



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO: 255 OF 2021 (DDJ)**

**BETWEEN: JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND  
(IN OFFICIAL LIQUIDATION)**

**PLAINTIFF**

**AND: (1) XIONG HUI  
(2) ZHANG JIAN  
(3) POWERFUL WARRIOR LIMITED  
(4) SHI KAIYI  
(5) HU JING  
(6) YANG DONGMEI  
(7) OURGAME INTERNATIONAL HOLDINGS LIMITED**

**DEFENDANTS**

**AND IN THE MATTER BETWEEN**

**FSD CAUSE NO. 258 of 2021 (DDJ)**

**BETWEEN: JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND  
(IN OFFICIAL LIQUIDATION)**

**PLAINTIFF**

**AND: (1) POWERFUL WARRIOR LIMITED  
(2) SHI KAIYI  
(3) HU JING  
(4) YANG DONGMEI**

**DEFENDANTS**



**Appearances:** Alex Potts QC, Erik Bodden and Alecia Johns of Conyers Dill & Pearman LLP for the Third Defendant

Matthew Goucke, Harriet Ter-Berg and Adrian Fourie of Walkers (Cayman) LLP for the Plaintiff

**Before:** The Hon. Justice David Doyle

**Heard:** 19 July 2022

**Ex Tempore Judgment Delivered:** 19 July 2022

**Draft transcript of Ex Tempore Judgment Circulated:** 20 July 2022

**Transcript of Ex Tempore Judgment Approved:** 22 July 2022

## HEADNOTE

*Application of the recusal test namely whether a fair-minded and informed observer, having considered all of the facts, would conclude that there was a real possibility the judge was biased*



## **JUDGMENT**

### **Introduction**

1. In a reply skeleton argument of Powerful Warrior Limited (“Powerful Warrior”) dated 15 July 2022 and filed in proceedings FSD 255 and 258 of 2021 (DDJ) just after 3 p.m. on Friday 15 July 2022 in respect of a hearing scheduled to commence today 19 July 2022 at 10 a.m., Alex Potts QC, Erik Bodden and Alecia Johns on behalf of Powerful Warrior raised, for the first time in these proceedings, the issue of recusal.
2. The hearing today was set down many months ago to deal with two applications made by Powerful Warrior dated 9 December 2021 in FSD 255 and 258 of 2021 (DDJ). Proceedings under reference FSD 255 of 2021 have been referred to as the writ proceedings in which the substantive claims will be determined and proceedings under reference FSD 258 of 2021 have been referred to as the receivership proceedings in which I appointed, on an *ex parte* basis, receivers in respect of certain shares defined as the Subject Shares. Powerful Warrior now seeks relief that the *ex parte* permission to serve out of the jurisdiction and other orders granted by me on 2 September 2021 be discharged, the writ be set aside, and the *ex parte* Order of 2 September 2021 appointing interim receivers in FSD 258 of 2021 (DDJ) be discharged and a declaration be made that the court has no jurisdiction over Powerful Warrior, a company incorporated under the laws of the BVI.
3. The grounds of these two applications were not specified in the applications themselves but from the supporting evidence and the skeleton argument of Powerful Warrior filed on 12 July 2022 it appears now to be an argument based on an arbitration agreement the authenticity of which is challenged by the Plaintiff. The honesty of Powerful Warrior and Zhang Shaopeng, who says he is its sole director, and who exhibits the document which is said to contain the arbitration agreement is in dispute. In the Amended Writ of Summons



(28 October 2021) the Plaintiff, Jian Ying Ourgame High Growth Investment Fund (in official liquidation) (the “Company” or the “Fund”), seeks a declaration that the purported transfer of 132,464,336 shares in Ourgame International Holdings Limited, a company incorporated under the laws of the Cayman Islands, (the “Subject Shares”) to Powerful Warrior on 31 March 2021 was entered into as a result of the breach of fiduciary duty of directors Xiong Hui and Zhang Jian, without proper authority and was void and/or voidable.

4. Counsel for Powerful Warrior in their reply skeleton filed on Friday reminded me that nearly a year ago now on 14 September 2021, upon the application of Kinetic Creation Global Investments Limited, I made an Order and delivered an *ex tempore* judgment in FSD 90 of 2021 (DDJ).

#### **The 14 September 2021 Order in FSD 90 of 2021 (DDJ)**

5. In the Order I made on 14 September 2021 in FSD 90 of 2021 (DDJ), I referred to the evidence I had read and noted also that the court had read the report of the joint provisional liquidators of the Company. In the Order made on 14 September 2021, I ordered that the Company be wound up and I appointed joint official liquidators (“JOLs”). I authorised the JOLs at paragraph 7 of the Order, without further sanction or intervention from the court, to exercise amongst others the power “to bring or defend any action or other legal proceeding in the name and on behalf of the Company.” I am not aware of any appeal against that Order.

#### **The 14 September 2021 Judgment in FSD 90 of 2021 (DDJ)**

6. In my *ex tempore* judgment delivered on 14 September 2021 with the transcript of the judgment approved on 16 September 2021 (in FSD 90 of 2021 (DDJ)):



- (1) I recorded at paragraph 5 that: “No notice of appearance has been received from anyone and no one has appeared to oppose the relief sought by the Petitioner. The application has been made with the agreement and support of the JPLs and all procedural requirements in respect of the winding up of the Fund pursuant to the Petition have been met.”;
- (2) At paragraph 10 I stated that I was satisfied that the grounds for winding up had been established. At paragraphs 11 – 14 I dealt with the section 92(c) duration expiration ground and at paragraphs 15 – 28 I dealt with the section 92(e) just and equitable ground;
- (3) At paragraph 15 I stated that:

“There are many issues of concern which require further investigation. It is crystal clear that the Petitioner has justifiably lost trust and confidence in the conduct of the affairs of the Fund by its management and the acts and omissions by one or more of the directors of the Fund.”;
- (4) At paragraph 16 I stated:

“It warrants the Fund being placed into official liquidation so that independent liquidators can take appropriate steps to investigate and remedy the situation insofar as possible. The JOLs will be able to pursue the recovery of the Subject Shares for the benefit of those entitled to such and the Fund’s stakeholders.”;
- (5) At paragraph 21 I stated:



“The serious matters of concern in respect of mismanagement and misconduct are outlined in the Petition, and subsequent events have further justified the lack of confidence.”;

(6) At paragraph 22 I referred to some law and at paragraph 23 I added:

“Suffice to say there is no doubt that subsequent developments have confirmed the Petitioner’s pleaded concerns that there has been serious mismanagement and misconduct.”;

(7) At paragraph 27 I agreed that in view of the loss of trust and confidence and “the Petitioner’s concerns in respect of breaches of duty that there is a real need for a thorough investigation into the affairs of the Fund and its officers.”; and

(8) At paragraph 31 I stated:

“I am satisfied that the powers that remain in paragraph 7 of the draft Order following my exchanges with Counsel are necessary, specific powers in the particular circumstances of this case.”

### **The 2 September 2021 judgment in FSD 258 of 2021 (DDJ)**

7. Powerful Warrior does not in its skeleton argument make reference to my *ex tempore* judgment delivered in FSD 258 of 2021 (DDJ) on 2 September 2021 which is also online. It was delivered at an *ex parte* hearing and is included in today’s hearing bundles. Powerful Warrior does not however rely upon it and says it accepts, as is well established, that it is normally proper for a judge who grants *ex parte* Orders to deal with any applications to



discharge or vary such Orders on an *inter partes* basis.

8. In that judgment I stated:

- (1) “The transfer of the shares to Powerful Warrior and then to the Individual Recipients, and the lack of explanations in that respect, causes this Court some considerable concern. It is unfortunate that the JPLs and Segal J were not aware at the hearing on 27 July 2021 that Powerful Warrior had transferred the Subject Shares to the Individual Recipients on 2 July 2021” (paragraph 10);
- (2) “Frankly, the circumstances in which the Subject Shares have been transferred on two occasions, excites suspicions.” (paragraph 12);
- (3) “In summary, if notice is given, I am satisfied that there is a real risk that the Subject Shares could be further transferred and as such may frustrate or defeat the Fund’s claim. If notice is given, further steps may be taken to defeat the efforts being made by the JPLs in respect of the Subject Shares” (paragraph 13);
- (4) “An objective bystander might reasonably and rhetorically ask the question, “Exactly what is going on here?”” (paragraph 33);
- (5) “It appears from what I have read and heard to date that something irregular is happening in respect of the Subject Shares .... It is no wonder that the suspicions and concerns of the JPLs have been excited and aggravated” (paragraph 34);
- (6) “There has been no openness or transparency in respect of the March Transfer or the subsequent transfers and any justifications for them ...” (paragraph 41); and
- (7) “The appointment of receivers will, of course, impact on the ability of the persons claiming entitlement to the Subject Shares to exercise the rights attaching to those



shares, whether by voting or by selling them. I am satisfied however that this intrusion is necessary to preserve the position, pending the determination of the dispute.” (paragraph 46).

### **The recusal application**

9. Powerful Warrior at paragraph 11 of its reply skeleton “respectfully submits that Mr Justice Doyle would need to consider recusing himself from any substantive determination of the Jurisdiction Summonses in FSD 255 and 258 of 2021 (DDJ) on an *inter partes* basis, given:

“11.1 his role as the Liquidation Judge [in FSD 90 of 2021 (DDJ)];

11.2 the documents he has reviewed on an *ex parte* basis but which are not available to [Powerful Warrior]; and

11.3 the contents of the Order dated 14 September 2021... and the Judgment dated 16 September 2021...”

10. The reply skeleton puts a little more meat on the bones at paragraph 9 by stating that:

(1) the judge has been made privy to certain *ex parte* filings by the Plaintiff’s liquidators that have never been provided to Powerful Warrior including the first report of the JPLs dated 7 September 2021;

(2) in his capacity as the judge with supervision of the Plaintiff’s official liquidation in FSD 90 of 2021 (DDJ) the judge has given sanction to the JOLs in respect of the writ proceedings and the receivership proceedings in FSD 255 and 258 of 2021 (DDJ) against Powerful Warrior and other defendants including Xiong Hui and Zhang Jian; and





- (3) the judge already appears to have made a finding at paragraph 16 of the judgment (in the absence of Powerful Warrior, without notice to Powerful Warrior and without hearing any evidence or submissions on behalf of Powerful Warrior) that “the JOLs will be able to pursue the recovery of the Subject Shares for the benefit of those entitled to such and the Fund’s stakeholders.”
11. Footnote 3 of the reply skeleton says that the recusal issue “follows from the case law relating to issues of apparent bias, natural justice, and pre-determination, as has been recognised, for example, in the texts and authorities that prevent a *Beddoes* judge (who has granted leave to a trustee on an *ex parte* basis to bring legal proceedings) from ordinarily sitting as the judge in the main action on an *inter partes* basis ...”
12. Paragraphs 12 and 13 of Powerful Warrior’s reply skeleton are in somewhat unusual terms:
- “12. PWL wishes to be clear, however, that the issue of whether or not the Judge should consider recusing himself only arises because of the Plaintiff’s misguided attempts to persuade the Court to reject PWL’s and Zhang Shaopeng’s affirmation evidence summarily, without any application for leave to cross-examine Zhang Shaopeng.
13. If the Court were to accept, as PWL submits that it should, that Zhang Shaopeng’s affirmation evidence must be accepted to be true for the purposes of the Jurisdiction Summonses, the issue of recusal need not arise at this stage (but PWL’s rights must remain fully reserved in this respect).”
13. With or without the cross-examination of Zhang Shaopeng, I must consider the issue of recusal and it is not for a litigant to attempt to reserve its rights and play another recusal card at its convenience at a later stage of the proceedings. Either Powerful Warrior has



good grounds for recusal today or it does not. There is no half-way house compromise with the issue of recusal. I deprecate the tendency of some litigants to keep cards up their sleeves to be played later. This is inconsistent with the overriding objective and the modern litigation culture.

14. This morning Mr Potts has endeavoured to reinforce the recusal points made in the reply skeleton and made further points including the following:

- (1) proceedings in FSD 255 and 258 of 2021 are interconnected and should be consolidated at some point. If the court concludes that it must recuse in FSD 255 of 2021 it should also recuse in FSD 258 of 2021;
- (2) the role of a *Beddoes* Judge and the role of a Liquidation Judge giving sanction for legal proceedings are very similar and the same principle applies. The Liquidation Judge should not deal with the substantive litigation against third parties which he has sanctioned; and
- (3) ideally the recusal application should have been made earlier but it was only on receipt of recent evidence and skeleton argument alleging dishonesty and fraud (without an application to cross-examine) that the recusal issues became readily apparent. The recusal application is not cynically brought forward and must be dealt with on its merits.

### **The relevant test in recusal applications on grounds of apparent bias**

15. The relevant test in respect of recusal applications on the ground of apparent bias is well established (see for example paragraph 152 of the judgment of Sir Jack Beatson, JA, in *Perry v Lopag Trust Reg. and others* (CICA; unreported judgment 19 November 2021)) helpfully referred to by Mr Potts in his reply skeleton. It is whether the fair-minded and



informed observer, having considered all the facts, would conclude that there was a real possibility that the judge was biased (the “recusal test”). Recently Lord Malcolm in *Smith v Attorney General of Trinidad and Tobago* [2022] UKPC 28 at paragraph 1 set out the well-known recusal test and added:

“Sometimes it is asked whether there is a legitimate doubt as to the tribunal’s impartiality, a quality seen as indispensable to the fair administration of justice.”

16. Lord Mance, giving the advice of the majority of the Board of the Judicial Committee of the Privy Council, in *Almazeedi v Penner* 2018 (1) CILR 143 at paragraph 1 reiterated the recusal test and added:

“There is no suggestion of actual bias but ... if a judge of the utmost integrity lacks independence, “then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence.” The right of a litigant to an independent and impartial tribunal is “fundamental to his right to a fair trial”... The right to a fair trial is enshrined in s.7(1) of the Cayman Islands Constitution ...”

17. Returning to *Perry* in the Cayman Islands Court of Appeal it can be seen from paragraph 139 of the judgment that the Appellants submitted that the judge’s involvement in a confidential funding application in June 2018 (which they said they only became aware of in June 2021 although a redacted judgment was published on 8 August 2018) gave rise to apparent bias and that the judge had failed to disclose this to them and to recuse himself from conducting the trial which started in February 2019. They too relied on the analogy of guidance provided by the requirement under *Re Beddoe* [1893] 1 Ch. 547 and other cases concerning the procedure when a trustee seeks directions as to whether to bring or to defend legal proceedings in that capacity. It can be seen from paragraph 152 of the judgment that



the Appellants' principal ground was apparent bias because of the judge's involvement in the funding application. Sir Jack Beatson, JA, at paragraph 161 stated "The consideration and determination of whether the funding agreement was unlawful under Cayman Islands law did not involve a consideration of the merits of the Appellants' claims against the trustees."

18. It appears in that case that it was for "the Liechtenstein Court and not the Grand Court to consider the issues as to the merits and other matters that would arise and be resolved in England and in these islands by a *Beddoe* application ...".

19. Sir Jack Beatson, JA, at paragraph 162 stated:

"While such matters are sensitive and will depend on the precise circumstances, there are other situations in which a judge dealing with an aspect of a case can properly also deal with the substantive underlying issue even when he or she has expressed a preliminary view. The observations in the cases that the fair-minded and informed observer is neither complacent nor unduly suspicious and that his or her approach must not be confused with that of the person who has brought the complaint are particularly pertinent. For example, a judge who has given a preliminary view on the merits of a case by refusing leave to appeal which is later granted by other judges or by granting leave to apply for judicial review may sit in the substantive hearing..."

20. The Justice of Appeal at paragraph 165 felt that the analogy which the Appellants sought to draw between the funding application and a *Beddoe* application was misplaced because of the difference between the purpose of a *Beddoe* application and the matters considered in it and the purpose of the funding application to the judge. In a *Beddoe* application the



trustee discloses to the court the strengths and weaknesses of the trustee's case and as Lightman J concluded in *Alsop Wilkinson (a firm) v Neary* [1996] 1 WLR 1220 at 1225 “[i]t would be quite inappropriate for all this to be revealed to the court which has to try the case or the other parties to the litigation.”

21. Sir Jack Beatson, JA, at paragraph 166 added:

“... the fact that the trustees needed litigation funding in order to defend the underlying proceedings did not mean that justice required the beneficiaries to be given an opportunity to object to the application. The independent and informed observer would not expect an adverse party to litigation to be privy to the arrangements made to enable the other party to bring or defend the proceedings.”

22. *Perry* also confirms (at paragraph 163) that the mere fact that a judge has previously commented adversely on a party or witness would not “without more” found a sustainable objection. The position would be different if a judge committed himself to a view of the facts or decided that a party or a witness was a crook or a rogue so that he might not be able to put himself back into a state where he has no preconceptions about the merits of the case. So might it, where he has expressed a preliminary view in such vituperative language that any reasonable person will regard him as disqualified from taking a fair view of the case if he is called on to revisit it (paragraph 164 of *Perry*). In between these two extremes there may be other circumstances in which a judge is duty bound to recuse.

23. Fairness and justice allow no room for the perception of pre-judgment especially on substantive issues. Judges must also carefully guard against the possibility of unconscious and cognitive bias. As Benjamin Cardozo stated in *The Nature of the Judicial Process* (1921): “We may try to see things as objectively as we please. Nonetheless, we can never see them with eyes except our own.”



24. In *Byers v Chen Ningning* [2021] UKPC 4 the Privy Council again stressed the following:

“36. It is of course a fundamental principle of civil justice that everyone is entitled to a fair trial before an independent and impartial tribunal”

and referred to the judge’s remarks being “forthright and robust and it would have been better had he expressed himself in a more moderate manner. But they must be considered in context ... The Board is satisfied that, having regard to the nature of these proceedings, the parties to them and the skill and experience of those representing them, a fair minded observer, who heard these remarks in the context in which they were made, would not conclude that the judge had set his mind against the Liquidators or had predetermined the case against them. Indeed, the judge’s evaluation of Miss Chen’s evidence, accepting some parts but rejecting others indicates that he applied a critical mind to the case ...”

25. Lord Lloyd-Jones in the Privy Council in *Stubbs v R* [2018] UKPC 30 at 15 stated:

“The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal.”

Lord Lloyd-Jones referred to quotes from other authorities as follows:

“The appearance of bias includes a clear indication of a prematurely closed mind.”

“The concept of bias .... extends further to any real possibility that a judge would approach a case with a closed mind, or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have ‘prejudged’ the case.”

At paragraph 17 Lord Lloyd-Jones added:



“It is not acceptable for a judge to form, or to give the impression of having formed, a concluded view on an issue prior to hearing full argument by all parties on the point.”

Lord Lloyd-Jones stated:

“34. ...The Board wholeheartedly agrees with the Court of Appeal that a judge should not recuse himself unless there is a sound reason for recusal, lest unmeritorious applications for recusal become the norm and result in damage to the administration of justice. In particular, it is necessary to stand firm against illegitimate attempts to influence which judge shall sit in a particular case ...”

### **Submissions**

26. I have considered all the submissions put before the court on this recusal issue. I do not set them all out in detail in this *ex tempore* judgment. They form part of the court record and I have full regard to all of them. I have recorded some of the submissions made by Mr Potts above.
27. In their reply skeleton filed yesterday the JOLs of the Plaintiff make the following points, amongst many others:
- (1) Powerful Warrior’s bizarre suggestion that Doyle J should recuse himself “if he is minded to find against PW on affidavit evidence” is highly inappropriate in so far as it appears to constitute a thinly-veiled threat to the Court of a challenge that will be made if the Court finds against Powerful Warrior;
  - (2) there is no unfairness in principle in a judge seized of the supervision of liquidation proceedings hearing claims brought by liquidators on behalf of the company in liquidation;



- (3) the first report of the JOLs dated 7 September 2021 is uncontroversial and the suggestion by Powerful Warrior that it is prejudiced by not being provided with this material is clearly opportunistic and designed to obfuscate and delay. It also contradicts its position that the evidential documents requested to be included in the hearing bundle by the JOLs are “largely irrelevant to the issues before the Court on these applications, save perhaps by way of broader procedural background”;
- (4) Doyle J did not make an order granting sanction as the Writ and Receivership Summons were both issued on 27 August 2021 when the Fund was in provisional liquidation and the JPLs were authorised to commence proceedings (by way of a general sanction) under the provisional liquidation Order made by Segal J on 2 July 2021;
- (5) Doyle J has not made any findings at paragraph 16 of his judgment or otherwise pre-judged matters and it is clutching at straws for Powerful Warrior to suggest that he did; and
- (6) if Powerful Warrior were genuinely concerned about these issues and considered there to be proper grounds for recusal, they would presumably have insisted upon the issue of recusal being determined in advance of the substantive hearing, rather than trying to deploy the argument two business days before the hearing as a bet each way contingent upon whether the Court is with them or not. It is a transparent and untenable position for Powerful Warrior to adopt.

28. The main oral submissions of Mr Goucke for the Plaintiff this morning were as follows:

- (1) the recusal issue is ultimately an issue for the judge and the Plaintiff does not argue





strongly one way or the other but submits that on the material before the court it is not necessary or appropriate for the judge to recuse in this case;

- (2) the role of *Beddoes* Judge and a Liquidation Judge is quite different and Powerful Warrior has, other than an analogy with the position of a *Beddoes* Judge, produced no authority to the effect that a Liquidation Judge cannot determine substantive proceedings that are taking place with his sanction;
- (3) if there is to be a recusal the judge could recuse as the Liquidation Judge;
- (4) paragraph 16 of the judgment delivered on 14 September 2021 contains no finding as to who is entitled to the Subject Shares; and
- (5) the chronology and previous correspondence shows the unsatisfactory approach and delay of Powerful Warrior.

### **Determination of recusal issue**

29. At the end of the day, it is for the judge to stand back, as objectively as he can, and to consider the recusal test, the relevant facts and circumstances and come to a conclusion as to whether he should continue to preside or whether he should recuse. If grounds for recusal have been established the judge must recuse. If grounds for recusal have not been established, the judge is duty bound to continue to preside (*South Africa (President) v South African Rugby Football Union* [1999] SA 147 at 177).
30. Looking at the issue through the eyes of a fair-minded and informed observer and having considered all the facts I have, with some considerable reluctance, decided that the recusal



test is met in the circumstances of this case. I am therefore duty bound to recuse and I do so in respect of proceedings under reference FSD 255 of 2021 and it is rare common ground between the parties that if I recuse in respect of FSD 255 of 2021, I must also recuse in the ancillary connected receivership proceedings in FSD 258 of 2021. Moreover, it is best that the same judge deals with the summonses in both FSD 255 and 258 of 2021. It is also common ground between the parties that in view of Segal J's prior involvement, including the sanction he gave the JPLs in respect of the substantive proceedings, it would be inappropriate for Segal J to be assigned to FSD 255 and 258 of 2021. No doubt, court administration and the Chief Justice, who the attorneys will ask to make judicial reassignments of these matters, will bear these points in mind. All of these issues will, of course, be issues for the Chief Justice to consider when the parties apply to him for the reassignment of these matters.

31. I say that I recuse with “some considerable reluctance” because my recusal will involve delay and additional expense for the parties. Had the recusal issue been raised earlier some time and costs could have been saved. I have also spent a lot of scarce judicial time reading into the two summonses dated as long ago as 9 December 2021, together with the 3 hearing files and the skeleton arguments and authorities, in readiness for today's hearing. Powerful Warrior left it very late in the day to raise the recusal issue. Powerful Warrior has not said when my judgment of 14 September 2021 came to its notice but it would have been put online soon after the transcript was approved on 16 September 2021. Powerful Warrior could have accessed it many months ago and raised the recusal issue much earlier than it eventually did. All that is said in its reply skeleton is that “PWL's Counsel have reviewed” the Order dated 14 September 2021 and the subsequent judgment. It is careful not to indicate a date the Order and judgment were accessed or reviewed. As counsel fairly accepted, a busy judge dealing with many hearings and delivering numerous judgments



and making numerous orders over a long period of time cannot reasonably be expected to remember all of them and the judge is reliant on the parties and their attorneys, as officers of the court, to promptly bring to the judge's attention any orders or judgments or indeed other matters of relevance to any recusal issues. I say this to encourage attorneys to act promptly in the future if they have good grounds for a recusal application.

32. Although I admire the ingenuity of Mr Goucke's thought, I do not think it a sensible or fair approach to recuse as the Liquidation Judge and stay on to deal with the substantive issues in the writ proceedings in FSD 255 of 2021. The fair minded and informed observer would remain concerned over my previous sanction of the substantive proceedings and the comments I made in my judgment of 14 September 2021.
33. If the granting of the sanction application to continue the pursuit of legal proceedings against the Defendants had stood alone (especially having regard to the apparent differences between a *Beddoe* application and a sanction application) it may be that recusal might not have been appropriate in FSD 255 of 2021, but taken together with the fact that I remain the Liquidation Judge and the comments I made in my judgment of 14 September 2021, I have come to the conclusion that the recusal test has been met. The determinations of recusal applications are very much fact and issue sensitive.
34. I have applied the recusal test to the circumstances of this case. I have also been careful to guard against any potential abuse by way of "judge shopping" whereby some litigants wrongly present recusal applications in an attempt to remove a judge who they regard as unfavourably disposed to their case (*Anglo International Holdings Limited v Cashandale Limited* 1996 – 98 MLR 8 at pages 15 – 16; Appeal Division, Isle of Man High Court). Litigants, of course, cannot choose their judges. Lord Sumption dissenting strongly in *Almazeedi v Penner* at paragraph 36 noted that "...applications based on apparent bias are open to abuse..." adding: "The many decisions in this field are generally characterized by robust common sense."



35. I am also aware that judges should be sensitive to the fact that in small compact jurisdictions with limited numbers in the judicial pool great care should be taken to ensure that the recusal test is met. It may be more difficult in some small jurisdictions to find replacement judicial officers. As Lord Neuberger put it, whilst speaking extra-judicially, in the *FA Mann Lecture 2015* at paragraph 36:

“It is all too easy for a litigant who does not want his case heard by the assigned Judge, or wishes to postpone a hearing, to conjure up reasons for objecting to a particular judge. It is contrary to justice for one party to be able to pick the judge who will hear the case. In small jurisdictions or in specialized areas of work, it is not always easy to find an appropriate judge, and if the objection is taken, as it often is, at the last minute, it will often lead to delay and extra cost for the parties and the court.”

36. Lord Rodger in *Belize Bank Limited v AG* [2011] UKPC 36 referred to the difficulties in some small jurisdictions where substitute judges cannot readily be found. But see Lord Mance in *Almazeedi v Penner* at paragraph 34 in respect of the Cayman Islands where he makes the following observation: “An alternative to disclosure might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would, so far as appears, have been no obstacle.”
37. Attorneys need to take great care when considering whether to file a recusal application. Stanley Burnton J in *R (Toovey and Gwenlan v The Law Society* [2002] EWHC 391 (Admin) at paragraph 80 stated:

“Applications for the court to recuse itself have become increasingly fashionable



of late, regrettably often with no factual or legal justification. It may be tempting for a client to want to recuse the Court when he perceives his case is failing, but that is no justification for counsel to make the application .... It is for counsel to satisfy himself that there are reasonable grounds for making such an application.”

38. Fortunately, in my experience, such improper applications are not fashionable in the Cayman Islands and long may that continue. It is important that such applications are only made on solid grounds and on a timely basis. Moreover, the position should not be reserved (as Powerful Warrior seemingly attempted to do so at paragraph 13 of its reply skeleton) and the recusal card should not be kept up the sleeve to be played at a time which the applicant considers best suits its own interests, rather than the interests of justice.
  
39. I am quite sure that I could deal with the summonses fairly and justly but that, of course, is not the relevant test. My own protestations that I am not and would not be biased against Powerful Warrior are not to the point and can be given no weight in this context. We are dealing with apparent bias rather than an allegation of actual bias. I have to look at the matter objectively through the eyes of a fair minded and informed observer. It is important to maintain the community’s trust and confidence in the administration of justice that justice must not only be done it must also be seen to be done. Moreover, considerations of inconvenience and costs do not count in a case where the principle of perception of judicial impartiality is properly invoked. This is because the right to a fair trial by an impartial and independent tribunal is a fundamental principle of justice both at common law and under the Constitution. The recusal test is a mandatory test. It is not a discretionary case management decision reached by weighing various factors in the balance (see Mummery LJ in *AWG Group Ltd v Morrison* [2006] 1 WLR 1163 at paragraph 6).



40. It is not sufficient, in the circumstances of this case, for me to say I made the comments in my *ex tempore* judgment delivered on 14 September 2021 on the basis of the evidence and arguments then before the court, and I keep a mind open to persuasion and will decide the issues in the substantive proceedings based on the evidence and arguments then presented including evidence and arguments from the defendants. In the context of a recusal application it is not what I think that is important. Of course, I would keep a mind that is open to persuasion, but the fair minded and informed observer may, nevertheless despite those subjective protestations, reasonably conclude that my continuing involvement as the Liquidation Judge and my prior judicial comments, which may be regarded as indicative of pre-judgment, were sufficient for the recusal test to be duly met.
41. It is important to take into account the nature of the issues to be decided when applying the recusal test. Moreover, in my judgment there are differences between the role of a judge considering and determining a *Beddoe* application and the role of a judge considering and determining an application by a liquidator for court sanction to commence or continue with legal proceedings. I was not addressed in any detail on this sanction point but see, by way of examples, my judgment in *Income Collecting 1 – 3 Months T-Bills Mutual Fund (in official liquidation)* (FSD; unreported judgment 21 January 2022) albeit in the context of the sanction of a compromise; and in different contexts the judgment of Chief Justice Smellie in *Premier Assurance Group SPC Ltd (in official liquidation)* (FSD; unreported judgment 26 April 2022) and Segal J’s judgment in *Direct Lending Income Feeder Fund, Ltd (in official liquidation)* (FSD; unreported judgment 9 May 2022). The fact that the JOLs say that Segal J by order made on 2 July 2021 authorised the JPLs to commence proceedings does not remove the fact that I granted the JOLs sanction by my Order made on 14 September 2021 and it is pursuant to this Order that the JOLs are progressing the substantive proceedings. Furthermore, I remain the Liquidation Judge.

42. I have taken into account my sanction of the substantive proceedings in the case by way of the Order on 14 September 2021 and the comments I made in my *ex tempore* judgment delivered on 14 September 2021 (with transcript approved on 16 September 2021). In light of the same, I feel that I am duty bound to conclude that the recusal test has been met in this case and I must recuse. I therefore recuse for the reasons stated in this judgment.
43. The parties sensibly agree that the costs of and incidental to today's hearing should be reserved to the judge who is assigned to deal with the proceedings in FSD 255 and 258 of 2021.
44. I leave it to the parties to liaise with court administration and the Chief Justice in order that another appropriate Justice can be assigned to FSD 255 and 258 of 2021.

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**THE HONOURABLE JUSTICE DAVID DOYLE**  
**JUDGE OF THE GRAND COURT**