Neutral Citation Number: [2021] EWHC 3600 (Fam)

Case No: FA-2020-000207

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

ON APPEAL FROM THE FAMILY COURT SITTING AT DERBY
Order of HHJ Williscroft dated 4th June 2021
DE19P00318

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/12/2021

Before:

MRS JUSTICE ARBUTHNOT

- -

Between:

KATE ELIZABETH GRIFFITHS	**Appellant**
- and –	
ANDREW JAMES GRIFFITHS	**First Respondent**
- and –	
D **(by the Children's Guardian, Louise Barton)**	**Second Respondent**

- -

Griffiths v Griffiths: Decision on Recusal

- -

Dr Charlotte Proudman (instructed by **Nelsons Law**) for the **Appellant**
Mr Andrew Griffiths (in person) **First Respondent**
Mr Timothy Bowe (instructed by **Moseleys**) for the **Second Respondent**

- -

Hearing dates: 27th & 28th October 2021
Draft Judgment: 13th January 2022
Recusal Judgment: 9th December 2021

Mrs Justice Arbuthnot:

Background

1. Ms Griffiths is the ex-partner of Mr Griffiths. They separated after a sexting scandal in 2018 when Mr Griffiths was a conservative Member of Parliament. He stepped down and his ex-partner became the Member of Parliament for the same constituency in 2019.

2. They have a child together D who lives with the mother. Ms Griffiths made allegations of very serious abuse against Mr Griffiths. Various findings were made in the lower court amongst which is that Mr Griffiths raped Ms Griffiths. An interim contact order was made in the court below. Lieven J granted Ms Griffiths permission to appeal the decision made.

3. The substantive appeal came before me on 27th October 2021, when I heard Ms Griffiths' appeal against the decision contact should take place between D and the father at an interim stage before final reports were ready and that she should pay 50% towards the cost of contact in a contact centre.

4. The appeal was heard in open court with both parties present and represented. There were two members of the press present.

5. The appeal took half a day. I then adjourned for ten days to write a judgment.

The first letter

6. On 11th November 2021 I received a letter dated 4th November 2021 from Griffin Law who were now representing Mr Griffiths.

7. This letter said the following:

    - That on 4th November 2021 Mr Griffiths had learned that I was married to my husband who was a former Conservative Member of Parliament.

    - That Mr Griffiths knows my husband well and had met me on many occasions.

    - That Mr Griffiths had tried to get information from the Parliamentary server to confirm this but it was no longer available. He had asked his ex-office manager to go through her files but she had not been able to collate any information by doing this.

    - Mr Griffiths had worked as Chief of Staff firstly to Theresa May MP and then to Eric Pickles MP.

    - During that time, he had met my husband and me on a number of occasions at Conservative Party events.

    - Mr Griffiths was elected in 2010 and after that and before 2015, he and my husband would meet regularly in the tearoom and the Division lobby.

    - They were colleagues and "well known to each other".

- Mr Griffiths continued to see my husband at "Parliamentary and Party events in Parliament" between 2015 and 2019 when Mr Griffiths left Parliament. Between 2015 and 2019, my husband was sitting in the House of Lords.

- Mr Griffiths "has met with Emma on numerous occasions during these 10 years" but he does not have the exact dates as his diary has been deleted.

- Mr Griffiths distinctly remembers "meeting and talking with Emma many times at events in Downing Street and at events both in Parliament and in London more generally". Mr Griffiths also believed he met Emma at an event at Buckingham Palace with other Conservative colleagues.

- Mr Griffiths had not realised that Arbuthnot J was James' wife as she was not appointed until February 2020.

- He did not raise the matter with his direct access barrister James Nosworthy, because at the time he had not realised what the true position was.

- As a previous Conservative Party Chief Whip my husband had "very clear views on the behaviour of Conservative Members of Parliament". Mr Griffiths was concerned given his exposure in the press in 2018 that my husband may have expressed a view on Mr Griffith's behaviour to me.

8. In these circumstances, Mr Griffiths is "deeply concerned that Arbuthnot J failed to disclose her relationship with Mr Griffiths before hearing the appeal on 27th October 2021".

9. Griffin Law submitted that "it is plain that Mr Griffiths' previous relationship gives rise to a serious and important issue of apparent bias, whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased (*Porter v Magill* [2002] 2 AC 357).

10. The letter set out the well-known principles that the court should apply.

11. The letter finished by submitting that I had no alternative "but to disclose the nature and extent of her relationship with Mr Griffiths before deciding to hear the appeal". They invited me to recuse myself at this stage "so as to avoid the need for Mr Griffiths to pursue any complaint of apparent bias". Griffin Law asked that the court indicate its decision as soon as practicable.

My letter to Mr Griffiths' solicitors

12. I was on circuit when the first letter was received. I responded on 18th November 2021.

13. I explained the following to Griffin Law, the Respondent's solicitors:

- Mr Griffiths must have confused me with someone else.

- I had never heard of Mr Griffiths before the appeal hearing on 27th October 2021.

- I certainly did not recognise him during the hearing.
- The sexting report in the newspaper had not registered with me at all. I had no recollection of ever reading these reports.
- I had met Lord Pickles, possibly twice, many years ago.
- I had met Theresa May MP more times than that but not to my knowledge between 2005 and 2010.
- I would need more detail about any Conservative Party events I may have attended because after I became a judge in 2005, I avoided attending most political events.
- I had been to Downing Street on a very limited number of occasions. Once when Geoffrey Howe QC was the Chancellor of the Exchequer. Once when Margaret Thatcher was Prime Minister. Once about 20 years ago for a local conservative party event (Hampshire) and once for a youth knife crime symposium hosted by the Home Secretary when I was Chief Magistrate.
- As to Buckingham Palace, I explained I had been to three or four garden parties but other than meeting a couple of colleagues, I have no recollection of meeting any politicians. I remember going to one drinks event at Buckingham Palace many, many years ago.
- I explained that Mr Griffiths' recollection is mistaken.
- In terms of my husband, James, on 26th October 2021 (the day before the hearing of the appeal), I sent him a WhatsApp message asking him whether he knew Ex MP Andrew Griffiths and now MP Kate Griffiths. His reply was the following: "I may have spoken to him (we overlapped) but don't remember doing so; almost certain never met her". He has told me he had to look Mr Griffiths up on Wikipedia.
- I ended the letter by saying that "this is a paradigm example of misidentification".

The second letter

14. On 30th November 2021, I received a reply directly from Mr Griffiths, not from Griffin Law.

15. Mr Griffiths said the following:

- He wished to proceed with his application that I recuse myself.
- He disagreed that this was a case of misidentification.
- He maintained the account he had given in the letter written by Griffin Law was correct

- The account given by me was not correct.

- His relationship with my husband involved rather more than the fact that they would meet regularly in the tearoom or Division Lobby in the House of Commons and were colleagues and well known to each other, or that he continued to see him at parliamentary and party events in Parliament during 2015 to 2019 when he became a member of the House of Lords.

  Mr Griffiths gave the following examples:

  In 2006, my husband was appointed by the Leader of the Opposition, David Cameron MP, to chair a committee of six to select the "A List" of Parliamentary candidates for the 2010 election. 50 men and 50 women were selected and only those were allowed to apply for "winnable" seats. The committee included Theresa May at a time that Mr Griffiths was her Chief of Staff. According to Mr Griffiths, Theresa May MP would have declared an interest when considering Mr Griffiths' candidature. Mr Griffiths was one of the 50 men selected.

  My husband was Chair of the Conservative Friends of Israel. In 2008, the group paid for Mr Griffiths and a few other parliamentary candidates to visit Israel.

  Mr Griffiths also attended a number of receptions, dinners and other functions hosted by the group chaired by my husband.

16. Mr Griffiths' concern was that it should have been obvious to me that as a former MP he had brought shame on the Conservative Party. Mr Griffiths said that as a former Chief Whip my husband would no doubt have views on the behavioural standards of MPs. He relied on his ex partner's skeleton argument which drew attention to the sexting scandal Mr Griffiths was involved in.

17. Mr Griffiths says that my husband's role as a prominent Conservative politician also required me to recuse myself.

18. Mr Griffiths drew my attention to the test for apparent bias set out in *Porter v Magill* (*supra*).

19. He contended that as soon as I read his ex-partner's skeleton argument, I should have transferred the case to another Judge. I should have explained any reasons for retaining the appeal. Had he been informed that I was married to my husband he would have asked me to recuse myself. If he had realised that I was married to my husband he would have raised the issue. He reiterated that he did not accept that it was a case of misidentification. It would be wrong for the Judge to determine any dispute in this case. Mr Griffiths said it was not fair for me to decide whether his account or my account was correct.

20. Mr Griffiths then relies on a report in a newspaper or online blog called the Daily Maverick of the Julian Assange case where it says I recused myself from further hearings due to my husband's connections to CFI. I would note that that report does not accurately reflect what happened in that case.

21. I need to make clear that the exchange of correspondence between Mr Griffiths and myself was copied to the mother who had no submissions to make on the point other than she had never met my husband. After the second letter was sent to Ms Griffiths's representatives they replied and said they opposed the application for recusal.

Law

22. The common law test for apparent bias was as set out in *Porter v Magill* [2002] 2 AC 357 at paragraph 103: i.e. whether "a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

23. In *ex parte Pinochet (No. 2)* [2000] 1 AC 119 at paragraph 139 Lord Nolan said "In any case where the impartiality of a judge is in question, the appearance of the matter is just as important as the reality".

24. The test was considered in *Resolution Chemicals Ltd v H Lundbeck A/C* [2013] EWCA Civ 1515, at paragraph 36 Sir Terence Etherton C said that while "the test if certainly less rigorous than one of probability, it is a test which is founded on reality. The test is not one of "any possibility" but of a "real" possibility of bias".

25. The observer is considered by Lord Hope in *Helow v Secretary of State for the Home Department* [2008] 1 WLR 2416 at paragraphs 2 to 3 the "observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious… she is not complacent either".

26. The test of "real possibility" is considered at paragraph 8 in *Locobail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, when applying the test "it will very often be appropriate to enquire whether the judge knew of the matter relied on as appearing to undermine his impartiality, because if it is shown that he did not know of it the danger of its having influenced his judgment is eliminated and the appearance of possible bias is dispelled". In paragraph 19, it was said that no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind.

27. *Locobail* sets out at paragraph 25 examples of close connections or interests which would not give rise to apparent bias:

> "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books,

> lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (*KFTCIC v. Icori Estero SpA* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol. 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v. Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be".

28. In any case where the judge's interest is said to derive from the interest of a spouse as Mr Griffiths says is the case here, the link must be "so close and direct as to render the interest of that other person, for all practical purposes, indistinguishable from an interest of the judge himself" (paragraph 10 of *Locobail*). As the Lord Chief Justice observes in *The Queen on the application of United Cabbies Group (London) Ltd and Westminster Magistrates' Court and Transport for London, Licensed Taxi Drivers' Association and Uber London Ltd* [2019] EWHC 409 (Admin) at paragraph 36 (iv): "The fair-minded observer does not assume that the interests of the husband and wife are indistinguishable. They are not".

29. Mr Griffiths also relied on various parts of the judgment in *Jones v DAS Legal Expenses Insurance Co. Ltd* [2003] EWCA Civ. 1071. In paragraph 30, Ward LJ focusses on whether any failure by a person to raise the issue might amount to a waiver of any

complaint by that person of apparent bias. The requirements for waiver were set out in paragraph 31, where earlier cases such as *Pinochet* and *Locabail* were considered.

30. There were two essential requirements, that a waiver must be clear and unequivocal and made with full knowledge of all the facts relevant to the decision whether to waive or not. Waiver will occur where there has been appropriate disclosure by the judge and the party raises no objection to the judge continuing to hear the case, that party cannot thereafter complain of the matter disclosed as giving rise to a real danger of bias.

31. It is clear in this case that Mr Griffiths had not made a clear or unequivocal waiver in full knowledge of the facts. I do not doubt him when he said he did not know I was married to my husband. He had not recognised me in the same way that I had not recognised him. In those circumstances I will not consider the principles concerning waiver any further.

Discussion

32. Mr Griffiths concerns are the following, that he knew my husband well and had met me on "many occasions" or a "number of occasions", my husband is a senior Conservative politician and ex Chief Whip who Mr Griffiths assumes would have disapproved of the shame Mr Griffiths' activities brought on the Conservative Party. As a result of those matters, I should now recuse myself from further involvement in this case and transfer the case to another judge to be reheard.

33. As I have stated in the letter I sent to Mr Griffiths on 18th November 2021:

34. I had never heard of Mr Griffiths before I considered the papers the day before the appeal hearing took place.

35. I had not heard of this particular sexting scandal.

36. I have set out above the extent of any meetings I had with the two MPs Mr Griffiths worked for.

37. After my appointment as a District Judge (Magistrates' Courts) in October 2005, I avoided involvement with most political events.

38. I have set out above my recollections of visits I had made to Downing Street and Buckingham Palace.

39. Mr Griffiths said he had met me on many occasions. As I said in my letter to him of 18th November 2021, I had not met him on many occasions. I am not aware I had met him even once. I said in the letter that he had mistaken me for someone else. That remains my view.

40. On the date of the hearing, 27th October 2021, I did not recognise Mr Griffiths. He was a complete stranger to me; I saw no reason at all to recuse myself as there was no connection between him or his ex-partner and myself (or indeed my husband).

41. Mr Griffiths said in his first letter that he "knows James well". I noted that they were elected at different times, they are a different generation to each other and did not either

go to Israel together or sit on any committees together. Mr Griffiths has not suggested that my husband ever interviewed him for the "A list".

42. I cannot say that Mr Griffiths and my husband may not have passed each other in the Lobby or sat near each other in the tearoom.

43. Mr Griffiths has not suggested that I have prejudged the issues raised by the appeal. I was discharging my judicial functions and had made only one earlier ruling which was that his wife could be identified as being a "politician" with him called her "ex-partner". This decision Mr Griffiths had argued against and then appealed arguing that the two parties should not be identified.

44. I bear in mind the useful guidance of Floyd LJ in *Zuma's Choice Pet Products Ltd v Azumi Ltd* [2017] EWCA Civ 2133, where at paragraphs 29 and 30, it was said: "The fair-minded and informed observer does not assume that because a judge had taken an adverse view of a previous application or applications, he or she will have pre-judged or will not deal fairly with, all future applications by the same litigant".

45. A fair-minded observer would be informed of the matters I have set out above. The informed observer would know about the WhatsApp message sent the night before the hearing, when I asked my husband whether he knew ex MP Andrew Griffiths and now MP Kate Griffiths. His reply was the following: "I may have spoken to him (we overlapped) but don't remember doing so; almost certain never met her". If I had known Mr Griffiths there would have been no point in asking my husband whether he knew him. Had he replied that Mr Griffiths was a friend or someone he had worked with, I would have raised this with the parties.

46. Furthermore, a fair-minded observer when informed of the circumstances set out above, would consider that there was no immediate link between Mr Griffith's concerns about views he imputes to my husband and me. This is not a case where there is a so close and direct a link so as to render a presumed interest of my husband, for all practical purposes, indistinguishable from an interest of mine.

47. The observer would bear in mind that my husband stopped being Chief Whip in 2001, which was 17 years before the sexting scandal Mr Griffiths was involved in. There have been any number of scandals involving politicians between 2001 and 2018. I don't accept I had them but if I have prejudices and predilections in relation to his position in the case, I should be trusted to bring an objective judgement on the issues before me (*Locobail*). I have not commented on the allegations or adversely about the parties.

48. In my judgment Mr Griffiths has said nothing which would lead me to conclude that this is a case where I should recuse myself. I do not consider that that informed person, having considered the facts, would conclude that there was a real possibility that I was biased.

49. As a postscript, I add the following quotation from Ward LJ set out in paragraph 32 in *El Farargy v El Farargy & Ors* [2007] EWCA Civ 1149:

> "It is an embarrassment to our administration of justice that recusal applications, once almost unheard of, are now so

> frequently coming to this Court in ways that do none of us any good. It is, however, right that they should. The procedure for doing so is, however, concerning. It is invidious for a judge to sit in judgment on his own conduct in a case like this but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal. Whilst judges must heed the exhortation in *Locabail* not to yield to tenuous or frivolous objections, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour.".

50. I am conscious that after the hearing had taken place, quite properly Mr Griffiths has raised his recusal invitation with me informally in correspondence. I have considered his arguments and rejected them, his objection is "tenuous" but I am conscious that I am sitting in judgment on my own behaviour.

51. I will hand this judgment down and give Mr Griffiths time to consider what his next steps should be. When 21 days have passed, if there is no appeal, I will give judgment in relation to the mother's appeal about interim contact.