GENERAL MEDICAL COUNCIL

FITNESS TO PRACTISE PANEL (MISCONDUCT/PERFORMANCE)

On:
Monday, 2 July 2007

Held at:
St James's Buildings
79 Oxford Street
Manchester M1 6FQ

Case of:

GORDON ROBERT BRUCE SKINNER MB ChB 1965 Glasg SR
Registration No: 0726922
(Day One)

Panel Members:
Prof M Whitehouse (Chairman)
Mrs S Sturdy
Mr W Payne
Mrs K Whitehill
Mr P Gribble (Legal Assessor)

MR A JENKINS, Counsel, instructed by RadcliffesLeBrasseur, Solicitors, appeared on behalf of the doctor, who was present.

MR T KARK, Counsel, instructed by Eversheds, Solicitors, appeared on behalf of the General Medical Council.

Transcript of the shorthand notes of Transcribe UK Ltd
Tel No: 01889 270708

INDEX

(*The hearing commenced in private – see separate transcript*)

THE CHAIRMAN: Mr Jenkins.

MR JENKINS: Sir, I think you will want to open the proceedings by asking the parties whether there are any preliminary legal arguments. Can I assume you have done that?

THE CHAIRMAN: Well, I will do it. The fact is that we know that there is a preliminary argument.

MR JENKINS: Yes indeed, but I say it for the sake of the record and for those who have just come into the room.

Sir, the argument I would like to place before you is that you should withdraw from the case, you personally, on the basis that you know a witness who is to be called on Dr Skinner's behalf. Sir, as you know, we wrote to the General Medical Council to indicate that we will be calling a patient of Dr Skinner's, Sue Conway, as a factual witness. We indicated that she is someone who is known to you. In fact, I think you and she have known each other for very many years. We got the response from the General Medical Council that you would continue to sit as Chairman of this Panel because you felt comfortable in considering the case, not withstanding that you know Mrs Conway. What my instructing solicitor was told over the telephone was that you do not know her that well. Sir, you nod, but I wonder if I could invite you to confirm, for the sake of the record, that that is in fact the case, that you do not know her that well.

THE CHAIRMAN: I have known her for a good many years. She is married to someone who was a student with me at Cambridge, who is my senior. So I have known her for many years. I am not sure what well or otherwise means. We meet two, three, perhaps four times a year, and I know her as well as I know some others. She is not an intimate friend.

MR JENKINS: Sir, can I ask you to indicate whether you have been on holiday with her in the past?

THE CHAIRMAN: Yes, we have had a holiday together, yes.

MR JENKINS: Can I ask you to indicate whether she was invited to your home on Saturday evening last, two days ago, as a dinner guest?

THE CHAIRMAN: She was.

MR JENKINS: Her husband I think is a very old friend of yours from university days. Your two families I think have been very close, and your wife is an extremely good friend of Sue Conway. Can I ask if that is right?

THE CHAIRMAN: She is a friend of Sue Conway, yes.

MR JENKINS: I think you know that Sue Conway has discussed her medical condition with your wife, certainly for very many years?

THE CHAIRMAN: She did not know that, but that maybe the case.

MR JENKINS: You, sir, have been involved in suggesting the names of doctors that Sue Conway may consider consulting.

THE CHAIRMAN: I have to put that into perspective. Many, many people, because I am a cancer specialist, and have been a cancer specialist in the past, approach me for advice of one kind or another. Usually advice about who they might see. In the case of Mrs Conway, she asked if there were endocrinologists in Southampton, and I happened to give her the name of the one I knew of, but that is the extent of the advice that I gave her.

MR JENKINS: Sir, the suggestion I make is that if you know anything about a patient who is to be a witness in the case it is wholly inappropriate that you should sit, not, I suggest immediately, because there maybe any, there is any bias, but that a fair minded and reasonable observer may consider that there maybe bias. Again, I propose to call Mrs Conway as a factual witness within these proceedings, and I anticipate there maybe some legal argument as to when she should be called. I would like to call her in the factual part of the hearing, I anticipate Mr Kark will resist that and say she can be called at a later stage, but, sir, whenever she is called as a witness you know her, you have known her for, is it 30 years, and it is wholly inappropriate that you should sit in judgment on her accuracy, her reliability and her credibility.

The issues that this case touches upon are the appropriateness of thyroid replacement therapy, and there is a debate that I anticipate the Panel that hears this case will have to be heavily immersed in, and there are experts on both sides who will give evidence as to whether Dr Skinner's practise with regard to prescribing for patients was appropriate or not, and Sue Conway has a lot to say about her own medical history and how she feels she was failed by many doctors until she was treated by Dr Skinner. I want to call her, as I say, in the factual part of the case, because her evidence clearly touches upon whether Dr Skinner's prescribing for other patients in a similar manner as he did to her, whether that was appropriate or not.

Again, because you know her and have known her for many years, it is not appropriate for you to sit on the case. If you have views about her, about her reliability or integrity, I would not know what those were. It turns you immediately into a witness in the case, and it has been impertinent of me to ask you questions that I have already, but I certainly could not throughout the course of the hearing ask you, what do you think of Sue Conway. You would take your views into the deliberations of the Panel, whenever those would be, and I would not be able to meet them or address them. Similarly, so far as any legal argument is concerned, whether I could call her in part one or at any later stage, you would be tainted by knowing her, you could not involve yourself fairly or dispassionately in any such legal argument, and it is for those reasons I say that you should withdraw from the case.

So I am afraid I am going to burden you with some authority. It is quite a lot of paper I am afraid. Mr Kark has had some but not a great deal of notice of the particular authorities

that I am going to refer to, but I know that he has been aware of the point for some time and the concerns that we have about you sitting.

Can I hand in a case called *Porter v Magill [2001] UKHL 67*, you should not be too apprehensive of the size of the bundle, because I am only going to refer to small parts of it. This is a pronouncement of the House of Lords on the question of bias, or apparent bias, or the possibility of bias.

THE CHAIRMAN: We shall make this D1.

MR JENKINS: Thank you. (*Same handed to the Panel*) This is a case in which the Panel will recall, it concerns Dame Shirley Porter, when she was Chairman I think of Westminster City Council, and the decision to sell off certain council homes, and the allegation in general terms was one of gerrymandering. Can I take you through the head note. Again, I will not deal with all of it but just those sections which assist you to understand the substance of the case. It reads as follows:

> "In the local government elections in May 1986 the Conservative Party retained control of a city council with a much reduced majority. In a belief that home owners were more likely than council tenants to vote Conservative, P and W, the leader and deputy leader of the council formulated a policy to sell, pursuant to powers under Section 32 of the Housing Act 1985, 250 council properties a year in eight marginal wards. Following legal advice that such targeted sales would be unlawful, the policy was revised to extend designated sales to 500 across the city whilst maintaining the target of 250 sales in the marginal wards."

I miss the next couple of sentences.

> "Measures to implement the policy were introduced and the progress of the policy was monitored. Opposition councillors objected that the policy prevented the council from meeting its statutory obligations as a housing authority, and in July 1989 gave notice of that objection to the auditor under Section 17 of the Local Government Finance Act 1982. The objectors requested that the council's auditor certify a sum due to the council as a result of wilful misconduct under section 20 of the 1982 Act on the ground that all expenditure arising from the policy was unlawful. Having completed his investigation into the statutory objections in January 1994, the auditor announced his provisional findings in a press statement which attracted considerable publicity. He also made such findings available to those he had interviewed, including P and W and invited submissions. After an audit hearing and further evidence on quantum of damages, in May 1996 the auditor gave a final decision. In reaching his conclusion the auditor found, with regard to P and W, that the council had adopted a policy with the predominant purpose of achieving electoral advantage for the majority party, that P and W were party to its adoption and implementation in the knowledge that it was unlawful, and that the policy so promoted and implemented by them had caused financial loss to the council,"

A

And it goes on to say that he certified the loss of approximately £31M.

If I can take you over the page to the second paragraph:

> "On appeal by the auditor and on the questions of whether the conduct of his investigation had been fair and P's and W's rights under article 6(1), as scheduled to the Human Rights Act 1998, had been infringed,"

B

And it then goes on to list a number of findings, the majority of which I need not trouble you. Can I take you to number three towards the bottom of that page.

Towards the bottom of that page there is reference to Convention Rights – those are human rights – but I will take you over the page, if I may, seven lines down, which reads as follows as one of the findings:

C

> "That the appropriate test in determining an issue of apparent bias was whether the fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased; that since the auditor had emphasised in his public statement that is findings were provisional, since a progress statement would have been appropriate in view of the public interest in the matter and having regard to his subsequent conduct, no real possibility of bias was shown."

D

That is all I would take from that but take you on, if I may, please, to the various passages in the judgments that may be relevant. You will be pleased to hear that I take you to page 70 straightaway. At the top of page 70, we are right at the very end of a very lengthy judgment of Lord Bingham. He deals with the question of impartiality of the auditor and the fairness of investigation in paragraph 57, right at the top of the page. Mercifully it is the only reference that he has in his long judgment to the issue. He says as follows:

E

> "Before the Divisional Court and in the Court of Appeal Dame Shirley Porter and Mr Weeks challenged the impartiality of the auditor, the fairness of his investigation and the time taken to carry out the audit. The challenge was very fully considered by the Divisional Court but failed both in that court and in the Court of Appeal. The challenge has been further pursued by this House. It must in my opinion be rejected for the detailed reasons given by my noble and learned friend Lord Hope of Craighead."

F

G

The next Judgment is that of Lord Steyn, who says he is in complete agreement with the opinion of Lord Bingham:

> "I am also in complete agreement with the reasons given by my noble and learned friend Lord Hope of Craighead in regard to the issues of impartiality, fairness and delay."

H

He would also allow the appeal.

We then, sir, come on at paragraph 60 to the Judgment of Lord Hope. He says:

> "I have had the advantage of reading in draft the speech of my noble and learned friend Lord Bingham of Cornhill. I agree with all that he has said on the issue of liability and, subject to some observations of my own, with what he has said on the issue of quantum. I wish to concentrate in this speech with the remaining issues in the case, which are those of impartiality, fairness and delay."

Can I then take you on, please, to page 80? He deals with the question of apparent bias at paragraph 95:

> "I turn now to the question whether the auditor's certificate should have been quashed on the ground of apparent bias. The respondents submit that the way in which the auditor conducted himself when he made his statement on 13 January 1994 indicated an appearance of bias on his part which affected all stages of his investigation both before and after that date.
>
> Both the Article 6(1) Convention right to an independent and impartial tribunal and the respondents' rights to an unbiased judge at common law as it was understood before the coming into effect of the relevant provisions of the Human Rights Act 1998 are invoked under this heading.
>
> As I have said, the statement which the auditor made on 13 January 1994 received considerable publicity on television and in the newspapers. The Divisional Court saw video recordings of the relevant item on the 1 pm and 9 pm BBC TV news…"

and goes on to give a description of the event which I need not read to you. Paragraph 97:

> "In the reasons which he gave on 18 October 1994 for deciding not to disqualify himself the auditor said that he was mindful of the serious nature of the allegations made against the respondents, that he had been careful to give them a full opportunity to respond to these allegations and his provisional findings, that he retained an open mind and that he was not biased against any individual or the council. He went on to say:
>
> 'I am not biased. I have acted fairly and will continue to do so. I will exercise impartial, independent and objective judgment. I will reach a decision on the evidence and submissions before me. I will not reach any decision adverse to the council and/or to any respondent unless I am satisfied on the basis of the evidence that I am under a duty to do so. All parties will get a fair hearing from me.
>
> In my consideration of the disqualification application, I have sought to apply the test formulated in *R v Gough* [1993] AC 646, namely

> "whether, in all the circumstances of the case, there appeared to be a real danger of bias…". In my view, a person having ascertained the relevant circumstances would not consider that I will regard unfairly any person's case with disfavour. It has been suggested that I will find it difficult to depart from my provisional findings and views because of the publicity given to these. I feel no such inhibition. Nor, in my view, is there any ground on which I should reasonably be thought to be so inhibited. I have always made it plain that before reaching any conclusion I will consider any representations made to me. In my view, that is a process which necessarily conveys to any reasonable person the point that my conclusions may not coincide with my provisional findings and views. My view is that no real danger of bias exists and nor is there any other basis on which I should disqualify myself.'"

There then follows a passage from the Divisional Court, again which I think I do not need to read. Paragraph 99 reads as follows:

> "The test for apparent bias which the auditor sought to apply to himself, and was applied in its turn by the Divisional Court, was that which was described in *R v Gough* by Lord Goff of Chieveley where he said at page 670:
>
> 'I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily have been available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him."

There are then references to cases decided in Australia and Scotland which I need not take you to. Over the page, if you would, reference to the English Courts being reluctant to depart from the test which Lord Goff had so carefully formulated in the case of *R v Gough*. I do not read the rest of that paragraph but I read the next, 102:

> "In my opinion however it is now possible to set this debate to rest. The Court of Appeal took the opportunity in *re Medicaments and Related Classes of Goods (No 2)* to reconsider the whole question. Lord Phillips of Worth Matravers Master of the Rolls, giving the judgment of the court, observed, that the precise test to be applied

when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough* had not commanded universal approval. At page 711 he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v Gough* to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions.

'When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. 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.'

I respectfully suggest that your Lordships should now approve the modest adjustment of the test in *R v Gough* set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. 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.

Turning to the facts, there are two points that need to be made at the outset. The first relates to the auditor's own assertion that he was not biased. The Divisional Court said … that it had had particular regard to his reasons for declining to recuse himself in reaching its conclusion that he had an open mind and was justified in continuing with the subsequent hearings. I would agree that the reasons that he gave were relevant, but an examination of them shows that they consisted largely of assertions that he was unbiased. Looking at the matter from the standpoint of the fair-minded and informed observer, protestations of that kind are unlikely to be helpful. I think that [Lord Justice] Schiemann adopted the right approach in the Court of Appeal when he said that he would give no weight to the auditor's reasons."

The second point is made there. I do not know that it is helpful here but, of course, your attention may be drawn to it by others.

He says at paragraph 105:

> "I think it is plain, as the Divisional Court observed, that the auditor made an error of judgment when he decided to make his statement in public at a press conference. The main impression which this would have conveyed to the fair-minded observer was that the purpose of this exercise was to attract publicity to himself, and perhaps also to his firm. It was an exercise in self-promotion in which he should not have indulged. But it is quite another matter to conclude from this that there was a real possibility that he was biased"

Sir, I should take you on to the conclusion, page 88, just so that you have it, on the question of unfairness, paragraph 118. He says:

> "For these reasons I would hold that the proceedings as a whole did not infringe the respondents' Convention rights and that there was no unfairness at common law on the ground either of apparent bias or of delay."

Sir, that is all I take from that decision. I am sorry if parts of it were tedious. What one takes from it is this – the proper test to be applied is to determine the facts and in this case it is your knowledge of Mrs Conway and the dealings you have had with her over 30 years or so; the fact that you have been on holiday with her; the fact that you see that couple on a fairly regular basis and, indeed, she was a dinner guest at your home as recently as two nights ago.

Those facts have, I suggest been determined and the test then to be applied is whether a fair-minded, neutral observer might think that there was a possibility that you would be influenced in your view of her evidence. I would say it is plain that they would be.

If you were to say, "I am not biased, I am comfortable in continuing to sit as a Chair", as I have suggested, Lord Justice Schiemann in the Court of Appeal was saying that no weight should be given to that so, sir, with respect you are not in a position to say "I am not biased", because it is of no assistance in looking at the test.

Can I please take you to two other cases? Again, Mr Kark has had notice of these but perhaps not as much as he would have wished and for that I apologise.

THE CHAIRMAN: The one headed 'AWG Group Ltd' should be D2.

MR JENKINS: Thank you.

This is a case decided in the Court of Appeal. It concerns the sale and purchase of Morrisons, the supermarket group. Can I take you to the headnote? It is:

> "AWG Group Ltd and another v Morrison and another".

A

The headnote reads as follows:

> "The first claimant company after acquiring the second claimant company brought proceedings against the defendants, the former chairman and chief executive officer of the second claimant. A week before the trial, estimated to last six months, was due to start the judge designated to hear the action informed the parties that a witness the claimants proposed to call, who had been a director of the first claimant, was a long standing family acquaintance. The defendants applied to the judge to recuse himself from trying the action on the ground of the real possibility of apparent bias, the established test for which being whether a fair-minded and informed observer with knowledge of all the relevant circumstances would conclude that there was a real possibility that the tribunal was or would be biased. The judge accepted the claimants' suggestion that they would not call the witness but would call other witnesses to give the evidence that that witness would have given, held that that would not disadvantage the defendants, and concluded that the risk as to whether in such a complex case of a changed picture emerging in the course of the trial so as to cause him to find that he should not carry on hearing it was too small for him to recuse himself.
>
> On appeals by the defendant [it was held firstly]
>
> That a judge was automatically disqualified from hearing a case on the ground of apparent bias if, on an assessment of all the relevant circumstances, the conclusion was that the principle of judicial impartiality, which was the fundamental principle of justice, either had been or would be breached; and that such disqualification was not a discretionary case management decision reached by weighing various relevant factors, such as inconvenience, costs and delay, in the balance, since there was either a real possibility of bias or there was not, in which latter case there was no valid objection to the judge conducting the trial.

It was held secondly:

> "Allowing the appeals, that, on an assessment of the circumstances of the case, the judge was wrong not to recuse himself from the trial of the action; that factors bearing on the issue of apparent bias included the length of the judge's acquaintance with the witness, the witness's position in and association with the first claimant at the time of the take-over, the complexity of the action and the unpredictability as to whether his role in the acquisition process might come to be considered relevant later in the trial, the fact that he had been considered capable of giving relevant evidence and would give that evidence and be available for cross-examination but for the embarrassment of the judge's position, the fact that the

B C D E F G H

> calling of substitute witnesses to give evidence he would have given would not remove him from the events that occurred and in which he was or might have been involved and the veracity of the account which was given by others might be challenged; that the potential prejudicial effect on the parties and the administration of justice by the judge's late withdrawal were irrelevant to the crucial question of the real possibility of bias, and the possibility of apparent bias was not so small as to justify allowing the judge to try the case; and that, accordingly, the court would direct that the judge recuse himself from hearing the trial".

Can I take you, please, to the judgment of Lord Justice Mummery which I hope you find towards the bottom of the second page.

> "This is an appeal against the decision of Evans-Lombe J on 1 December 2005 not to recuse himself from trying an action in the Chancery Division. He granted permission to appeal.
>
> As the trial of the action was due to start on 6 December 2005 and is estimated to last for about six months, arrangements were made for the appeal to be heard urgently …. The case was very well argued"

and the names of the lawyers are given.

> "After considering the written and oral submissions the court announced its decision that the appeal would be allowed. The judge was directed to recuse himself from hearing the trial. It was stated that reasons would be given in judgments to be handed down in due course.
>
> *Background facts*
>
> The circumstances of the application and the nature of the proceedings were helpfully summarised by the judge in the opening paragraphs of his judgment, which I quote verbatim. The summary is accepted by the parties as broadly accurate for present purposes, although Mr Marshall and Ms Harington had certain reservations about the accuracy of some of the details in para 2 which are not material for present purposes".

There are then passages from the judge's judgment that I read, starting with paragraph 1:

> "I have to deal with an application made by the defendants Sir Alexander Fraser Morrison ("FM") the first defendant and Stephen John McBrierty ("SM") the second defendant, made on Wednesday 30 November the week immediately preceding the intended commencement of the trial on 5 December, that I should recuse myself from trying the case. The application arises in this way: in the course of my pre-reading into the case I noticed that it was intended

> to call as a witness for AWG Group Ltd Mr Richard Jewson who, at all material times until March 2002 was a director of AWG and chairman of the audit sub-committee of its board. Alerted by the name I then discovered that Mr Jewson is well known to me of which fact I in turn alerted the parties on 29 November. The response of the claimants was to indicate that, rather than risk my withdrawal and the consequent delay in obtaining another judge and his completing the pre-reading process on which I had already spent a week, they would not call him to give evidence since they did not regard him as other than a relatively peripheral witness. The response of the defendants is contained in a letter from"

(and a firm of solicitors is mentioned)

> "the conclusion of which was to ask me to withdraw."

It goes on to set out how the case arises. It says:

> "The case arises from the takeover by AWG of Morrison plc in which Sir Alexander Fraser Morrison and Mr McBrierty were respectively the chairman, and, in effect, the chief executive officer. They also held between them a substantial proportion of AWG's shares. In August 2000 AWG made an approach to Morrison with a view to bidding for the whole of the issued share capital of that company. In due course a bid was made which AWG declared to have gone unconditional".

Perhaps I need no read on. It is clear it is a commercial transaction. Paragraph 3, please, over the page:

> "At the outset of the hearing of the defendants' application I described my connection with AWG and with Mr Jewson in the following terms: AWG is a company whose primary business is supplying water to industry and the public in East Anglia and in particular in Norfolk. My family are farmers/landowners in Norfolk and so in the area of operation of AWG. I have had dealings with AWG, not always harmonious, over the years on such subjects as access for the purpose of sinking boreholes and running pipelines. Mr Jewson lives in the next village to the village where I and my family live being approximately one mile distant. Our families have known each other for at least 30 years. Our children are friends and we have dined with each other on a number of occasions. Mr Jewson and I in the past were tennis players. Mr Jewson has recently been appointed Lord Lieutenant of Norfolk. I would have the greatest difficulty in dealing with a case in which Mr Jewson was a witness where a challenge was to be made as to the truthfulness of his evidence.
>
> As is apparent the case which the claimants seek to make out against

A

> the defendants involves serious allegations against prominent businessmen for whom, if those allegations are found proved, most serious consequences would follow both in the damages which they might be required to pay and in the consequences that such findings would have for their future careers.

B

> *The test for apparent bias*
>
> As Mr Marshall made clear, his client's sole objection to Evans-Lombe J trying the case was the real possibility of apparent bias. There was not, it should be emphasised, any suggestion of actual bias or personal interest. The judge had no personal interest, pecuniary or otherwise, in the outcome of the litigation. In no sense would he be a judge in his own cause. The detailed objections in [the firm of solicitor's letter that I have referred to] were based entirely on an apprehension of the real possibility of apparent bias.

C

D

> Upholding the bias objection on the eve of the trial would cause considerable disruption: the trial would have to be adjourned, as there would be practical problems in finding a new trial judge at such short notice; the parties would suffer additional costs resulting from the adjournment; and there would be delay in fixing a new trial date.
>
> Inconvenience, costs and delay do not, however, count in a case where the principle of judicial impartiality is properly invoked. This is because it is *the* fundamental principle of justice, both at common law and under Article 6 of the European Convention for the Protection of Human Rights. If, on an assessment of all the relevant circumstances, the conclusion is that the principle either has been, or will be, breached, the judge is automatically disqualified from hearing the case. It is not a discretionary case management decision reached by weighing various relevant factors in the balance.

E

F

> The test for apparent bias now settled by a line of recent decisions of this court and of the House of Lords is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility…that the tribunal was biased'."

G

and you will see various cases cited including *Porter v Magill* which I have taken you through.

> "As to the kind of circumstances in which there would be a real possibility of bias, the judge cited a pertinent passage from another leading case, *Locabail (UK) Ltd v. Bayfield Properties Ltd***:**

H

> 'By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and

> any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case…or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him…In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal.'
>
> "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.
>
> *Mr Jewson*
>
> Moving from the statement of general principle to its application to the particular case, the precise question is whether a fair-minded and informed observer of the circumstances of this forthcoming trial would conclude that there was a real possibility that Evans-Lombe J might be subconsciously biased by his long acquaintance with Mr Jewson".

There is reference to Lord Steyn who had stated:

> "Public perception of the possibility of unconscious bias is the key." "Lord Steyn also emphasised that high standards are set by the 'indispensable requirement of public confidence in the administration of justice.'"
>
> "The defendants' principal point was that aspects of Mr Jewson's evidence are contentious, or might become so in the course of the hearing. The judge would then be confronted with having to decide whether his evidence was reliable. He recognised that he would have 'the greatest difficulty' in dealing with that situation."

There is then a suggestion that Mr Jewson would not have been called but other witnesses could have been called instead and the court went on to consider that. Can I take you to paragraph 14:

A

> "In dealing with the scenario of a trial without Mr Jewson as a witness the judge referred to the test of apparent bias:
>
> 'In deciding whether I should recuse myself from the case I have first to decide, applying the test derived from the authorities which I have set out above whether all circumstances which have a bearing on the suggestion that I might arrive at a conclusion in the case through bias would lead "a fair-minded and informed observer to conclude that there was a real possibility" that that might be the result of my failure to withdraw.'
>
> The judge then concluded that his continuation as trial judge would not fail the test. He explained the position:
>
> 'I have come to the conclusion that my continuation as judge in the case will not fail the test. Mr Jewson's witness statement is mainly directed to the issue of causation of loss and to the impression made on the board of AWG of the representations made by the defendants in the course of AWG's "due diligence" inquiries. I can see no reason why the proposed new witnesses will not be able to give the evidence which Mr Jewson would have given. The fact that they are giving it in his place should not constitute an unfair advantage to the defendants. The same is true of the evidence given by Mr Jewson of the impact of the letter of 11 September 2000 on the AWG board".

Sir, I do not go on, frankly because it is turgid, but I will take you, if I may, to paragraph 16:

> "The judge went on to consider what he described as 'a second stage' of the exercise"

and can I break off? That is, that something might arise in the course of a hearing if the judge proceeded with the case which would cause people to reconsider. I resume the narrative:

> "There was a possibility in a complex case with substantial disclosure of documents and large numbers of witnesses that new facts and a changed picture would emerge unexpectedly during the course of the trial, leading the judge to conclude that he ought not to carry on with a trial in which he would have to decide whether serious allegations made by the claimants were made out. He concluded:
>
> '…I have to balance whether the apparent role of Mr Jewson in the overall circumstances of the case leads to a risk that such a changed picture might emerge. I have to balance such risk against the undoubted disruption of the administration of justice generally caused by having to find a new judge to try a case of this length at

B C D E F G H

short notice and also the inevitable further cost imposed on the parties resulting from the ensuing delay. I have come to the conclusion that such a risk, which must always be present, is too small to drive me to the conclusion that I should recuse myself. For these reasons I must dismiss the application.'

"This very experienced judge was faced with an unwelcome dilemma on the eve of a major trial, for which costly arrangements had been made. In his consideration of the objections to his trying the case and in his decision to grant permission to appeal he was sensitive to the situation of the parties and to the problems involved both in proceeding with the trial and in withdrawing from it at a late stage.

I appreciate that, having started to read into the case, he was in a good position to make an assessment of the circumstances. On the one hand, it was certain that his withdrawal from the trial would have serious consequences for the parties and for the administration of justice: delay, costs, listing problems. On the other hand, there were risks in his not withdrawing, which he fully recognised in his admission that his acquaintance with Mr Jewson would cause 'the greatest difficulty', if there was a challenge to the truthfulness of his evidence. He came down in favour of remaining in the case.

What is the position of this court on an appeal from the judge's decision not to recuse himself? If the judge had a discretion whether to recuse himself and had to weigh in the balance all the relevant factors, this court would be reluctant to interfere with his discretion, unless there had been an error of principle or unless his decision was plainly wrong.

As already indicated, however, I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.

Conclusion

In my judgment, the judge ought to have recused himself in the unfortunate circumstances in which, through no fault of his own or of anyone else, he was placed. This was the conclusion I reached at the hearing on 5 December 2005. My assessment of the circumstances bearing on the issue of apparent judicial bias is as

follows.

> First, the judge knew Mr Jewson and Mr Jewson knew the judge. It was not a fleeting acquaintance. They had known each other for 30 years. The judge recognised that this fact alone was potentially a valid ground of objection to his trying the case when he acknowledged that he would have 'the greatest difficulty' if he had to deal with a challenge to Mr Jewson's evidence".

It then deals with other issues which I think I should probably read:

> "Secondly, Mr Jewson, in his capacity as a long serving and senior non-executive director …. as deputy chairman of the AWG board at the time of and after the acquisition of Morrisons and as chairman of AWG's Audit Committee, was connected or associated with AWG at the time of the events, which have given rise to AWG's very serious allegations that the defendants are guilty of defrauding AWG. Whether or not he was to give evidence at the trial, Mr Jewson was, in terms of *Locabail,* 'involved in the case.'
>
> Thirdly, the action by AWG against the defendants is very substantial and complex. It may take six months to hear. The documentation is voluminous (250 trial bundles). There are many witnesses. There is a great deal at stake on each side in terms of money and personal reputation. In those circumstances it is extremely difficult for anyone to predict with confidence at this stage what may, or may not, happen during the trial concerning, in particular, evidence of the role of Mr Jewson relating to relevant pre- and post-acquisition events.
>
> Fourthly, Mr Jewson's position with AWG at the material time was such that it was considered that he could give relevant evidence at the trial. This was certainly the position up to the time when objection was made to the trial judge. Mr Jewson's evidence was potentially relevant to two issues"

and those are set out. One is (a) reliance and the other (b) causation. I am not going to read the rest of that because it deals with detail of the case but can I take you to paragraph 26:

> "Fifthly, I am not persuaded, although the judge was, that the problem of the real possibility of bias, which would arise from the above circumstances, can be completely resolved if AWG call other witnesses, instead of Mr Jewson, to give the evidence which he would have given".

Again, that is not a circumstance that is going to apply here, because I will be calling Susan Conway. Sir, can I take you to the sixth point over the page:

> "Sixthly, while I fully understand the judge's concerns …. about the prejudicial effect that his withdrawal from the trial would have on the parties and on the administration of justice, those concerns are totally irrelevant to the crucial question of the real possibility of bias and automatic disqualification of the judge. In terms of time, cost and listing it might well be more efficient and convenient to proceed with the trial, but efficiency and convenience are not the determinative legal values: the paramount concern of the legal system is to administer justice, which must be, and must be seen by the litigants and fair-minded members of the public to be, fair and impartial. Anything less is not worth having."

It then deals with the second stage and concludes with this paragraph under the heading "Result":

> "With the greatest possible respect, the judge's well intentioned decision not to recuse himself was wrong. It is in the interests of all concerned that he does not hear this case".

Sir, I adapt those principles to this case. It is an unfortunate position but it is easily remedied by you recusing yourself. She is a woman you have known very well for a very long period of time. Considerations of when can this case be re-listed, there may be inconvenience to witnesses and matters of that nature are unimportant, with respect, to the central question and that is you should ensure that these proceedings are independent, independent and crucially that they are seen to be so.

If there is any doubt as to what the fair-minded observer might think, then again you should recuse yourself. You should avoid the possibility that there may be an appeal based on this, if I may say, obvious point.

Can I take you to one further authority, please? It is the case of *Lawal* and again Mr Kark has a copy. *(Same handed)*

THE CHAIRMAN: This will be D3.

MR JENKINS: It is a case which tangentially indicates that someone who might sit as a Legal Assessor of the GMC could not appear before the Panel as an advocate. But it maybe that we can take that from the judgment.

This is a judgment of the House of Lords in the case of *Lawal v Northern Spirit Ltd [2004] 1 All ER 187*. It concerns a case of a claim of racial discrimination. Can I read the head note please.

> "The claimant complained of racial discrimination to the employment tribunal. His case was dismissed. When his appeal came before the Employment Appeal Tribunal it was discovered that senior counsel instructed by the employer had previously sat as a recorder with one of the lay members of the appeal tribunal. The claimant raised an objection on the basis that there was a real possibility of subconscious bias on the

A

part of the lay member. Without ruling on that objection the tribunal ordered that the appeal should be heard before a differently constituted tribunal. Although the Chairman of that tribunal was sitting with two lay members with whom senior counsel had not sat, it considered the point of principle. It determined that there was no real possibility that the Employment Appeal Tribunal was biased where the only objection was

B

that either one or both of the lay members hearing an appeal had previously sat with a recorder who, as counsel, was appearing for a party in that appeal. The Court of Appeal affirmed that decision. The claimant appealed. The appeal was considered by the appellate committee of the House of Lords.

C

Held – The present practice whereby part-time judges in the Employment Appeal Tribunal might appear as counsel before a tribunal having previously sat with one or more lay members of the bench hearing the appeal should be discontinued, as a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the lay member might be subconsciously biased. That observer was likely to approach the matter on the basis that the lay members looked to the judge for guidance on the law, and could be

D

expected to develop a fairly close relationship of trust and confidence with the judge. He might also be credited with the knowledge that a recorder, who in a criminal case sat with juries, might not subsequently appear as counsel in a case in which one of more of those jurors served, and with knowledge of the practice forbidding part-time judges in the employment tribunal from appearing as counsel before an employment tribunal which included lay members with whom they had previously sat.

E

Furthermore, the observer would be aware that the indispensable requirement of public confidence in the administration of justice now required higher standards than had been the case previously. It followed that the present practice in the Employment Appeal Tribunal should be assimilated to that in the employment tribunal. Accordingly, the appeal would be allowed in part and the matter remitted to the Court of Appeal to rule on the substantive issue."

F

Can I take you right at the bottom of page 3, just to identify that it is the speech of Lord Steyn that we are looking at, and then take you, if I may, to page 4. Paragraph 2:

G

"The issue in this appeal is whether, in circumstances in which a Queen's Counsel appearing on an appeal before the Employment Appeal Tribunal (EAT) had sat as a part-time judge in the EAT with one or both of the lay members…hearing that appeal, the hearing before the EAT was compatible with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms…and the common law test of bias. It is not suggested that there was actual bias. The question is whether in the view of a fair-minded and informed observer there was a real possibility of subconscious bias on the part of the lay member or lay members."

H

It goes on to look at the history of the case, which I do not trouble you with, and then the position, at the bottom of page 6, of part-time judges and lay members of the Employment Appeal Tribunal, again which is relevant to the substance of the decision but not for us. If I may, I will take you to page 7 and paragraph 14, under the heading `The test for bias':

> "In *Porter v Magill [2001] UKHL 67, [2002] 1 All ER 465, [2002] 2 AC* 357 the House of Lords approved a modification of the common law test of bias enunciated in *R v Gough [1993] 2 All ER 724, [1993] AC 646*. This modification was first put forward in *Re Medicaments and Related Classes of Goods (No 2) [2001] ICR 564, [2001] 1 WLR* 700. The purpose and effect of the modification was to bring the common law rule into line with the Strasbourg jurisprudence. In *Porter*'s case Lord Hope of Craighead explained:
>
> > "The Court of Appeal took the opportunity…to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in *R v Gough [1993] 2 All ER 724, [1993] AC* 646 had not commanded universal approval. He said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review *R v* Gough to see whether the test it lays down is indeed in conflict with the Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions.""

Sir, I have plainly read this to you before when dealing with *Porter v* Magill. The test is set out again. Top of page 8:

> "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."

There then follows a passage which again I have read before.

> "The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under article 6 of the convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in *Porter*'s case has, at its core, the need for `the confidence which must be inspired by the courts in a democratic society'….Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer.

> What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach."

Can I take you on to the paragraph at page 10, under the general heading `Conclusions'. Various matters are set out about the Lord Chancellor's Department, which I do not trouble you with. Paragraph 20 reads in this way:

> "The correct analysis is as follows. One starts by identifying the circumstances which are said to give rise to the bias. In the present case the evidence is limited to the facts set out at the beginning of this opinion, namely that a Queen's Counsel appearing on an appeal before the EAT has sat as a part-time judge in the EAT with one or both lay members hearing the appeal. In such cases there maybe substantial variations in the extent to which the part-time judge and the wing members had sat together in the EAT and how recently. These differences are, however, not material. The House must concentrate on a systemic challenge and apply a principled approach to the facts on which it is called to rule.
>
> The principle to be applied is that stated in *Porter*'s case, namely whether a fair-minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the tribunal was biased. Concretely, would such an observer consider that it was reasonably possible that the wing member maybe subconsciously biased? The observer is likely to approach the matter on the basis that the lay members look to the judge for guidance on the law, and can be expected to develop a fairly close relationship of trust and confidence with the judge,"

and deals with other matters that I have read to you in the head note.

So, that is the law that I place before you. The test is absolutely clear. You must determine the facts, and I think we have done, and then go on to consider what a reasonable and fair-minded objective observer might consider as to the possibility of bias.

Again, it is wrong in principle for anyone sitting as a fact finder to know one of the witnesses who is going to be giving factual evidence for the very reasons that I have just set out. You know this lady extremely well, she would say very well, and you have known her for years. In those circumstances you should recuse yourself. Again, what are the risks if you do not do so? The risks are that this hearing has to be put off, perhaps, or another chairman or chair person take over your seat. Well, those are inconsequential, as I have suggested, in taking you through the material. Those are not matters to be weighed in the balance one way or the other.

So, those are the matters that I place before you.

THE CHAIRMAN: Thank you, Mr Jenkins. Just before Mr Kark responds, there is one matter of fact to which you have not referred, which I think has no bearing on your argument but nonetheless for the sake of the record ought to be included. That is the fact

that at the moment Mrs Conway advised me that she was part of this case I contacted those organising this hearing and required them to contact both the defence counsel and the GMC to advise them that we were known to one another, and that was some six weeks ago.

MR JENKINS: Sir, I am grateful. I do not suggest for a moment that you have done anything other than what was proper to be done in the circumstances.

THE CHAIRMAN: Thank you. Mr Kark.

MR KARK: Sir, the GMC are effectively neutral on this application. The reason being that either there is a perceived bias or there is not, and I do not disagree with the tests that Mr Jenkins has laid before you. But there is perhaps a different emphasis that I would seek to place on some of the authorities, and it would be my submission that you are not, in fact, in possession of all of the facts that you need to be in possession of in order to make this decision.

So far as your own role is concerned, I suppose these additional questions ought to be asked, and that is whether - I am sorry to do this - but whether you have spoken about this case with the potential witness, or whether you have spoken about Dr Skinner with this potential witness.

THE CHAIRMAN: I can answer that question very clearly. That it was Mrs Conway who asked me whether I was to be involved with this case. I said, at that stage I did not know, but I would look into the name of the doctor, and when I found that it was I then contacted the GMC. That is the full extent of my discussion.

MR KARK: I do not seek to go back through the extensive authorities, but there are just I think one, there is one passage in each authority that I draw your attention to. If we can go back to *Porter v Magill*.

THE CHAIRMAN: D1.

MR KARK: Sorry, D1, yes. Page 83, in the course of Lord Hope's judgment, he was dealing, in paragraph 102, with the case of *Re Medicaments and Related Classes of Goods (No 2)*, and repeating the words of Lord Phillips:

> "…that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict."

Then he quotes this at the bottom of that paragraph:

> "Having conducted that review he summarised the court's conclusions, [as follows]:
>
> "When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in *R v Gough* is called for, which makes it plain that it is, in effect, no different from the test applied in

> most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased.""

In the *Morrison* case, D2, there is this at paragraph 18, and this was repeating the words of the judge in that case:

> "I appreciate that, having started to read into the case, he [the judge] was in a good position to make an assessment of the circumstances. On the one hand, it was certain that his withdrawal from the trial would have serious consequences for the parties and for the administration of justice:"

I agree with Mr Jenkins absolutely that you have to put that out of your mind so far as this decision is made.

> "On the other hand, there were risks in his not withdrawing, which he fully recognised in his admission that his acquaintance with Mr Jewson would cause "the greatest difficulty", if there was a challenge to the truthfulness of his evidence."

Thirdly, in the most recent case that was drawn to your attention, *Lawal v Northern Spirit Ltd*, paragraph 20:

> "The correct analysis is as follows. One starts by identifying the circumstances which are said to give rise to bias."

Now all of that is, of course, obvious. But in Mr Jenkins' submission to you all that he has told you so far as the circumstances which give rise to the possible perception of bias is that there is a witness and you know her. What you have not heard is what the witness is going to say. That, it seems to me, with respect is of some importance to this application. If it is a witness, just by way of example, who was going to give evidence that Dr Skinner is a jolly good doctor so far as his administrations to her were concerned, and he helped her, and there would be no challenge to that statement by her, then that, you might think, would give less of a cause for concern as to bias than if she were a factual witness giving evidence about the facts with which you are going to be concerned, particularly in part one, and where there was a challenge, and I list the fundamental matters that Mr Jenkins related to you, if there was a challenge to her accuracy, her reliability or her credibility. If a witness' credibility is in issue and one of the Panel knows the witness, and therefore might be affected in his or her judgment of that issue, then there will almost inevitably be a perception of bias. If there is no issue as to credibility then I ask rhetorically what is the bias said to be, and I suppose it is also important that you know whether the witness is going to be giving evidence on part one or part three, should we get to that stage in these proceedings. If this were effectively a testimonial witness, who I, most unlikely, would want to have to cross-examine on behalf of the GMC, then again you may think that any perception of bias would disappear, or would be unfounded. If she were a factual witness called in part one, then you would have to consider the extent of her evidence. At the moment you have not been told anything about what she is going to say, you have not seen her statement, and I am quite content for you to see her statement, if there is one, so

that you can form an opinion. It seems to me you have to know what the witness is going to say in order to form a sensible opinion in relation to this issue as to whether an informed observer, knowing all the facts, would perceive a danger of bias. Knowing all the facts includes, in my submission, what would bias be based upon. So it seems to me that you need to know more.

There is a second matter which Mr Jenkins has not addressed you about but which it seems to me could be relevant to your consideration. That is this. This is a witness who, whether she gives evidence in part one or part three, is going to be giving evidence apparently about her own health, and I think you would have to ask yourselves, and it maybe that Mr Jenkins can assist us, whether there is a danger that Mrs Conway would be embarrassed so that she would not reveal certain matters which she otherwise would do because of your presence on the Panel. Because, of course, she would not be revealing them to you as a doctor, as you are, or indeed as a friend, but as a Panellist, but there is that second side to it. We have not heard that she would be embarrassed to reveal matters to you, but it maybe that she would not, but it seems to me that that is a consideration potentially. If the defence are able to say, well, we are not able to ask this witness the right questions, because she is too embarrassed to come out with the particular revelation, we have not heard that but it is something you may wish to consider.

So my submission, as I say, which is intended to be neutral but I hope is intended to direct you, as it were, to the issues that you would need to consider, the test is whether a fair-minded and reasonable person, having considered all the facts, would conclude that there was a real possibility that the tribunal would be biased. In my submission the facts would have to include what she is likely to say, when she is likely to say it and whether you are likely to be biased or perceived to be biased on the basis of that evidence.

THE CHAIRMAN: Mr Jenkins, do you have any other points?

MR JENKINS: I do. I wonder if you would give me perhaps ten minutes to see which documents we can photocopy? Sue Conway has written lots of letters to the GMC. She has written testimonials and sent them to the GMC. I do not see any difficulty in you having those if Mr Kark thinks that you need to see what it is she would say. I have no problem with that but I wonder if you would give me a few minutes to organise that?

THE CHAIRMAN: Very well, we will adjourn until quarter-past twelve.

MR JENKINS: Thank you.

(The Panel adjourned for a short time)

THE CHAIRMAN: Mr Jenkins.

MR JENKINS: Sir, I am sorry to take longer than the time you allotted. I am afraid we have put such a strain on the photocopier that we have caused it to break down this morning, so what I have are two pages of the four that I hope to place before you from Susan Conway. These are letters that she has written to the GMC in the past. I do not read them to you. As I say, there is another letter, a two-page document to come.

The issues, Mr Kark rightly says that you need to look at the facts. He encourages you to look at all the facts. It is difficult to do that when you have not had the Notice of Hearing read to you and you have not heard an opening speech from Mr Kark, but he will forgive me if I suggest that what the case is about is a debate as to how hypothyroid patients should be treated, who is and who is not a hypothyroid patient. Mr Kark's case is based on four specific patients and he will say that Dr Skinner's treatment in respect of those patients is inappropriate. He will say that Dr Skinner generally approaches patients in a way that is appropriate and he has two experts who will say that.

I will pause whilst you read these documents. *(Same handed)*

THE CHAIRMAN: For the sake of the record, I think the letter dated 22 June 2005 could be D4A and the second letter, dated 25 July 2006, could be D4B.

MR JENKINS: I am grateful.

THE CHAIRMAN: We will take a moment to read them.

MR JENKINS: I think we may give you 'C' as well, sir.

THE CHAIRMAN: Thank you very much. *(Same handed) (Pause)*

THE CHAIRMAN: Mr Jenkins.

MR JENKINS: Sir, thank you. I remind you that the husband that she refers to on D4C is, of course, a man you have been close friends with for 30 years or more.

That is what she would say and she plainly contributes to the debate. What is clear from her documents is that there is a very substantial patient body who want to be heard on the question of whether Dr Skinner's treatment is adequate or not.

I have said I would like to call her in Part 1 of the hearing on the facts to the extent that the prosecution case is that Dr Skinner's treatment of four patients is inadequate, is inappropriate. I would like to call patients who will say their experience of exactly the same form of treatment.

There will be an objection to that – I know it now – but we cannot prejudge now what the ruling will be. We cannot have that argument now. It would be wholly wrong for anyone to proceed on the basis now that this lady will only be permitted to give evidence at a later stage of the hearing, if the hearing proceeds to later stages. It would be wholly wrong for anyone to say, "We can make a preliminary legal judgment on that question."

Sir, again, you could not take any part in making that decision in the circumstances that I have outlined that there may be a perception that your knowledge of her over years may interfere with your judgment.

I do not know whether you know this lady to be a reliable witness or otherwise. You have known her for years, been on holiday with her. You must have a view about her

credibility one way or the other. Whatever that view is, it should not intrude on these proceedings. You may think she is a wonderful woman and that everything she ways should have the greatest heed paid to it. You may hold a directly contrary view. I do not know. It does not matter. The fact is because you know her, you know of her and you have dealt with her in the ways that I have outlined means that you should have no part in this hearing.

Why would you not recuse yourself? My understanding is that Panellists are chosen to sit on cases because they are available for the time when the case is due to be heard. Of course, there are concerns occasionally as to whether X or Y is sufficiently experienced to chair a hearing, but I anticipate that you will know nothing more about the case than that.

This is not the case that we have seen in the authorities that I have placed before you where a Judge has done a lot of pre-reading, where a Judge knows a lot about the case and has studied all the documents in advance. Sir, as I understand it you should know nothing at all about this case other than it is the case of Dr Skinner.

What considerations are there that would lead you to say that you should stay? Again, we have looked at the cases which deal with fairness being the utmost and paramount consideration. There is no weighing up to be done. One cannot say – should not say – because it is to introduce wholly irrelevant considerations, the hearing will have to go off for a long time, or it may be inconvenient for the witnesses. The fact that you know her means that you should not sit at all.

Sir, I am one who naturally rejects any conspiracy theory. I do not know whether you know anything more about the case. My belief is that you know nothing about it but there may be a suspicion if you were to continue to hear the case that you may have been told something about the case, that you may have been chosen to sit specifically on this case.

Again, I reject it instinctively but what I understand is that those instructing me would want an enquiry as to what communication there may have been between you and the GMC about why you should sit on this case.

I raise that just so that it is out in the open. Again, I reject instinctively any conspiracy theory but it may be that if you continue to sit on the case there will be a view held by others that there is a specific reason why you have chosen to continue sitting on the case. As I say, there should be no reason to require you to continue to sit on the case. The only thing that is relevant is that you know Susan Conway and have known her for 30 years. She would say you are very good friends and that the assertion with which you agreed that you do not know her that well, which was how we started the morning, that is not correct.

Sir, in those circumstances everything drives you to recuse yourself from this hearing and if there were any doubt about it at all – and again we have been through the authorities – then you should recuse yourself.

Sir, that is the application that I make and the basis upon which I make it.

THE CHAIRMAN: Thank you, Mr Jenkins. Just before Mr Kark continues I perhaps

should add to something I said earlier to you about having advise those who were organising this hearing. I was told that they had contacted both the Defence and the General Medical Council and there was no objection whatsoever to my continuing as the Chairman.

MR JENKINS: Sir, I learned very recently that her husband was an old friend of yours from university. I learned very recently that you had been on holiday with the family and I learned very recently, plainly, that she had been invited to have dinner at your house on Saturday night. The circumstances, or our knowledge of the circumstances, has changed quite dramatically in recent days. We have always had concerns about you sitting and Mrs Conway would say she assumed when she came to have dinner with you on Saturday that you were not going to sit. That was her belief. She expects you not to sit in this case.

THE CHAIRMAN: Mr Kark?

MR KARK: This case and no case before this sort of Panel is a debate about anything in general. This is not a debate. This is a case in which the GMC have to prove some 33 heads of charge against the doctor to the criminal standard and it is in relation, in essence, to four specific patients that you will be hearing evidence. That is the first point that I would make.

The second is that on behalf of the GMC I would object to evidence in Part 1 – Stage 1 – which amounts to no more than testimonial evidence. You all know as a Panel the difference between factual evidence and testimonial evidence. To take a completely different example, one might have a surgeon who has performed surgery particularly badly in four specific cases. The fact that he can call 100 other patients who are happy with their surgery is neither here nor there so far as Part 1 of your consideration.

Third, do not worry about appeals as a consequence of your decision now. That is not a matter for you. If there is an appeal there is an appeal, but you must apply the test as it has been set out, I think accurately, to you and equally do not worry about any enquiry, if I may say so, hereafter by the defence.

The test has been set out accurately. You are now in better possession of the facts because you know what this witness is going to say.

I agree that you cannot make the decision now about whether this evidence is likely to be admissible in Part 1 or not because you have to hear the rest of the evidence first, it seems to me, before you could make that decision, so you have to set that to one side.

On the face of it – and I can only say on the face of it – as one looks at the material that has been produced before you from Mrs Conway, I cannot see that her evidence is likely to be challenged. I am not saying that I would not want to ask her the questions, whether it is in Part 1 or Part 3, but I cannot see that what she actually says is likely to be challenged.

As I say, the GMC really has to be neutral so far as this application is concerned because if there is perceived bias, or the potential for perceived bias, that, it seems to me, is the end of the argument and you would have to recuse yourself. Those are my submissions.

MR JENKINS: Can I just reply very briefly? It is not a good analogy to say that a surgeon may have completed one operation successfully in hundreds of cases and the Panel when asked to look at three only concentrate on those three. It is not a good analogy with this case, with respect. The issue is the treatment of patients who may or may not be hypothyroid. The four cases you are asked to consider are specific instances of the way in which Dr Skinner treats patients in general.

It would be ludicrous for you to say, "Well, for these four patients we found that you treated them inappropriately, but for the scores of other patients that you treated in exactly the same way, those were appropriately treated". Not at all. It is a much wider question. Mr Kark, for obvious reasons, chooses to say it is very specific and limited to four patients, but it really is not. It is a much wider debate. Again, this is the way in which Dr Skinner approaches patient care and I shall be calling, whenever the hearing takes place, many, many patients so that you can hear their views as to their treatment by other doctors whose views perhaps are similar to those of the experts that Mr Kark intends to call.

This is a case in which many, many patients have felt failed by doctors and I think it is fair that you hear what those patients have to say. Again, you cannot pre-judge whether Mrs Conway will be heard in part one or part three, if we get that far, of the hearing and it is not appropriate for you to be invited effectively to say, "Well, her evidence will not be in dispute".

I have no doubt that Mr Kark's case will be the way in which patients such as Mrs Conway were treated was wrong. That is the debate that we have to have and that is why I propose to call her.

So again, you know this lady, you know her well, you should take no part in a Panel which considers her evidence.

THE CHAIRMAN: I now ask the Legal Assessor to advise the Panel.

THE LEGAL ASSESSOR: Before I advise the Panel, may I make some enquiry, please, Mr Jenkins? Please do not stand up because you may want to write some notes while I ask. You obviously appreciate that the only paperwork that the Panel members including the Chairman have are the allegation, the paragraphs of the allegation. They all have that and have read that. They are given that before the commencement of the hearing. Yes?

MR JENKINS: Yes.

THE LEGAL ASSESSOR: Are you able to identify for the Panel which paragraphs of the allegation Mrs Conway's evidence would go towards?

MR JENKINS: Yes, I can do that. Every allegation that suggests that Dr Skinner's prescribing for one of the patients was inappropriate, unnecessary, irresponsible, not in the best interests of the patient or placing the patient at harm. So that is head 5 which relates specifically to Mrs A, but it relates to every patient that Dr Skinner has treated. Head 6 suggests that his conduct was inappropriate, unprofessional, irresponsible and repeats the same two issues. Her evidence is relevant to that. Turning on to Patient B, it is

relevant to head 9, head 11, head 13, head 15, head 18, head 20, head 22, head 26, head 29 and head 32. It is relevant to all those issues.

THE LEGAL ASSESSOR: Those are obviously allegations into individual patients where the Panel must make a finding in relation to that individual patient, yes?

MR JENKINS: Yes, they are.

THE LEGAL ASSESSOR: So far as Mrs Conway is concerned, could I just ask you in relation to the paragraph from the *Morrison* case. You have produced letters from her which go back in fact to 2005 and if I can summarise them very briefly, they effectively go as to on the face of it testimonial character towards the doctor and the way in which he practises.

Is there anything which you could identify (I am looking at page 1167 of the case of *Morrison*) of aspects of her evidence being contentious in the sense that the Chairman having to be confronted with having to decide whether her evidence was reliable? I am looking at paragraph 11 on page 1167 and recognising "that he would have 'the greatest difficulty' in dealing with that situation".

MR JENKINS: Yes, sure. What she says is that she and thousands of others have been failed by medical practitioners. That is an issue and if the Chairman continues to sit he will have to deal with that. She says on the one hand that Dr Skinner … you have seen what she said about him, and she says that other doctors have been limited in their approach. They have taken an approach whereby a particular blood test determines exactly what they do and who they will permit to receive treatment. Her evidence is in two parts. Firstly, testimonial about Dr Skinner but secondly it is an assault upon other medical practitioners.

The issues that the Panel will have to deal with are is it appropriate for Dr Skinner to prescribe or for anyone to prescribe the sort of medications that he was prescribing. The way in which Mr Kark would seek to prove that is using experts to say that this kind of prescribing is inappropriate. Clearly, that involves a wider question and she touches upon that in the evidence that she gives. So to the question that I am asked, what will the Chairman be confronted with that he will have to accept or not accept in her evidence, you have to deal with her views about medical practitioners, about the doctors that she has faced, about the approach that some of them have taken towards testing and to the approach that Dr Skinner has taken. The Chairman undoubtedly has views about this lady. Again, what they are I will never know and I will be in no position to deal with his views. That is why he cannot sit. I hope that is an answer to the question that was asked.

MR KARK: Could I just make one comment about that? Although you have read these letters, this witness would not be entitled to give in evidence, for instance, the suggestion by her that thousands of patients have been failed by the medical profession. That is opinion evidence. She is not on any basis an expert. She can give evidence about what happened to her with other medical practitioners, she can give evidence about what happened to her with Dr Skinner, but that, it seems to me, is the limit.

MR JENKINS: I am grateful. I agree with that.

THE LEGAL ASSESSOR: There is just one last matter which in fact before I advise I must ask both counsel to deal with. This is an application where the Chairman is being asked to recuse himself as a member of this Panel. The Chairman is sitting as a member of this Panel. The difficulty is, of course, under normal circumstances as a member of the Panel he has an equal vote. Should he continue to do so? Does anybody argue against that?

MR KARK: It is a very nice point, but if we were dealing with a judge whether in the Court of Appeal sitting with three or a judge on his own, somebody has to make the decision and this would not be a properly constituted Panel were you to recuse yourself for the purposes of making this decision. Therefore, you cannot recuse yourself, in my submission, from making the decision, you must be part of the Panel.

Can I say this, however? Were you to tell the Panel anything about your knowledge of this witness which we have not heard in public, I think that ought, with respect, to become a matter of public knowledge in due course. That is the only caveat that I would put upon you sitting as a panellist.

MR JENKINS: I agree with both of those points. Can I also say that the mathematics favours, sir, you being involved in the decision. If you were not to be, there is a risk of the Panel being split two/two and I think that would be undesirable.

THE LEGAL ASSESSOR: Thank you. I thought we had better just clarify that one. It is always one of those slightly difficult problems that arises.

This is an application, members of the Panel, for the Chairman to recuse himself on the basis of knowledge of a witness or a potential witness who is to be called by the defence called Mrs Susan Conway. You have heard the details put before you of how the Chairman knows that witness. Apparently when he was informed about six weeks ago he made immediate efforts to ensure that both sides were made aware of his state of knowledge of Mrs Conway.

The defence object to the Chairman remaining as Chairman of this Panel and say that he should recuse himself on the basis of bias or apparent bias and they have produced to you three authorities, *Porter v Magill, AWG Group v Morrison* and the case of *Lawal*. Effectively, you may think that you may gain most help, though it is a matter for you because you act as judges of law here, from items identified in *AWG Group v Morrison* where it refined the test in *Porter v Magill*:

> "Having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility…that the tribunal was biased'."

Some of the questions which you may be aided by answering have been identified: Is Mrs Conway's evidence likely to be contentious or might become so in the course of the hearing? Would the Chairman therefore be confronted with having to decide whether her

evidence was reliable? Would the Chairman have the greatest difficulty in dealing with that situation?

I think for the purposes of this application you have to put on one side any discussions about a debate. This hearing is not a debate. This hearing is a Fitness to Practise Panel which is making decisions on an allegation which you have before you and which you have read which contain 33 paragraphs in total dealing with five*(sic)* patients.

MR KARK: Four patients.

THE LEGAL ASSESSOR: I am sorry, four patients, I apologise. At the end of your findings of fact you then have to make a decision as to whether the doctor's fitness to practise is impaired because of misconduct and deficient professional performance, assuming, of course, that you have found any findings of fact to begin with. If you have not, the question does not arise. But I emphasise the fact it is an allegation. That is your purpose. It is not a debate.

So when you weigh up all the factors can I refer you then finally to a passage in Archbold where it finishes with the conclusion of the relevant principles of *Gough* and this is page 344 of the 2007 edition. I have it typed out and everybody can have it. *(Same handed)* Because of the position of you at this stage you are both judges of fact and judges of law and you are dealing with this in a position of the Chairman in the same way as a judge would deal with it in a court. So if I follow to where (1) is about eight lines down:

> "If a judge is shown to have been influenced by actual bias, his decision must be set aside; (2) where actual bias has not been established the personal impartiality of the judge is to be presumed; (3) the court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial; if they do, the decision of the judge must be set aside; (4) the material facts are not limited to those which were apparent to the appellant; they are those which are ascertained upon investigation by the court; (5) an important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice; whether or not there was a 'legitimate fear that the judge might not have been impartial' will depend on whether a fair-minded and informed observer would conclude that there was a real possibility, or real danger, the two being the same, that the judge was biased; the material circumstances will include any explanation given by the judge under review as to his knowledge of those circumstances; where that explanation is accepted by the appellant it can be treated as accurate; where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer; the court does not have to rule whether the explanation should be accepted or rejected; rather it has to decide whether a fair-minded observer would consider that there was a real danger, or real possibility (the two being the same thing) of bias, notwithstanding the explanation advanced."

That is a long winded way of putting it, but that is the question that you have to ask yourself and answer to yourselves. Thank you very much.

MR JENKINS: Can I just add to that, if I may. That, what you have just been given is the approach to be taken if one is looking back after a hearing has taken place. The point is that we are before the hearing has started and I remind you of paragraph 9 in the Morrison case:

> "Where the hearing has not yet begun, there is also scope for the sensible application of the precautionary principle…prudence naturally leans on the side of being safe rather than sorry."

MR KARK: Yes, if I may say so I agree with that. The test is the same, except I am not sure, I do not know if Mr Jenkins has a view on this, whether paragraph two is actually relevant at this stage. Where actual bias has not been established the personal impartiality of the judge has to be presumed.

I think one has to set that aside at this stage. I do not know if your Legal Assessor agrees with that.

THE LEGAL ASSESSOR: I think because I was copying out from Archbold I chose not to expurgate, so I had read out the document.

MR KARK: You agree that it should be exercised.

THE LEGAL ASSESSOR: At the discretion.

THE CHAIRMAN: Would you bear with me for a moment please. (*pause*)

THE LEGAL ASSESSOR: Let me just clarify one thing. Just to make sure. The Chairman quite properly and rightly, I think at this stage, is just expressing some concern as to whether he should act as Chairman in these proceedings. We have already established that he has the right to be present, and he is an experienced Chairman and knows fully his rights and obligations, and clearly anything that is said about personal knowledge we will clearly ask the parties, but I do not think there is any - clearly by raising it at this stage it emphasises the fact that just purely being a Chairman does not impart any superiority in decision over other members of the Panel.

MR JENKINS: I agree entirely. The issue would be exactly the same whether Professor Whitehouse was a lay member, a wing member of the Panel or Chairman, and it is perfectly appropriate for him to chair discussions on this next part of the proceedings. I take no objection, nor would I at any future stage.

THE CHAIRMAN: Thank you, that helps me. In which case we will go into private session, but in fact since it is one o'clock we will adjourn for lunch and go into private session after lunch. Thank you. Could I ask members of the public if they would take their bags out with them, these days of security one is reminded constantly of concern about bags left on their own. Thank you very much.

STRANGERS THEN, BY DIRECTION FROM THE CHAIR, WITHDREW AND THE PANEL DELIBERATED IN CAMERA

STRANGERS HAVING BEEN READMITTED

DETERMINATION

THE CHAIRMAN: Mr Jenkins. I will read this in the third person.

The Panel has considered your submission before it today that the Chairman of these proceedings, Professor Whitehouse, should consider recusing himself from the Panel.

You told the Panel, and Professor Whitehouse confirmed, that he knows of one of the witnesses that you intend to call on behalf of Dr Skinner, namely Susan Conway. Professor Whitehouse further confirmed that he informed the General Medical Council administration of this fact six weeks ago, and was assured, at that time, that neither party had any objection to his knowledge of a witness in this case.

You stated, and Professor Whitehouse confirmed, that he has known Susan Conway for a period of 30 years and knows Mrs Conway's husband as he and Professor Whitehouse were at University together. Professor Whitehouse further confirmed that he had been on holiday with Mrs Conway and her husband on one occasion and that they had been dinner guests at his home on Saturday last, 30 June 2007. You told the Panel that Professor Whitehouse had previously given Mrs Conway medical advice, although Professor Whitehouse stated that this merely amounted to giving her the names of local consultants.

You submitted that it would be wholly inappropriate for Professor Whitehouse to judge the accuracy, reliability and credibility of Mrs Conway's evidence, given his acquaintance with her. You further submitted that Professor Whitehouse would be unable to involve himself dispassionately in legal arguments regarding the admissibility of her evidence as his judgment might be tainted by knowing Mrs Conway.

You put before the Panel three judgments which go to the issue of recusal through bias or apparent bias. The first of these is *Porter v Magill [2001] UKHL 67* which sets out the test for determining bias or apparent bias:

> "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."

The judgment of *AWG Group Ltd and another v Morrison and another [2006] EWCA Civ 6* states that it is unreasonable for a `fact finder' to know a witness in a case. Furthermore, it states that a hearing must not only be independent and impartial but must be seen to be so.

The third judgment is *Lawal v Northern Spirit Ltd [2003] UKHL 35*.

Mr Kark submitted that the General Medical Council is neutral on the point of Professor Whitehouse being recused from this hearing. Mr Kark also referred the Panel to the three judgments referred to by you. He stated that where there is a suggestion that the judge is biased, consideration must be given to what that bias is said to be. He stated that the General Medical Council's view is that Mrs Conway's evidence amounts to testimonial evidence and that it is likely to be unchallenged by him during these proceedings. In those circumstances, the perception of bias is unfounded.

Mr Kark also raised the issue of Mrs Conway potentially giving evidence about her health before this Panel. He stated that consideration should be given to Mrs Conway's feelings about giving such evidence before an acquaintance of hers.

The Panel was referred by the Legal Assessor to the test of bias and apparent bias as set out in paragraphs 4-32, page 344 of Archbold (2007) as follows:

> "Where bias or apparent bias is raised as a ground of appeal, the leading authority as to be test to be applied was until recently the decision of the House of Lords in R v Gough [1996] A.C. 646. The Court of Appeal in Re Medicaments and Related Classes of Goods (No. 2) [2001] 1 W.L.R. 700 had to consider the compatibility of that test with the jurisprudence of the European Court of Human Rights. The conclusion was that Gough required modest adjustment. The relevant principles were summarised as follows [para 83]: (1) if a judge is shown to have been influenced by actual bias, his decision must be set aside;…; (3) the court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial; if they do, the decision of the judge must be set aside; (4) the material facts are not limited to those which were apparent to the appellant; they are those which are ascertained upon investigation by the court; (5) an important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice; whether or not there was a "legitimate fear that the judge might not have been impartial" will depend on whether a fair-minded and informed observer would conclude that there was a real possibility or real danger, the two being the same, that the judge was biased; the material circumstances will include any explanation given by the judge under review as to his knowledge of those circumstances; where that explanation is accepted by the appellant it can be treated as accurate; where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer; the court does not have to rule whether the explanation should be accepted or rejected; rather it has to decide whether a fair-minded observer would consider that there was a real danger or real possibility (the two being the same thing) of bias, notwithstanding the explanation advanced. The correctness of these principles was confirmed by the House of Lords in *Porter v Magill; Weeks v Magill [2002] 2 A.C. 357*."

The Panel considers that Professor Whitehouse is not biased in these proceedings by being acquainted with one of the intended defence witnesses, Mrs Susan Conway. Nevertheless, it has considered the issue of public perception and has determined that if Professor Whitehouse were to remain on the Panel, there may be a perceived bias.

Therefore, the Panel has determined that Professor Whitehouse now be recused from these proceedings.

The Panel will now adjourn for a short time in order that a new Chairman be appointed under Rule 5(3) of the Constitution of Panels Rules.

Thank you.

MR KARK: Sir, just for our administration, can we take it a short time means this afternoon?

THE CHAIRMAN: That is correct. I assume I shall no longer be here.

MR KARK: Thank you.

THE CHAIRMAN: If the suggestion you are asking is can you depart from the building, I think, that is not what I understood.

MR KARK: No, I wanted to confirm for all parties that they knew that hopefully a Panel will be reconvening this afternoon.

THE CHAIRMAN: Hopefully a decision will be taken about how it may proceed from here.

MR KARK: I particularly ask because I have a number of witnesses.

THE CHAIRMAN: We will adjourn until further notice.

(*The Panel later adjourned until 9.30 am on Tuesday 3 July 2007*)