Neutral Citation Number: [2022] EWHC 3217 (Ch)

Case No: CH-2019-000159 & CH-2019-000197

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS

ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON (Business and Property List) FROM DECISIONS OF MR RECORDER GERAINT JONES KC DATED 4th APRIL 2019 AND 5th JULY 2019

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

Date: 15/12/2022

Before :

Double-click to add the Judges name

- -

Between :

RONALD ALBERT POPELY

Appellant

- and –

(1) AYTON LIMITED
(2) ALAN MOSLEY
(acting by the Official Receiver as his Trustee in Bankruptcy)

Respondents

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- -

Ms Aileen McErlean (instructed by **Keystone Law**) for the **Appellant**
Mr TWE Evans (instructed by **Seddons LLP**) for the **First Respondent**

Hearing dates: 29 and 30 November 2022

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Approved Judgment

This judgment was handed down remotely at 10.30am on 15 December 2022, by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mrs Justice Joanna Smith:

1. The court has before it two appeals from decisions made by Mr Recorder Geraint Jones KC ("**the Judge**"):

    a. the first appeal is a highly unusual appeal by a person ("**Mr Popely**"), who was neither party to, nor witness in, proceedings brought in the County Court ("**the Proceedings**"), against adverse findings of fact made against him in a judgment dated 4 April 2019 ("**the Main Judgment**"). I granted permission to appeal at the outset of the hearing and (for reasons which will become clear) Ayton Limited ("**Ayton**") acknowledged that this was the right course (albeit that Ayton nevertheless submitted that the appeal should be dismissed);

    b. the second appeal concerns an order dated 5 July 2019 ("**the Recusal Order**"), in which the Judge dismissed Mr Popely's application that he should recuse himself from hearing a non-party costs application against Mr Popely, who had been joined to the Proceedings by order dated 4 April 2019 ("**the April 2019 Order**") specifically for the purposes of costs, pursuant to CPR 46.2. Permission to appeal on this issue was granted by the Judge.

BACKGROUND TO THE APPEALS

The Main Judgment

2. The Main Judgment followed a 5 day trial in the Proceedings brought by Ayton against Mr Alan Mosley ("Mr Mosley"), also named as a Respondent to these appeals, but not represented before me at the hearing. St Vincent Trust Services Limited ("SVTS") and Corporate Directors Limited ("CDL"), entities under the control of the Jeeves Group ("Jeeves"), were named as third parties in the Proceedings. In brief summary, the Proceedings concerned a dispute between Ayton and Mr Mosley over the ownership of a property known as White Owl Barn ("the Property"), occupied by John Popely ("JP"), his wife, Ann Popely ("AP"), and their son. The facts are somewhat convoluted and do not need to be rehearsed in any detail for the purposes of this judgment. Suffice to say, however, that at the heart of the case was an allegation that sale of the Property to Mr Mosley "constituted an unlawful and dishonest scheme", pursuant to which Mr Mosley had knowingly received trust property and/or dishonestly assisted in a breach of trust by SVTS, CDL and Mr Kaiser, the then liquidator of Ayton.

3. By the time of the Proceedings, JP, who is Mr Popely's brother, was in control of Ayton, which was no longer in liquidation. Witnesses for Ayton at the trial included JP, AP and Mr Popely's own son, Darren Popely. It is common ground that these family members were all hostile to Mr Popely.

4. The Amended Particulars of Claim, which should have framed the issues for determination at trial, neither made allegations against Mr Popely nor mentioned him as having been involved in the alleged dishonest scheme. Indeed he was not referred to <u>at all</u> in the Amended Particulars of Claim. Nevertheless, the Judge made a number of findings of fact of a serious nature against him which went far beyond the four corners of the case. In the first instance these were recorded in a document referred to by the Judge as his "primary findings of fact" ("**the Findings of Fact**").

5. In summary, the Findings of Fact recorded that since 2002 there had been a bitter feud between Mr Popely and JP and that, motivated purely by spite towards his brother, Mr Popely had conspired together with a legally qualified employee of Jeeves (another non-party to whom I shall refer as "KP") and Mr Mosley (albeit at a later stage), to cause Ayton to go into liquidation and the Property to be sold, thereby rendering JP and his family homeless. In addition, the Findings of Fact recorded that Mr Popely had (directly or indirectly) provided the purchase monies for the Property, including legal costs.

6. In paragraph 43 of the Findings of Fact, the Judge said this:

> "I am acutely aware that these findings impugn people who have not been parties to this litigation and/or given evidence. That is of concern, but I have had to deal with the issues that have arisen which, in my judgment could not have been fairly disposed of without me making the above findings relating to KP and [Mr Popely]; each of whom was conspicuous by his/her absence from the witness box".

7. On behalf of Ayton, Mr Evans very fairly informed me that (i) the evidence at trial had been that Mr Mosley had not been advised to seek Mr Popely's involvement as a witness[1]; and (ii) none of the parties to the Proceedings sought to take steps to address the observation in paragraph 43 of the Findings of Fact or to suggest to the Judge that his findings against non-parties might require any further consideration or process. It seems (although the transcript of the hearing has not been made available to me) that no one drew the Judge's attention to the fact that the pleaded issues in the case did not involve any allegations, let alone serious allegations of dishonesty, against Mr Popely.

8. The Judge subsequently produced the Main Judgment setting out his detailed reasoning which, if anything, expanded upon the findings against Mr Popely, including reinforcing the Judge's certainty around those findings.

9. Thus, in the Main Judgment, the Judge focused on what he described as "the web of dealings which [Mr Popely] and KP orchestrated between themselves", concluding that it was "overwhelmingly probable" that Jeeves, KP and Mr Popely had conspired to sell the Property, with Mr Mosley joining the conspiracy later; that this was part of a "dishonest plot hatched between" Mr Popely and KP; that Mr Popely had been motivated by the desire to damage his brother towards whom he had acted maliciously; that all costs of the purchase of the Property were "bankrolled" by Mr Popely who was the "overall paymaster and main conspirator" behind the sale of the Property; that he was satisfied "to the criminal standard of proof" that KP and Mr Popely conspired together to wind up Ayton and sell the Property using Mr Mosley as "a stooge" and a "tool" and that this had involved "the device of secretly procuring the appointment of a liquidator" for Ayton, orchestrating a scheme to avoid court undertakings and dictating the generation of false documents.

10. These findings are made and repeated throughout the Main Judgment in trenchant and often unequivocal terms and there is little doubt that the Judge took the view that they were findings he was required to make on, as he put it, the "issues that have arisen". It is unclear how he squared that view with the pleaded case, or indeed with the submissions

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[1] This is confirmed in the eleventh witness statement of Mr Charles Burrell dated 1 April 2019.

that Mr Evans tells me were made to him in closing, which did not invite a finding of dishonest conspiracy against Mr Popely[2]. During the appeal hearing, Ms McErlean, on behalf of Mr Popely, referred to all of the findings against Mr Popely identified at [9] above as "the Adverse Findings" and I shall adopt this shorthand for the purposes of this judgment.

11. The Main Judgment was handed down on 4 April 2019. By this time, Mr Mosley had been made bankrupt. In light of the Adverse Findings made in the Main Judgment, Ayton then applied for an order that Mr Popely be joined to the Proceedings and for an order that Mr Popely be jointly and severally liable with Mr Mosley for Ayton's costs thereof. This non-party costs application ("**the NPCA**") was supported by the 11th Witness statement of Mr Charles Burrell, Ayton's solicitor, ("**Burrell 11**") dated 1 April 2019.

12. Burrell 11 relies upon the Adverse Findings against Mr Popely in support of the NPCA together with the fact that Mr Popely "was available or could easily have made himself available as a witness at trial" (a proposition that appears to echo the words of the Judge in paragraph 43 of the Findings of Fact). From "the present state of the evidence" (which includes the Adverse Findings), Mr Burrell invites the inference that Mr Popely "funded and directed Mr Mosley's defence of the claim throughout" which he suggests must have been done out of spite for his brother given "the absence of any other available motive". On the subject of why Mr Popely had never been joined as a defendant to the Proceedings, Burrell 11 explains that although this step had been canvassed by Ayton, it had decided against joinder, essentially because, (i) although it had evidence of funding of the purchase of the Property by Mr Popely by January 2016, Mr Mosley's evidence in his statements was that Mr Popely had nothing to do with the purchase. By the time Ayton had what it considered to be "unassailable evidence" against Mr Popely it was too late to contemplate an amendment; (ii) Ayton did not have the funds available to incur the costs of joining Mr Popely and (iii) Ayton was anxious to avoid further delay.

13. Burrell 11 accepts that Mr Popely should have the opportunity to file evidence in response to the NPCA and also seeks an order for a statement from Mr Mosley explaining in detail how the Proceedings had been funded.

14. The recitals to the April 2019 Order record that the order to join Mr Popely to the claim for costs purposes only had been made upon reading Burrell 11 and upon "IT APPEARING to the Court that such an order should be made **unless Mr Popely shows cause why it should not be made**" (**emphasis added**). The Judge also ordered that both Mr Mosley and Mr Popely provide witness statements, an order that has been stayed in relation to Mr Popely pending these appeals.

15. On 19 June 2019, Mr Popely filed a Notice of Appeal, out of time, against the Adverse Findings made against him in the Main Judgment and on 18 July 2019, Mr Popely applied to rely on his first witness statement of the same date ("**Popely 1**") in support of his application to extend time for his application for permission to appeal. Popely 1 makes clear that Mr Popely vehemently disputes the Adverse Findings and sets out his evidence as to the prejudice he has suffered by reason of those findings made in the Main Judgment

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[2] This is confirmed by Ayton's solicitors' correspondence referred to in paragraph 16 of the witness statement of Mr Popely dated 18 July 2019.

and how his reputation, familial and professional relationships have been, and are likely to be, affected. I shall return to this evidence later in this judgment.

16. In addition, Popely 1 confirms that Mr Popely had never been provided with the pleadings or witness statements in the Proceedings and that he did not know what Ayton's case was going to be in the Proceedings or that Ayton might make any allegations against him. In response to the Judge's observation that he had been "conspicuous" by his absence from the trial, Mr Popely says this:

> "I do not understand why the Recorder would say that. I was not a party to the action and, as far as I was concerned, it had nothing to do with me…If either Ayton or Mr Mosley had wanted me to appear as a witness in the proceedings they could have asked me to be a witness, but neither did."

The Recusal Order

17. On 30th May 2019, Mr Popely made an application to the court, supported by a witness statement, for the Judge to recuse himself from hearing the NPCA. His application was dismissed by the Judge in the Recusal Order. In his *ex tempore* judgment on the application ("**the Recusal Judgment**"), at paragraph 10, the Judge said this:

> "…the approach I take is this: the instant case did present circumstances where it was necessary for the findings that I made to be made in order to adjudicate properly upon the issues that were joined between the parties to the litigation. There was no need for them to be provisional views. The findings of fact were made in that litigation and on the evidence that had been heard in that litigation. An informed observer would know that in any subsequent application made by a party who was not a party to the litigation or a witness within it, it would be open to that party to adduce such evidence he or she wished to put before the court and for the earlier findings to be said to be not sustainable in the context of that further evidence.
>
> …No properly informed objective bystander could reasonably consider that a court would not take into account subsequent evidence, further argument and submissions in respect of findings against somebody who was not a party to the instant litigation."

18. On 25 July 2019, Mr Popely filed an Appellant's Notice against the Recusal Order.

The progress of the Appeals

19. By order dated 30 July 2019, Falk J (as she then was) granted Mr Popely permission to rely upon Popely 1 in support of his application for an extension of time, his permission application and, if permission was granted, his substantive appeal against the Adverse Findings in the Main Judgment. She also gave permission to Ayton and Mr Mosley to serve evidence in reply, if so advised. Falk J granted Mr Popely's application for an extension of time to file his Appellant's Notice and ordered that his application for

permission to appeal should be heard together with his appeal on a date to be fixed. The hearing of the appeal against the Recusal Order was to be heard immediately thereafter. By a further order of 14 November 2019, Falk J increased the original time estimate for the two appeals to 2 days.

20. On 12 September 2019, Ayton filed a witness statement from JP ("**JP3**") in response to Popely 1. That witness statement exhibited, amongst other things, judgments, skeleton arguments and orders in entirely separate legal proceedings involving Mr Popely and (usually) other members of his family. It went on to describe various different pieces of litigation that have been on foot since 2000 between JP and Mr Popely and observed that, in JP's view, the Adverse Findings made by the Judge "seem mild compared to some of those that have been made about [Mr Popely] by other Judges in the past". JP3 also provided details of an undertaking given by Mr Popely to avoid disqualification as a director and sought to address the significance of the Adverse Findings made by the Judge in the context of the Proceedings.

21. Mr Popely filed a responsive statement to JP3 dated 10 November 2022 ("**Popely 2**"), in respect of which he sought permission from the court at the outset of the hearing of these appeals. No objection was made to Popely 2 and so I granted permission. Popely 2 is confined to a response to a few of the factual matters raised in JP3 and does not, to my mind, take matters any further.

22. It will be clear from this chronology that, for reasons I need not go into for the purposes of this judgment, the hearing of these appeals has been substantially delayed and that the Adverse Findings and the Recusal Order against which Mr Popely now appeals were made more than 3 years ago. It is for this reason that I have not shied away from referring in some detail to the Adverse Findings made against Mr Popely in this judgment, notwithstanding that it is his case that they should never have been made against him in the absence of a fair process. The findings were published in the Main Judgment in 2019 and nothing I can say or do at this point in time can expunge them from the face of that published judgment.

THE APPROACH ADOPTED BY AYTON

23. Ayton provided a detailed skeleton argument in respect of the first appeal in which it explained that its position was "neutral, except insofar as any of the Recorder's findings, about which [Mr Popely] complains, are in fact relied on by Ayton in its costs application against [Mr Popely]". I shall need to return to this in due course. For present purposes, suffice to say that it became clear during the hearing that Ayton considers there to be something of a bright line between the findings of dishonest conspiracy made against Mr Popely (which Ayton identifies narrowly) and the remaining findings (including as to Mr Popely's malicious intent and as to his having funded the purchase of the Property and subsequent litigation), which Ayton submits were unobjectionable in the context of the issues before the court.

24. Ayton did not provide a skeleton argument in respect of the second appeal, acknowledging (rightly) that the issue of recusal was entirely a matter for the court. Mr Evans made no oral submissions in respect of the appeal against the Recusal Order.

THE FIRST APPEAL: GROUNDS OF APPEAL

25. Mr Popely's Grounds of Appeal identify some 17 occasions on which Adverse Findings of fact were made against him in the Main Judgment and, essentially, complain that the process adopted by the Judge was unfair in various respects. He contends that he has been deprived of fundamental procedural protections conferred on him by Articles 6 and 8 of the European Convention on Human Rights ("**the ECHR**") and by the common law. Accordingly, it is his case that the Judge's findings are a "judicial act" which was "unlawful" under sections 6 and 7(1) of the Human Rights Act 1998 ("**the HRA**").

26. Specifically, Mr Popely contends that the findings made against him were of an extremely serious nature, likely adversely to impact upon his reputation and his right to a private life more generally, but that the Judge neither forewarned him of the possibility that such findings might be made, nor gave him any opportunity to know of, or to meet, any evidence or allegations made during the trial which gave rise to those findings. He only became aware of the Adverse Findings, as he explains in Popely 1, when files including the Main Judgment were left outside his office (in his absence at his home in Gibraltar) and on 8 May 2019 he was able to arrange for the files to be sent to his solicitors. Mr Popely says that the Adverse Findings, if true, amount to a set of facts which disclose an independent cause of action against him on the part of either Ayton and/or JP.

27. This court is not asked to analyse the evidence underpinning the Adverse Findings much less to consider whether they could properly have been made on the available evidence. This appeal is purely about process. Mr Popely seeks an effective remedy which, in so far as may be possible, corrects the unfairness of the Main Judgment. In her skeleton argument for the hearing, Ms McErlean identified two possible remedies: the redaction of the offending paragraphs from the Main Judgment (redaction in this context meaning that those paragraphs would no longer stand against Mr Popely or have any validity for any purpose); alternatively, the setting aside of the Main Judgment and directions for a re-trial. In light of the joinder of Mr Popely to the Proceedings for the purposes of the NPCA, there is also a need to consider whether, if he is entitled to any remedy at all, his opportunity to make submissions on that application could afford him a potential "remedy", as Ayton suggests, and, if not, whether any steps ought to be taken by this court in respect of the NPCA.

THE APPLICABLE LAW

28. There was little between the parties as to the law to be applied by the court on this appeal.

Potential Jurisdictional Issues

29. It is common ground that Mr Popely has standing to make this appeal. Between them, the parties identified at least three separate grounds:

    i) CPR 51.1(3)(d) defines an appellant as "a person who brings or seeks to bring an appeal". This definition is sufficiently wide to include a person who is not a party to the proceedings below, but who is adversely affected by its outcome (*MA Holdings Ltd v George Wimpey UK Ltd and Tewkesbury Borough Council* [2008]

EWCA Civ 12, per Dyson LJ at [9]-[22] and *In re W (A Child)(Care Proceedings: Non Party Appeal* [2017] 1 WLR 2415 ("***Re W***"), per McFarlane LJ at [41]).

ii) Although Mr Popely was not a party to the Proceedings when the Main Judgment was handed down, he became one immediately thereafter when he was joined for the purposes of the NPCA. The findings on which Ayton relied in order to obtain his joinder for costs purposes were the very Adverse Findings about which Mr Popely now complains.

iii) If an individual fails to achieve the status of an appellant by any other route, but it is established that his rights under Article 8 of the ECHR have been breached by the outcome of the proceedings in the lower court, then this court has a duty under section 3 of the HRA to read down the relevant court rules "in such a manner as to afford that individual a right of appeal" (*Re W* at [42]).

30. It is also common ground that the jurisdictional problem that might ordinarily prevent an appeal against anything other than a "decision", "order", "judgment" or "determination" of the court (see *Cie Noga d'Importation et d'Exportation SA v Australia and New Zealand Banking Group Ltd* [2003] 1 WLR 307) does not preclude an appeal where a judge's findings themselves are a "judicial act" which, on the facts of this case, is capable of being held to be unlawful under section 6(1) of the HRA and therefore the proper subject of an appeal (see *Re W* at [112]-[118]). It was in this context that Ayton accepted that permission to appeal should be granted to Mr Popely.

European Convention Rights

31. Articles 6 and 8 of the EHCR provide (in so far as is relevant):

> "**Article 6**
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"
>
> **Article 8**
>
> 1. Everyone has the right to respect for his private and family life, his home and correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

32. Section 6(1) of the HRA provides that "[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right". It is common ground that the court

is "a public authority" pursuant to section 6(3) of the HRA and is therefore bound by section 6(1).

33. The concept of "private life" within Article 8 is "a broad term not susceptible to exhaustive definition". It covers the physical and psychological integrity of a person and can embrace multiple aspects of a person's identity (see *Vincent del Campo v Spain (Application No 25527/13)* [2018] ECHR 909 at [36]-[37]. It also covers the right to establish and develop relationships with others and the entitlement to protection of reputation and honour (*A v Norway (Application No 28070/06)* (9 April 2009) at [64]).

34. Importantly, Article 8 private life rights include procedural rights to fair process in addition to the protection of substantive rights. Thus in *Turek v Slovakia (Application No 57986/00)* (2007) 44 EHRR 43, at [111], the European Court said that "whilst Art.8 of the Convention contains no explicit procedural requirements, the decision-making process involved in measures of interference must be fair and such as to ensure due respect of the interests safeguarded by Art.8". The court also observed, at [112], that "the difference between the purposes pursued by the safeguards afforded by Art 6(1) and Art 8 of the Conventions, respectively, may justify an examination of the same set of facts under both Articles".

35. These principles have been applied by the domestic courts: see *R(Tabbakh) v Staffordshire and West Midlands Probation Trust* [2014[1 WLR, per Cranston J at [58]:

> "What the Strasbourg court requires is that the decision making process involved in measures of interference, when considered as a whole, must be fair and such as to afford due respect to the interests safeguarded by article 8. Regard is to be had to the particular circumstances of the case, notably the serious nature of the decisions taken: R v United Kingdom (2011) 54 EHRR 28, para 75…"

36. In a passage subsequently approved by the Court of Appeal in *Re W*, at [60] Cranston J went on to liken these principles to the approach at common law:

> "What is required by way of procedure in any particular case turns on the extent of interference with those rights and the nature of the interests at stake: R (BB) v Special Immigration Appeals Commission (No 2) [2013] 1 WLR 1568, para 52, per Lord Dyson MR. That is the same approach as the common law; the standards of fairness are not immutable. In a well-known passage in R v Secretary of State for the Home Department, Ex p Doody [1994] 1AC 531, 560 Lord Mustill made that point, identifying as factors the statutory background and the context of the decision. Fairness, he said, very often required that a person adversely affected by a decision have an opportunity to make representations on his own behalf "either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both". Lord Mustill added that since the person affected usually cannot make worthwhile representations without knowing what factors may

> weigh against his interests, fairness very often required that a person be informed of the gist of the case to be answered".

37. Both parties referred me in detail in this context to *Re W*, a case in which very serious extraneous findings were made by the Judge in care proceedings against the local authority (a party to the care proceedings), a social worker and police officer who were witnesses. Having addressed at length the reasons why the court had jurisdiction to hear the appeals of the social worker and police officer against the extremely damaging findings made by the judge "out of the blue" against them (to the effect that they had conspired to manufacture allegations of sexual abuse made in the case), McFarlane LJ said this at [88]:

> "It is plainly necessary to consider what elements of procedural fairness are required by article 8 in this context. In my view, however, for the purposes of deciding this appeal, it is unnecessary to go beyond what must be an essential factor to be included on any list of the elements of procedural fairness, namely giving the party or witness who is to be the subject of a level of criticism that is sufficient to trigger protection under article 8 (or article 6) rights to procedural fairness proper notice of the case against them."

38. In that case, none of the matters found against the local authority or the witnesses had been put to the parties or to the witnesses at the hearing and the ground for the criticisms that the Judge made had not been covered at all. The first time that the "substantial and professionally damaging" criticisms emerged was in a bullet-point judgment. The Court of Appeal held that the Judge had thereby conducted a process which was "intrinsically unfair"; it infringed the rights of the local authority under Article 6 and at common law (the local authority being unable to benefit from Article 8 rights), and it infringed the rights of the two witnesses under Article 8 and at common law.

39. On the question of what the judge should have done, McFarlane LJ said this at [95]-[96]:

> "95. Where during the course of a hearing, it becomes clear to the parties and/or the judge that adverse findings of significance outside the known parameters of the case may be made against a party or a witness consideration should be given to the following: (a) ensuring that the case in support of such adverse findings is adequately "put" to the relevant witness(es), if necessary by recalling them to give further evidence; (b) prior to the case being put in cross examination, providing disclosure of relevant court documents or other material to the witness and allowing sufficient time for the witness to reflect on the material; (c) investigating the need for, and if there is a need for the provision of, adequate legal advice, support in court and/or representation for the witness.
>
> 96. In the present case, once the judge came to form the view that significant adverse findings may well be made and that these were outside the case as it had been put to the witnesses, he should have alerted the parties to the situation and canvassed

> submissions on the appropriate way to proceed. One option at this stage, of course, is for the judge to draw back from making extraneous findings. But if, after due consideration, it remains a real possibility that adverse findings may be made, then the judge should have established a process that met the requirements listed in para 95 above."

40. *Re W* was, as McFarlane LJ observed at [100], an "extreme case", firstly because of "the degree by which the process adopted fell below the basic requirements of fairness" and secondly because of "the scale of the adverse findings that were made". This led him to caution that his judgment "is, therefore, certainly not a call for the development of 'defensive judging'; on the contrary judges should remain not only free to, but also under a duty to, make such findings as may be justified by the evidence on the issues that are raised in each case before them".

41. On the exceptional facts of *Re W*, where it was determined that the High Court had acted in breach of the ECHR rights of the local authority, the police officer and the social worker, the Court of Appeal held that, on an appeal under section 9(1)(a) HRA, there was scope for a remedy pursuant to section 8(1) HRA which provides that:

> "In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate".

42. Indeed, at [119], McFarlane LJ said this:

> "Where, as I have found to be the case here, the adverse findings complained of have been made as a result of a wholly unfair process and where, again as here, the consequences for those who are criticised in those findings are both real and significant, it is incumbent on this court to provide a remedy and, so far as may be possible, to correct the effect of the unfairness that has occurred".

43. The remedy adopted by the Court of Appeal was to remove from the judgment (which was, at the time of the appeal, still in draft) any matters found by the judge against the local authority, the social worker and the police officer that fell outside the parameters of the care proceedings and had not been raised properly or at all during the hearing. This involved redaction from the judgment, albeit such redaction was intended not just to remove words from the judgment that was then to be published, but to set aside those findings so that they no longer stood or had any validity for any purpose (see [120]).

44. It is common ground that the principles applied in *Re W* are applicable to the circumstances of this case, and indeed Ms McErlean points out, with some justification, that there should be no less protection afforded to an individual who was neither a party to, nor witness in, the proceedings. Indeed, it is her submission that where serious unheralded and extraneous findings are made by a judge against a non-party, the unfairness is "even more obvious". In such a case there need be no debate over whether particular matters have been "put" to a witness and the principle in *Browne v Dunn* (1893) 6 R 67, which featured in *Re W*, is therefore inapplicable. The individual's status as a

non-party will mean that it is axiomatic that notice of the adverse findings to be made against him will not have been given and that a fair procedure will not have been followed.

45. It was also common ground that if Mr Popely is able to make good on his complaints and can satisfy this court that the County Court acted "unlawfully" for the purposes of section 6(1) HRA, then this court may equally provide a remedy, in so far as such remedy is just and appropriate.

THE SUBMISSIONS OF THE PARTIES ON THE APPEAL

46. In her clear and attractive submissions, Ms McErlean argued that, like *Re W*, this is an extreme case involving serious Adverse Findings and a complete failure to put in place any fair process to enable Mr Popely to know of the potential for those findings to be made, or to reply to them. She submits that once the Judge had formed the view that he was likely to make such findings against Mr Popely, he should have involved Mr Popely in the proceedings and given him the opportunity to see the available evidence, to obtain legal representation and to address the court. Instead the Judge made robust and apparently concluded findings against Mr Popely (see for example [62] of the Main Judgment), which appear to have been influenced (see paragraph 43 of the Findings of Fact) by a misconceived view that he had somehow deliberately absented himself from the trial. When the Findings of Fact were provided to the parties, neither the parties nor the Judge stood back to consider whether it was fair to make findings against a non-party and no-one sought to consider whether a proper process needed to be put in place to enable Mr Popely to answer the findings that it was intended would be made against him.

47. Ms McErlean contends that the nature of the Adverse Findings against Mr Popely is such as to engage both Article 6 and Article 8 protections, together with the common law right to a fair hearing. Furthermore, she submits that the consequences of the unfair process presided over by the court in this case are real and significant. Not only is the finding of dishonest (and malicious) conspiracy extremely damaging to Mr Popely's reputation and relationships, but such finding (together with the finding that Mr Popely funded, whether directly or indirectly, the purchase of the Property and subsequent litigation) is "pregnant with legal consequences", a phrase said by McFarlane LJ in *Re W* at [118] to be "relevant to determining whether or not the individual's article 8 private life rights are engaged and in reviewing the overall proportionality of establishing whether or not there has been a breach of those rights". The most obvious legal consequences of these findings in this case is the NPCA, which Ms McErlean points out is based on the Adverse Findings made against Mr Popely by the Judge, but (by reason of the terms of the April 2019 Order apparently reversing the burden of proof against Mr Popely, together with the limited nature of the issues arising on such an application) cannot possibly provide him with a fair opportunity to address those findings.

48. During the course of his oral submissions (although not in his skeleton), it became clear that Mr Evans for Ayton accepts that, in so far as the Adverse Findings include findings of dishonest conspiracy involving Mr Popely, such findings are serious, objectionable, trenchant and capable of affecting Mr Popely's Article 8 rights (and also, as Mr Evans appeared ultimately to accept on Day 2 of the appeal, his Article 6 rights). Mr Evans accepts that, in his words, "[t]he Judge has embellished the story to describe Mr Popely

as a co-conspirator with KP" and that this involved "a frolic of his own". He also accepts that the Judge's findings in this regard were unnecessary in that they went far beyond the scope of the pleaded case and that Mr Popely was given no opportunity to deal with these findings.

49. Notwithstanding these concessions, Ayton continued to resist the appeal, as I understood it for the following reasons:

    a. That the findings against Mr Popely in relation to funding (both in respect of the purchase of the Property and subsequent legal proceedings) together with the finding as to Mr Popely's motivation for providing that funding, which Mr Evans submits were legitimate and necessary findings in light of the dispute between the parties as to whether Mr Mosley had himself funded the purchase of the Property, are not capable of engaging Article 8 (or indeed Article 6) rights. Alternatively the consequences of any unfair process in relation to these issues are not sufficiently real or significant for it to be proportionate for any remedy to be granted.

    b. That the findings of dishonest conspiracy did not in fact impact on Mr Popely's 'moral and psychological integrity' or otherwise infringe his Article 8 rights, by reason of the fact that his reputation is already severely compromised by reason of pre-existing decisions made against him in the courts as outlined in Burrell 11 (extracts from which were set out at the end of Mr Evans' skeleton argument). Ayton relies on these decisions as evidence of existing published statements adverse to Mr Popely's reputation. Furthermore, Ayton contends that these publicly available judgments show that Mr Popely is capable of "precisely the sort of behaviour" that is characterised by the findings of dishonest conspiracy.

    c. That Mr Popely's evidence in Popely 1 of the damage done by reason of the adverse findings in the Main Judgment is trivial and does not evidence the fact that Mr Popely has been adversely affected in his private or professional life (over and above any difficulties he may already have been experiencing by reason of pre-existing findings made against him). Mr Evans also points out that in so far as it was originally suggested in the skeleton lodged with the Grounds of Appeal that a further witness statement would be served by Mr Popely outlining the prejudice he has suffered as a consequence of the Adverse Findings, no further statement has been provided.

    d. That the facts of this case may be distinguished from *Re W* because, in this case, Mr Popely will have an opportunity to deal with the Adverse Findings at the hearing of the NPCA.

    e. In all the circumstances there is no need, and neither would it be proportionate or appropriate, for the court to grant a remedy. In particular, a re-trial would be disproportionate and unfair to the parties to the Proceedings. Indeed, Mr Evans submits that in circumstances where the Main Judgment can scarcely be supposed to have caused Mr Popely any embarrassment at all, the real reason for this appeal can only be to seek to improve Mr Popely's position in the NPCA. In his skeleton argument, however, Mr Evans identified that if a *prima facie* Article 8 infringement is found to have occurred, then "the only relevant

factor is whether any offending Adverse Finding(s) can be expunged or modified without adversely affecting the cogency of the Judgment".

DISCUSSION

50. It is extremely unusual in a civil case for the court to make serious findings (with potential legal consequences) on unpleaded matters against a non-party. I am also very struck by the fact that the Judge appears to have concluded that Mr Popely was somehow responsible for not attending the trial ("conspicuous by his absence"), a conclusion which may very well have influenced his willingness to make such serious findings. The assumption that individuals who are not involved in a case and have not been asked to appear to give evidence should nevertheless be putting themselves forward voluntarily appears to me to be fundamentally misconceived and is an important part of the procedural unfairness that occurred in this case. The court may draw adverse inferences in respect of a party's case if a witness who might obviously have assisted with that case is not present, but that is very different from treating a third party against whom no pleaded allegation is made as being responsible for his own non-attendance at trial (notwithstanding evidence to the effect that he was not even approached to give evidence).

51. In my judgment, the seriousness of the Adverse Findings together with what I can only describe as a wholly mistaken approach to the non-attendance of Mr Popely and the total lack of any procedural process to address the fact that findings were to be made against a non-party elevate this case to the level required to bring the principles articulated in *Re W* into play. The circumstances appear to me to be extreme for the same reasons that applied in *Re W*: first, the scale of the Adverse Findings, made against a non-party, is startling, as is the fact that they were (as Mr Evans accepts at least in relation to the specific findings of dishonest conspiracy) unnecessary; second, the process clearly fell far below the requirements of procedural fairness.

52. Although Mr Evans invites me to divide the Adverse Findings into two distinct categories, I do not consider on the facts of this case that it would be appropriate for me to do so. The Adverse Findings as I have identified them, all appear to me to have been made by the Judge in the context of the narrative of a dishonest conspiracy involving Mr Popely. The Judge identified Mr Popely's malice towards his brother as providing the motivation for the conspiracy and he identified Mr Popely's funding of the purchase of the Property (through the agency of Mr Mosley), together with the secret procurement of a liquidator for Ayton and his likely involvement in the generation of false invoices (amongst other things) as the means of pursuit of that dishonest scheme. In so far as the funding of subsequent litigation involving Mr Mosley was concerned, the Judge held that Mr Popely was willing to "bankroll" such expenses because Mr Mosley was his 'stooge' in and about the purchase of the Property. In my judgment, the Adverse Findings together form the complete picture of the dishonest scheme said by the Judge to have involved Mr Popely.

53. While I accept that in different circumstances a finding that a non-party has funded a purchase, or has funded litigation (where such finding may properly be said to arise in the context of dealing with an evidential issue that is before the court) may very well not be objectionable or capable of engaging Article 8 or Article 6 rights, I do not consider

that it is possible on the exceptional facts of this case to "salami slice" the Adverse Findings in the manner suggested by Mr Evans. I consider that the Adverse Findings must be viewed as a whole; taken together they add up to a complete narrative which is both extremely serious and clearly capable of engaging Article 8 and Article 6 rights, together with the entitlement to common law protections.

54. In my judgment, there was no justification for making the Adverse Findings given that Mr Popely was not a party to the Proceedings. However, once the Judge had decided that he was going to make them, he should have canvassed with the parties how the fundamental principles of procedural fairness could then be met. Ordinarily it would have been far too late to contemplate joining a new party to the Proceedings with all of the potentially wasted costs, delay and disruption that would have then ensued. No doubt, had the Judge raised the matter, the parties would have pointed this out and the Judge may well have revisited his approach. If Ayton had, on reflection, been prepared to incur the expense of joining another party, then the only fair course of action (subject to the views of the other parties) would have been to join Mr Popely to the Proceedings and adjourn the trial to enable him to take all the steps necessary to defend himself.

55. However, in the event, it appears that the Judge's intention to make findings of this nature only emerged upon the circulation of the Findings of Fact, at which point neither the parties nor the Judge seems to have appreciated that there was any issue. Mr Popely himself only became aware of the Adverse Findings several weeks after the publication of the Main Judgment. I consider this to have been intrinsically unfair.

56. I have carefully considered Ayton's argument that Mr Popely had no reputation to protect and that accordingly there was in fact no interference with his ECHR rights, alternatively, in so far as there was interference, the consequences of the same are so trivial that a remedy is neither justified nor proportionate. In the latter context I am particularly conscious that, unlike in *Re W*, the Main Judgment was published over 3 years ago and it is therefore likely that much of the damage caused by its publication has already been done.

57. However, on balance I consider Ayton's argument to be misconceived. The consequences of the unfairness are real and significant, essentially for the following main reasons:

    a. In the ordinary case, Mr Evans accepts that a finding of dishonest conspiracy is obviously capable of reducing an individual's reputational standing and affecting his personal identity and psychological integrity: such a finding plainly engages Article 8.

    b. I reject the suggestion that because an individual's reputation may have been damaged through earlier publication of findings as to his credibility (relating of course to different facts), that necessarily means he has no further need of protection against interference with his rights, or indeed that it is no longer possible to "interfere" with his rights. Mr Evans did not show me any authority which came close to supporting such a proposition. If anything, I agree with Ms McErlean that an individual in such a case has even greater need for vigilance around the maintenance of his fundamental right to a fair hearing and right to a private life – so as to avoid the making of inappropriate assumptions in connection with decisions which might adversely affect those rights.

c. I also reject the suggestion that I can properly conclude by reference to judgments in other proceedings that Mr Popely is capable of "precisely the sort of behaviour" that is characterised by the findings of dishonest conspiracy, such that he has no need of protection against interference. That submission appears to me to cross the line into inviting the court to accept the truth of what was said in those judgments, which would be contrary to the rule in *Hollington v Hewthorn* [1943] 1 KB 587.

d. Although Popely 1 does not contain a great deal of detailed evidence of damage to Mr Popely (and although no further statement has been served to provide additional evidence of any such damage), it does evidence concerns expressed by family members about the findings in the Main Judgment together with the obvious difficulties involved in explaining how it is possible that a court has arrived at a decision in respect of such a serious issue involving a non-party. As Mr Popely says "…I was forced to try to explain that what the Recorder had said, he had said without asking me about it. That is a difficult thing to try to explain to someone as it seems an unlikely thing for a Judge to have done". In my judgment this is a real consequence of the unfair procedural process and a tangible example of the way in which these findings have compromised Mr Popely's Article 8 rights to a private life. The obvious inference from a judgment in these terms is not only that there were grounds on which the Judge could have made such findings but also that the individual concerned had an opportunity to meet those grounds – an inference which in this case is wholly erroneous.

e. Popely 1 also explains the potential for damage to Mr Popely's professional work as a consultant to property development companies. I do not find it difficult to believe that if the Adverse Findings were to come to the attention of Mr Popely's colleagues and associates they would inevitably lead to questions about his integrity and his standing as someone with whom it is safe to do business. Accordingly I accept his evidence that the Main Judgment has the potential to jeopardise his position with his existing clients and also has the potential to make it more difficult for him to get work in the future from client recommendations. Whilst there is no up to date evidence that this has in fact occurred (and to this extent the court is not presented with evidence of serious harm of the type available in *Re W*), it is often difficult in the business environment to establish clearly whether work has not been forthcoming and, if so, what the reasons for that may be. That the Main Judgment has been publicly available for over 3 years does not mean that it has ceased to create the risk of harm, although (as I have said) there is no evidence of any ongoing damage.

f. One important and significant consequence of the Adverse Findings to date has been the April 2019 Order joining Mr Popely to the Proceedings for the purposes of the NPCA. The Adverse Findings were relied upon in Burrell 11 and it can only be inferred that they operated on the Judge's mind in making the order to join Mr Popely to the Proceedings and in effectively providing that the burden of proof on the NPCA should be reversed. In this sense the Adverse Findings were "pregnant with legal consequences". The NPCA is yet to take place owing to these appeals. I reject Mr Evans' submissions that the hearing of the NPCA will be an effective remedy for the obvious injustice that has

occurred. Its focus will be on the question of whether Mr Popely in fact funded Mr Mosley's defence of the Proceedings – it will not present a fair opportunity for Mr Popely properly to address the serious Adverse Findings made against him in the Main Judgment on other matters.

58. In all the circumstances, I accept Mr Popely's case that the Adverse Findings amounted to an unlawful judicial act such that the court is required to consider an appropriate remedy and, so far as may be possible, to correct the effect of the unfairness that has occurred.

AN APPROPRIATE REMEDY

59. Notwithstanding the way in which Ms McErlean originally put Mr Popely's case, I cannot see that it is possible for this court effectively to redact paragraphs in a published judgment and it is certainly not possible to "modify" them, or to invite the Judge to issue a revised judgment. Setting aside those findings and ordering that they are to be treated as if they had never been made is almost certainly the best that the court can do at this stage.

60. I am also instinctively troubled by the suggestion that I might order a retrial in a case where Mr Mosley has not sought to appeal the findings against him, the claim is valued at just under £200,000 plus interest and it is clear that substantial costs have already been spent in the conduct of the Proceedings. Ms McErlean submitted that any decision to order a retrial could only be made in any event after giving Mr Mosley (and any other interested parties) an opportunity to be heard on the subject, an exercise which would incur yet further costs.

61. While I have held that the consequences of the infringement of Mr Popely's ECHR rights have been real and significant, nevertheless I must also ensure that any remedy I now order is proportionate in all the circumstances, including the passage of time, the likelihood of ongoing damage and the interests of other parties. I do not consider that it would be proportionate or in the interests of justice to set aside the Main Judgment and order a retrial, nor do I consider such a remedy to be necessary in order to address the unlawful act I have identified. Ultimately, neither Mr Popely nor Ayton sought to argue for a retrial in the event that the appeal is allowed and a remedy required.

62. I obviously appreciate that setting aside the Adverse Findings and treating them as if they had never been made potentially has the effect of undermining the findings made against Mr Mosley and of course this plays in to Mr Evans' submissions as to the "cogency" of the Judgment. However, I cannot see that Mr Evans' proposed solution of separating findings of dishonest conspiracy from findings as to funding would assist, not least because, as I have already said, the two issues appear to me to be part and parcel of the same dishonest scheme (as found by the Judge) and so inextricably linked.

63. Looked at in the round, the Main Judgment determined that Mr Mosley had been part of a conspiracy to procure possession and sale of the Property for financial gain; that he had not funded the purchase of the Property or the subsequent litigation and that his evidence on this issue was false. The Judgment also found that his evidence as to key documents was untrue and that there is a high degree of probability that he dishonestly assisted in a breach of trust. I accept of course that it is somewhat artificial to consider the Main

Judgment in the absence of the findings made against Mr Popely, but on balance (and in the absence of any submissions on behalf of Mr Mosley) I remain of the view that an order setting aside the Main Judgment is not in the interests of justice and that my decision on this appeal does not operate wholly to undermine that judgment.

64. Doing the best I can in all the circumstances, it seems to me that I should order by way of remedy that:

    a. the Adverse Findings should be set aside and treated as if they had never been made. This does not mean that they are to be redacted as occurred in *Re W* (as this is impossible in a public judgment). However, if Mr Popely needs to explain himself in future, then he will have a judgment of this court to which he can draw attention.

    b. the April 2019 Order (in so far as it joins Mr Popely to the Proceedings for the purposes of the NPCA at paragraph (7) and requires him to serve a witness statement in answer to the NPCA at paragraph (10)) should be set aside, as it was obtained on an entirely wrong basis and the application for a NPCA is dismissed. I do not see how the NPCA could possibly be allowed to continue in the face of my decision on this appeal. Neither party to the appeal suggested that I did not have the power to take this step should I consider it appropriate and, in so far as may be necessary, I am prepared to treat Mr Popely's first appeal as including an application pursuant to CPR 40.9 and/or CPR 3.1(7) (as appropriate) to set aside those aspects of the April 2019 Order purely relating to him (as a non-party) in circumstances where my decision on this appeal gives rise to a material change of circumstances since the April 2019 Order was made. I cannot see any unfairness to Ayton in adopting this course. The remainder of the April 2019 Order will be unaffected – none of the other orders made are contingent upon Mr Popely's joinder to the Proceedings. Further it is clear from Ayton's anxiety to resist the Appeal in respect of those aspects of the Adverse Findings on which Ayton relies for the purpose of its NPCA, that Ayton has always viewed this appeal as potentially having a direct impact upon the underlying basis for the NPCA. The possibility of an order setting aside the joinder of Mr Popely to the Proceedings for the purposes of the NPCA (together with the possibility of liberty to apply on a different basis) was canvassed during the hearing, with Ms McErlean expressly submitting that this was the only way to ensure that the subsequent consideration of a non-party costs application would not be tainted by the Adverse Findings. I agree.

65. I should make it clear that, in the very particular circumstances of this case (and always subject to detailed submissions from the parties on the point), I presently see no reason why Ayton could not apply again to the court to join Mr Popely to the Proceedings for the purposes of making a non-party costs application on the basis of any evidence that it has managed to obtain which may support such an application. However, it would be wrong in principle to permit the existing NPCA to proceed against Mr Popely in circumstances where Burrell 11 relied on the Adverse Findings and also adopted the Judge's approach to Mr Popely's non-attendance at trial, asserting that he "was available or could easily have made himself available as a witness at trial".

66. If Ayton still wish to seek a joinder of Mr Popely to the Proceedings for the purposes of making a new non-party costs application, they will have liberty to apply.

THE RECUSAL APPEAL

67. In circumstances where I have found that the process at trial was wholly unfair to Mr Popely for the reasons identified above, and where I have set aside the order joining Mr Popely to the Proceedings and dismissed the NPCA, I need not deal in any detail with the recusal appeal, which must fall away. It will now be for Ayton to decide whether a new application should be made to the court.

68. Suffice to say for present purposes that, had the matter still been live, I would have granted this appeal, on the grounds that "a fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the tribunal was biased" (see *Porter v Magill* [2002] 2 AC 357 per Lord Hope at [103]) and that the Judge ought to have recused himself on that basis. I would have regarded this as a straightforward application of the relevant test, although I note in any event that the threshold of "real possibility" is not a high one and any doubts should be resolved in favour of recusal (*Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [25]).

69. In particular, I consider that the Judge misdirected himself as to the appropriate test for recusal on account of apparent bias, failing to give proper weight to the factors identified as militating in favour of recusal in *Mengiste v Endowment Fund for the Rehabilitation of Tigray* [2013] EWCA Civ 1003, and holding (wrongly) that where a properly informed observer is aware that a judge is required to look at matters afresh and without bias, that observer could not possibly conclude that there was apparent bias. The proper approach would have been to consider all of the factors which may give rise to the appearance of bias and then to consider whether, in the circumstances, the properly informed impartial observer could conclude that there was a real risk that the Judge had prematurely reached a concluded view as to Mr Popely's actions or his credibility and therefore would be unable to bring an objective judgment to bear on the issues before him.

70. The key factor militating in favour of a recusal in this case was that the Main Judgment evidences the premature formation of concluded views adverse to Mr Popely (relied upon in Burrell 11 in support of the NPCA), notwithstanding that Mr Popely has been given no opportunity to even know of the allegations that he might be required to meet, much less to defend himself against them. As I have said, those views are expressed in trenchant terms and are repeated throughout the Main Judgment, thereby reinforcing the impression of certainty on the part of the Judge. The Judge's finding that Mr Popely was "conspicuous by his absence" further creates the strong impression that the Judge has pre-judged the nature and credibility of Mr Popely's evidence.

71. In the way in which he expressed his conclusions, the Judge did not "leave the door open to the possibility that there might be another explanation" (see *Mengiste v Endowment Fund for the Rehabilitation of Tigray* [2013] EWCA Civ 1003 per Arden LJ at [59]) and did not consider that it was necessary to provide Mr Popely with an opportunity to explain. This inevitably creates an impression of bias in the fair-minded observer which is reinforced in circumstances where (i) there was in fact no need (contrary to the views expressed by the Judge in the Recusal Judgment) to make the grave findings of dishonest conspiracy against Mr Popely in any event and (ii) the prospect of a non-party costs application was plainly foreseeable.

72. In circumstances where the Judge's findings against Mr Popely clearly engaged both his ECHR and common law rights and where no action was taken to ensure a fair process, I consider that the making of those findings was "extreme" and "unbalanced".

73. Furthermore, the finding in the Recusal Judgment that there was a sufficient mechanism within the existing proceedings (in the form of the NPCA) to enable Mr Popely to challenge the Adverse Findings, was wrong in law. The NPCA procedure does not allow a fair and impartial forum for Mr Popely to challenge the Adverse Findings; on the contrary, it is concerned specifically with the question of whether Mr Popely funded the Proceedings and, as things stood pursuant to the April 2019 Order, the process envisaged by the Judge required Mr Popely to "show cause" as to why an order should not be made (even though the court had, as yet, heard no evidence whatever as to whether Mr Popely had in fact been involved in funding the current Proceedings). This error on the part of the Judge could only add further to the doubts of the fair minded observer as to whether there is a real danger of bias.

74. For these main reasons, I would have permitted the appeal against the Recusal Order had I not granted the remedies identified in paragraphs 64(i) and (ii) above.