt LJ at [17]-[18], *Broughal v. Walsh Bros Builders Ltd [2018] EWCA Civ 1610* per Patten LJ at [30]-[35]). The judge was entirely capable of maintaining an open mind, as the Court of Appeal's standard response indicated. Here, Nectrus only had itself to blame because the 17 July letter never asked the judge to allow further submissions, and the judge had been right to decide that he had not made the second PTA decision on his own initiative. Nectrus had delayed inappropriately at every stage of a process that had to be undertaken promptly. Moreover, the economic position had changed and third parties would be affected if the second PTA decision were re-opened.

19. Against this background, it seems to us that the following issues arise for decision:

i) Whether the judge's handling of the first Part 52.30 application was affected by apparent bias;

ii) Whether the judge ought to have recused himself from making the first Part 52.30 decision;

iii) Whether the judge's first Part 52.30 order and second PTA decision should be set aside;

iv) Whether (a) permission should be granted to apply to re-open the second PTA decision, and (b) whether the second PTA decision should be re-opened.

20. We emphasise, as CPR Part 52.30(1)(b) provides, and as the authorities emphasise, that final decisions on permission to appeal applications will only be re-opened in exceptional circumstances. That is even more so, where the court is faced with a second Part 52.30 application as in this case. We have nonetheless decided, for the reasons that follow, that the judge's first Part 52.30 decision should be set aside for apparent bias. The judge ought, in the very unusual circumstances of this case, to have recused himself from hearing the first Part 52.30 application, in essence because his own fairness in making earlier procedural decisions was under direct challenge. This application is in the circumstances the first occasion on which the court has been asked to re-open the second PTA decision under CPR Part 52.30. We have concluded that it should be re-opened, because: (a) the tests in CPR Part 52.30(1) are satisfied, (b) the integrity of the second PTA application was critically undermined, and (c) we are entitled to assume, in the light of *Primeo PC*, that it is likely that Nectrus will succeed in its reflective loss arguments if it is allowed to appeal Sir Michael Burton's decisions, so that there is at least a powerful possibility that those decisions were wrong.

Was the judge's handling of the first Part 52.30 application affected by apparent bias?

21. The test applicable in a case of apparent bias was common ground. It was established by Lord Hope at [102]-[103] in *Porter v. Magill [2002] 2 AC 357* (*Porter v. Magill*). The test so established was:

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The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.

22. We have already described the most important circumstances in the introduction to this judgment. In considering whether any of the four circumstances set out at [16] above and relied upon by Nectrus did amount to apparent bias, one can perhaps distinguish between situations in which the judge is being asked to reconsider an issue in the light of new circumstances or new arguments on the one hand, and where the judge's own conduct is being challenged on the other hand.

23. It is extremely common, as the cases cited by UCP demonstrate, for judges to be asked to review their own decision in the light of new circumstances or arguments. It is an essential part of a judge's role to maintain an open mind, to be able to change their mind and to evaluate new arguments fairly. It is, however, rather different if it is being suggested that the judge has behaved unfairly. The test, of course, remains whether the circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility of bias, and a mere allegation of unfairness would not in all cases justify such a conclusion. But it might be thought that the fair-minded observer would be more likely to sense a real possibility of bias in circumstances where the judge is said to have adopted a process which was unfair in more than one respect. In our judgment, this is what happened in this case.

24. The first allegation concerning the judge's refusal to allow full submissions in July 2020 needs to be considered with a little care. There are countless procedural applications where judges receive letters of submission from the parties and then quite properly decide between them without waiting for formal skeleton arguments. In this case, however, the judge was, as a starting point, dealing with an unusual and difficult application. He thought of the application as a reference back at his own direction "to consider whether permission to appeal should still be granted" in the light of *Marex SC*. In fact, as we have explained, the application was a somewhat unusual one under CPR Part 52.18 to set aside permission to appeal that had been granted. It could only be granted if there were a compelling reason to do so. Given the judge's familiarity with *Marex CA*, it is perhaps not surprising that he considered himself well-suited to decide the question. Nonetheless, we think that the judge was mistaken not to call for full submissions, particularly when he knew that the two sides took diametrically opposite views of what *Marex SC* had actually decided. When this omission was later the subject of detailed argument on 13 January 2021, the judge justified not requesting submissions on the basis that the 17 July letter did not expressly ask for the opportunity to make further submissions. In fact, the 17 July letter was ambiguous. Although the final paragraph offered to provide further submissions "if the Court … would like", it is strongly arguable that, in context, that meant that the judge was being asked to seek further submissions if he was contemplating withdrawing permission. Be that as it may, that was not the main point. The judge was being asked to set aside permission to appeal that he had himself granted. In our view, that required full argument from both sides when the judge knew that they were very much not in agreement. The application was quite as important as the PTA decision, if not more so. It depended on a correct interpretation of *Marex SC*, in respect of which he knew the parties had quite different views.

25. In our judgment, the second and third allegations, namely the refusal to permit, or extend time for, a Part 3.3(5) application, and setting a 24-hour time limit for the CPR Part 52.30 application, compounded this error. That is not because it was not open to the judge to take the view that he had not made the second PTA decision on his own initiative. It was. It is because the judge would have appeared to the fair-minded observer to be taking an unorthodox and ever-harder line with Nectrus. On 28 July 2020, Nectrus suggested a CPR Part 3.3(5) application and sought a short extension for it. The judge responded on 30 July 2020 by setting a 24-hour deadline for both that application and an application under CPR Part 52.30 and said that he would "if necessary deal with [it] before going on vacation". There was no urgency and the vacation was not a good reason to impose it. When Nectrus applied under CPR Part 3.3(5), as directed on 31 July 2020, the judge responded on 3 August 2020 by directing that the second PTA decision "was not made on his own initiative", and that the application was not appropriate and would not, therefore, be permitted even to be issued. That too was, at least, an unorthodox response, which foreclosed argument on the proper interpretation of the 17 July letter.

26. By that stage, we take the view that the fair-minded observer might reasonably have taken the view that the judge had become unjustifiably antagonised by Nectrus' persistence. The three circumstances taken together satisfy the test in *Porter v. Magill*. The real question here, is, of course, whether the judge's handling of the first Part 52.30 application was affected by apparent bias. But the fact that the fair-minded observer would have thought there was a real possibility of bias by 3 August 2020 affects the question of whether the judge ought to have recused himself from hearing the first Part 52.30 application.

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27. We should emphasise that the fourth circumstance, namely that the judge had already decided on paper the substantive point on the application of *Marex SC* to Nectrus' appeal in the second PTA decision, certainly does not, by itself, satisfy the test of apparent bias. Here, it is the backdrop against which the other circumstances occurred. As will appear in the next section, we think that the judge ought to have been sensitive to the fact that he had reached such a decision, when he considered the recusal application.

Ought the judge to have recused himself from making the first Part 52.30 decision?

28. Two months passed after the three circumstances we have described as giving rise to apparent bias, until, on 28 September 2020, Nectrus made its first Part 52.30 application and applied within the application itself and in the supporting skeleton argument that the judge should recuse himself. Three days later, on 1 October 2020, Nectrus reminded the court of its recusal request.

29. Nectrus received a reply from the court on 2 October 2020. It was the standard form that is used when parties suggest that a different judge should hear a CPR Part 52.30 application. It said, as is the case, that the judge, as a professional judge, would have no difficulty changing their mind if grounds, such as new material or arguments, were shown to justify such a reconsideration, and that the judge would, himself, decide whether or not they could fairly determine the application. The judge made that determination a month later on 3 November 2020 when he directed that he would hear the first Part 52.30 application himself. But he did not give any reasons for declining the request that he should recuse himself. He also directed that the application would be heard on notice to UCP. That direction seems to have been one made under CPR Part 52.30(6); the judge did not grant permission for the second PTA decision to be re-opened.

30. Accordingly, in our judgment, the judge had, by 3 November 2020, decided that he would not recuse himself. We do not think that that is affected by Nectrus' solicitors' response to the standard form reply saying they would respect the decision of whoever was asked to determine the first Part 52.30 application. Nor do we think that the fact of the judge's decision not to recuse himself on 3 November 2020 is affected by the fact that the application was not renewed orally at the hearing on 13 January 2021. It is slightly odd that, when [24]-[26] of Nectrus' skeleton for the first Part 52.30 application sought recusal, no mention of the subject was raised at the hearing or in the judgment on that application. That said, we can understand that, once the judge had directed that he should hear the case, knowing that recusal had been sought, Nectrus' counsel may not have wished to exacerbate the situation. Contrary to UCP's submissions, we do not think that the failure to raise the matter again after 3 November 2020 affects the question of whether or not the judge ought to have recused himself.

31. It is instructive to set out [24]-[26] of Nectrus' skeleton. It seems clear that the judge saw these paragraphs before he directed that he should hear the first Part 52.30 application:

24. It is respectfully submitted that it would be appropriate for a Lord Justice of Appeal other than Flaux LJ to consider the present application in view of the criticism levelled both (i) at the procedure adopted by Flaux LJ in withdrawing permission to appeal without allowing Nectrus to replace its skeleton argument or otherwise affording it an opportunity to make its case on *Marex*, and (ii) Flaux LJ's involvement in refusing to issue Nectrus' application to vary or set aside the order pursuant to CPR 3.3(5) to permit Nectrus the opportunity to be heard.

25. In [*Zuma's Choice*], the Court of Appeal considered a recusal application in the context of CPR 52.30, stating at [29] that "The mere fact that a judge has decided applications or issues in the past adversely to a litigant is not generally a reason for that judge to recuse himself at further hearings". That of course is not the situation here. The Court of Appeal went on at [30] to say: "The position might well be different if in the past the judge has expressed a final, concluded view on the same issue as arises in the application".

26. Accordingly, while it is accepted that merely refusing permission to appeal would not constitute grounds for a Lord or Lady Justice of Appeal to be recused from determining a CPR 52.30 application to open the appeal in the same matter, a substantial part of the complaint in the present application is that Flaux LJ ought to have received submissions from Nectrus on [*Marex SC*] before withdrawing its permission to appeal. That precise issue was raised in Nectrus' application under CPR 3.3(5), which

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Flaux LJ was involved in refusing to issue. In these circumstances it would be appropriate for the application to be placed before a differently constituted Court.

32. With the exception of the third circumstance now relied upon (the imposition on 30 July 2020 of a time limit expiring on 31 July 2020 for the issue of an application under CPR Part 52.30), the way that Nectrus put its original application for recusal bears a close similarity to the submissions made to us as to why the judge ought to have recused himself.

33. UCP relied on passages in the authorities indicating that a party, which delays in applying for a recusal or which makes no objection to the judge hearing the case, cannot later complain that he should have recused himself (*Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451* at [25]-[26], and [68]-[69], and *Baker v. Quantum Clothing Group [2009] EWCA Civ 566* at [36]). It is true that Nectrus delayed some two months before making its first Part 52.30 application and delayed again in making its second Part 52.30 application. Whilst not condoning those delays, we do not think that the first was fatal to Nectrus' ability to make the well-considered complaints that it made in [24]-[26] of its skeleton argument on 28 September 2020. Nor do we think that the second delay was of any great consequence. A CPR Part 52.30 application is, as Nectrus has said, a serious matter and the judge was being somewhat optimistic to expect it to be put together between the 30 and 31 July 2020. CPR PD 52A at [7.2] provides that "[t]he application for permission must be made by application notice and be supported by written evidence, verified by a statement of truth".

34. In our judgment for the reasons we have already given, the circumstances relied upon by Nectrus in [24]-[26] of its skeleton argument should have made it apparent to the judge that any decision he made on the first Part 52.30 application would be affected by apparent bias. As we have said, the fourth circumstance (the fact that he had already decided the substantive point against Nectrus) would not, by itself, have been sufficient, but the judge ought to have been sensitive to the fact he had already taken a clear view of the substantive issue. Moreover, though the third circumstance was not initially mentioned by Nectrus, the judge would have been aware that he had set Nectrus an unreasonably short time to make the first Part 52.30 application.

35. In the course of hearing this application, we have had the opportunity to consider the appropriateness of the standard form response (see [12] and [29] above) that the Civil Appeals Office makes when parties suggest that a CPR Part 52.30 application should be heard by a judge other than the one who decided the original appeal or permission to appeal. That response seems to us to be an appropriate first response, but it should not be thought of as a substitute for a proper judicial consideration of whether the judge should recuse himself (as happened here on 3 November 2020) in all the circumstances of the case.

36. As the standard response itself says: a professional judge will have no difficulty changing his or her mind if new material or arguments justify doing so. Judges asked to recuse themselves should be careful to identify the grounds on which they are asked to do so. In this case, the grounds included allegations of repeated procedural unfairness to one party. That is a circumstance that may, if there is any substance to it, be thought to raise at least the possibility that recusal would be appropriate. Cases turn on their particular facts and we would not wish to lay down cumbersome and unworkably prescriptive rules. We would, however, urge judges to think carefully about whether it is appropriate for them to hear a CPR Part 52.30 application in any case where their own procedural decisions are under attack on the grounds of fairness. Moreover, in refusing an application to recuse, judges should give reasons for doing so, even if they are brief. That said, we see no reason to change the standard practice of the Civil Appeals Office. Successful applications under CPR Part 52.30 are rare. In our experience, many such applications make unsubstantiated and repetitive allegations which can both conveniently, efficiently and justly be dealt with by the judge most familiar with the case.

37. In the circumstances we have described, the judge ought to have recused himself from making the first Part 52.30 decision. That decision must, therefore, be set aside.

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Should the judge's first Part 52.30 order and second PTA decision be set aside?

38. In these circumstances, both the first Part 52.30 order and the second PTA decision must be set aside.

Should (a) permission be granted to apply to re-open the second PTA decision, and (b) the second PTA decision be re-opened?

39. On a proper analysis, therefore, we are faced with a situation in which there has, as yet, been no effective application under CPR Part 52.30 to set aside the second PTA decision. This hearing is that application.

40. The central question is whether the integrity of the second PTA application has been critically undermined. For the reasons we have explained at [24] above, we think that the judge was mistaken not to call for full submissions. He knew that the two sides took diametrically opposite views of what *Marex SC* had decided. The judge was being asked to set aside permission to appeal that he had himself granted, and he did so without full argument. The application was possibly even more important than the PTA decision. It might have been better if one of the parties had made clear that UCP needed to apply to set aside the permission to appeal that had been granted under CPR Part 52.18 on the grounds of compelling reasons. But even without that insight, it is clear that the integrity of the process of deciding whether to set aside the PTA decision was critically undermined. Moreover, applying the tests in CPR Part 52.30(1): (a) it is plainly necessary to re-open the second PTA decision in order to avoid real injustice, (b) the circumstances are exceptional and make that appropriate, and (c) there is no alternative effective remedy. The tests identified at [57]-[64] in *Municipio de Mariana* are satisfied. It is not correct, as UCP submitted, to say that Nectrus only had itself to blame. The 17 July letter may not have been as clear as it could have been, but for the reasons we have given, the judge ought to have realised that setting aside the permission he had granted was a serious and consequential step. We have dealt above with Nectrus' delay in applying under CPR Part 52.30. The fact that economic circumstances have changed does not, in these circumstances, affect the matter. Finally, we are satisfied for the reasons already given that there is at least a powerful probability that an erroneous result has been arrived at.

Conclusions

41. For the reasons we have given, Nectrus' second Part 52.30 application will succeed.

42. Realistically, UCP addressed no argument to whether, if we reached, as we have, the conclusion that both the first Part 52.30 order and the second PTA decision must be set aside, Nectrus should also have its permission to appeal on ground 2 under the PTA decision of 29 May 2020 confirmed. Ground 2 contended that Sir Michael Burton was wrong not to conclude that UCP was precluded from recovery by the reflective loss principle. We confirm that Nectrus has permission to appeal to the Court of Appeal on that ground.

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