[2017] WASC 168

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	WARWICK ENTERTAINMENT CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) atf THE WARWICK ENTERTAINMENT CENTRE UNIT TRUST -v- SILKCHIME PTY LTD (RECEIVERS AND MANAGERS APPOINTED) atf THE SILKCHIME UNIT TRUST [No 3] [2017] WASC 168
CORAM	**:**	LE MIERE J
HEARD	**:**	16 MARCH 2017 & ON THE PAPERS
DELIVERED	**:**	21 JUNE 2017
FILE NO/S	**:**	CIV 1094 of 2008
BETWEEN	**:**	WARWICK ENTERTAINMENT CENTRE PTY LTD (RECEIVERS AND MANAGERS APPOINTED) atf THE WARWICK ENTERTAINMENT CENTRE UNIT TRUST Plaintiff AND SILKCHIME PTY LTD (RECEIVERS AND MANAGERS APPOINTED) atf THE SILKCHIME UNIT TRUST Defendant EARLMIST PTY LTD Third Party

Catchwords:

Practice and procedure - Recusal application - Whether reasonable apprehension of bias - Whether reasonable apprehension of prejudgment - Whether right to apply for recusal waived - Turns on own facts

Practice and procedure - Case management powers - Recusal - Turns on own facts

Legislation:

Civil Judgments Enforcement Act 2004 (WA), s 86, s 86(1), s 86(1)(a), s 86(1)(e)
Civil Judgments Enforcement Regulations 2005 (WA), reg 54(1)
Corporations Act 2001 (Cth), s 475(1)

Result:

Proceeding referred to the CMC list allocation judge for reassignment to another judge of the court

Category: B

Representation:

Counsel:

Plaintiff	:	Mr J A Thomson SC
Defendant	:	Mr S Penglis
Third Party	:	Mr S Penglis

Solicitors:

Plaintiff	:	Corrs Chambers Westgarth
Defendant	:	Coulson Legal
Third Party	:	Coulson Legal

Case(s) referred to in judgment(s):

Inform Group Ltd v Fleet Card (NZ) Ltd [1989] 3 NZLR 293
JSC BTA Bank v Ablyazov [2012] EWCA Civ 1551
Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451
Sargent v ASL Developments (1974) 131 CLR 634
Silkchime Pty Ltd v Warwick Entertainment Centre Ltd [No 2] [2013] WASCA 224
Smits v Roach (2006) 227 CLR 423
Tropical Traders v Goonan (1964) 111 CLR 41
Vakuata v Kelly (1989) 167 CLR 568
Warwick Entertainment Centre Pty Ltd (Receivers and Managers Appointed) ATF the Warwick Entertainment Centre Unit Trust v Silkchime Pty Ltd (Receivers and Managers Appointed) ATF the Silkchime Unit Trust [No 2] [2012] WASC 275
Warwick Entertainment Centre Pty Ltd v Earlmist Pty Ltd [2016] WASC 79

LE MIERE J:

Summary

1 On 1 August 2012 I delivered my reasons for judgment in the original action in these proceedings: ***Warwick Entertainment Centre Pty Ltd (Receivers and Managers Appointed) ATF the Warwick Entertainment Centre Unit Trust v Silkchime Pty Ltd (Receivers and Managers Appointed) ATF the Silkchime Unit Trust [No 2]*** [2012] WASC 275 (***Warwick v Silkchime [No 2]***). I found that the defendant (Silkchime) was indebted to the plaintiff (Warwick) for the amount of $12,706,904 less $701,634 and less interest accrued and capitalised on the sum of $701,634. Judgment was subsequently entered for Warwick in the sum of $11,560,695.

2 Warwick caused the court to issue a Property (Seizure and Sale) Order (PSSO) to enforce the judgment and registered the PSSO on properties registered in the name of Silkchime (the Silkchime Property). The Sheriff made enquiries into Silkchime's interest in the Silkchime Property. The Sheriff ascertained that the third party (Earlmist) has a mortgage registered on the Silkchime Property and Earlmist claims that its mortgage secures a debt owed by Silkchime to Earlmist of $9,823,462. Warwick disputes both the validity of Earlmist's mortgage and, if it is found to be valid, the amount which it secures.

3 Warwick applied for a declaration pursuant to s 86(1)(a), or alternatively s 86(1)(e), of the *Civil Judgments Enforcement Act 2004* (WA) (CJEA) declaring the extent of the interest of Earlmist which is secured by mortgages in its favour over the Silkchime Property by reference to the amount of the indebtedness of Silkchime to Earlmist including the rate of interest, if any, payable on that amount. Warwick also sought a declaration pursuant to s 86(1)(a), or alternatively s 86(1)(e) of the CJEA in respect of whether the interest claimed in a caveat lodged by Earlmist over the Silkchime Property exists, and if so, the extent of that interest.

4 Silkchime and Earlmist have now applied to me to recuse myself from hearing the pending applications pursuant to the CJEA because of findings I made as the trial judge in the original action. I made findings adverse to the credibility of Mr Carey, a director of Silkchime and Warwick, whose evidence Silkchime and Earlmist say will be crucial to their case in the CJEA applications. Silkchime and Earlmist say that a fair minded lay observer might reasonably apprehend that I might not bring an impartial and unprejudiced mind to the issues in the CJEA applications.

5 I have decided that although I would, as a matter of prudence, recuse myself from hearing the CJEA applications, that the defendant and third party have waived any right to invoke the rule against bias. Notwithstanding this, I have decided that I should, in the exercise of my case management powers, refer the CJEA applications for hearing by another judge.

The test for apprehended bias

6 The parties, and third party, adopted the test for apprehended bias which I set out in [8] to [16] of my reasons for judgment in ***Warwick Entertainment Centre Pty Ltd v Earlmist Pty Ltd*** [2016] WASC 79 (***Warwick v Earlmist***). I will not repeat those principles here.

The original action

7 The first step in the test for apprehension of bias by reason of prejudgment is to identify what it is that is said might lead the judge to decide a case other than on its legal and factual merits. In the substantive action Warwick claimed that Silkchime was indebted to it in a sum in excess of $12 million as a result of sums advanced by Warwick to Silkchime. Silkchime admitted that Warwick advanced $3.6 million to Silkchime by way of loan to purchase some land (Loan 1) and some subsequent advances. Silkchime proceeded with the development of the land which was subdivided into two lots. Some, but not all, of the lots had been sold when, on 24 January 2006, receivers and managers (Receivers) were appointed in respect of all the property of Warwick and of the lots in the land still owned by Silkchime at that time.

8 Silkchime admitted Loan 1 and subsequent advances but claimed that the books of account did not correctly record the state of the loan account between Warwick and Silkchime. Silkchime claimed that the loan and advances were made by Warwick to Silkchime pursuant to an oral joint venture agreement made in or about 1994, reduced to writing on 20 July 1995 and dated 22 August 1995 (the JVA). Silkchime claimed that the JVA was to the effect that the loans were made on a non-recourse, interest free basis. Silkchime made other claims which are not necessary to refer to. The loans were recorded in a report as to affairs (RATA) signed by Mr Carey and submitted to the receivers of each company on 2 March 2006 pursuant to s 475(1) of the *Corporations Act 2001* (Cth).

9 Silkchime and Earlmist say that the authenticity of the joint venture agreement turned on the testimony of Mr Carey and the Ho brothers, Patrick and Stephen, who were directors of Silkchime. I did not accept

Mr Carey's testimony about the execution of the JVA. I found that the JVA was not executed by Mr Carey and the Ho brothers in Singapore in 1995 as they claimed and that it was not signed until some years after the relevant advances and had been made by Warwick to Silkchime. I did not make any express finding as to the date when the JVA was signed. However, as McLure P stated in the Court of Appeal, an analysis of my reasons for judgment shows that I found that the JVA was not in existence before the receivers were appointed in January 2006: see ***Silkchime Pty Ltd v Warwick Entertainment Centre Ltd [No 2]*** [2013] WASCA 224 [52].

Connection between previous findings and apprehended bias

10 The test for apprehended bias requires the person claiming bias to explain the logical connection between the suggested source of bias and its supposed effect. Silkchime and Earlmist submitted that in the CJEA applications the court will be called upon to consider the following issues:

(a) the existence and/or authenticity of a loan agreement (the Greenleaf Loan Agreement) which Mr Carey says was made in writing on or about 11 December 1993;

(b) the existence and/or authenticity of a loan agreement (Erley Loan Agreement), which Mr Carey says was made in writing on or about 11 December 1993;

(c) the authenticity of the Rompride Loan Agreement and the Rompride Mortgage which are dated 23 January 2006;

(d) the authenticity of the Erley/Silkchime Loan Agreement and the Erley Mortgage which are dated 23 January 2006; and

(e) the accuracy of the books of account for Warwick, Silkchime and Earlmist in respect of whether interest was payable and if so, when.

11 The existence and authenticity of the Greenleaf Loan Agreement will turn on the evidence of Mr Carey. Only three pages of the agreement are in evidence. Mr Carey says that the remaining pages, including the execution page, cannot be found. No part of the Erley Loan Agreement is in evidence. Mr Carey says that it cannot be found. The existence of the agreement will turn on the evidence of Mr Carey. Warwick says that each of the Greenleaf Loan Agreement, the Erley Loan Agreement, the Rompride Loan Agreement, the Rompride Mortgage and the

Erley/Silkchime Loan Agreement and the Erley Mortgage are inconsistent with objective circumstances and the accounts and the court should find that the agreements were not made or were not made at the time Mr Carey says they were made.

12 Silkchime and Earlmist say that the issues concerning the credibility of Mr Carey which will arise in the CJEA applications arise in circumstances that are strikingly similar to circumstances considered by the court in the original action. The issues concerning the credibility of Mr Carey arise in circumstances similar to those in the original action and might cause a fair minded lay observer to reasonably apprehend that I might not be able to eradicate the effect of the conclusions I reached in ***Warwick v Silkchime [No 2]*** in determining the relevant issues in the CJEA applications.

13 Warwick says I should not recuse myself from hearing the CJEA applications for three principal reasons. First, the CJEA applications are a continuation of the proceedings in which I made the findings which Silkchime and Earlmist say give rise to a reasonable apprehension of bias and the findings do not give rise to a reasonable apprehension of bias. Secondly, Silkchime and Earlmist have waived their right to object to me hearing the CJEA applications. Thirdly, I should not recuse myself from hearing the applications for case management reasons.

Warwick v Earlmist

14 Before considering the merits of the recusal application it is convenient to refer to ***Warwick v Earlmist***. Warwick and Earlmist operated a loan account with each other. The books of account record that Earlmist is indebted to Warwick for $1,373,453. Further, Mr Carey, a sole director of Earlmist, issued a special unit in the Earlmist Unit Trust to Warwick and made a trust distribution of $1,400,000 to Warwick. In CIV 2477 of 2011 Warwick claims from Earlmist $1,373,453 in respect of the book debt and $1,400,000 in respect of the trust distribution. Mr Carey denies that the books of account correctly record the indebtedness of Earlmist to Warwick. Mr Carey says that Warwick and Earlmist executed an option agreement dated 24 November 1997, a term of which is that if Warwick did not pay the option fee in cash it will attract interest calculated on a monthly basis until paid. Mr Carey says that the option fee was not paid, interest has accrued and Warwick is indebted to Earlmist for $2,700,000 as at December 2014. The books of account do not refer to the unpaid option fee or outstanding interest. So far as the trust distribution is concerned, Mr Carey denies that the

distribution sum is owed by Earlmist to Warwick for reasons which are not relevant to the present application. Mr Carey further says that as at 9 August 2012 Rompride Pty Ltd was owed $10,006,780 by Warwick and on that date Rompride assigned to Earlmist $3,000,000 of that debt by a deed of assignment, notice of which was given to the Receivers. Mr Carey says that Warwick's books of account make no reference to its indebtedness to Earlmist for that $3,000,000. Warwick does not accept the authenticity of the option agreement produced by Mr Carey. Furthermore, Warwick says that Earlmist has acknowledged or admitted that it is indebted to Warwick in the sum of $1,373,453 in that Earlmist submitted to the Receivers a Report as to Affairs (RATA) signed by Mr Carey on 2 March 2006 which admits that debt.

15 On 7 September 2015 I heard an application by Earlmist that I recuse myself from hearing the action on the ground of apprehended bias. In ***Warwick v Earlmist*** I found that there is a real possibility that my participation in that case might lead to a reasonable apprehension of prejudgment for two reasons [39]. First, the character and gravity of my findings about the testimony of Mr Carey, and Mr Patrick Ho, in ***Warwick v Silkchime [No 2]*** are such that a fair minded lay observer might reasonably think that I might not be able to eradicate the effect of the conclusions I reached in ***Warwick v Silkchime [No 2]*** about the conduct and credibility of Mr Carey from my mind in attempting to deal fairly and impartially with Mr Carey's evidence at the trial of that action. Secondly, some of the issues in ***Warwick v Silkchime [No 2]*** and ***Warwick v Earlmist*** arise from striking similar circumstances. In each case an instrument, the JVA in ***Warwick v Silkchime [No 2]*** and the option agreement in ***Warwick v Earlmist***, only came to light after the Receivers were appointed and made claims on Silkchime and Earlmist respectively. In each case Warwick claimed that the agreement is inconsistent with a RATA signed by Mr Carey. In each case the court is or will be called upon to consider Mr Carey's explanation for signing the RATA and for the apparent inconsistency between the alleged agreements and the objective circumstances. I decided to recuse myself.

16 Silkchime and Earlmist say that this application gives rise to the same or very similar considerations and arise in very similar circumstances. I turn now to consider the merits of their application.

Apprehension of bias

17 The mere fact that a judge, earlier in the same case or in a previous case, has commented adversely on a party or witness or rejected the

evidence of a party or witness, is not of itself a sufficient ground for recusal. The application of the principles of apparent bias to cases of alleged prejudgment are wholly fact sensitive. In ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451 (***Locabail***) the Court of Appeal of England and Wales consisting of Lord Bingham CJ, Lord Woolf MR and Sir Richard Scott VC, in a joint judgment said:

> 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 … a real danger of bias might well be thought to arise … 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 persons evidence with an open mind on any later occasion … 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, would 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. [25].

18 The plaintiff submitted that it is important that the present proceedings are, in a real sense, a continuation of the trial of the original action, that they involve enforcement of the judgment in that case and are not separate proceedings. Senior counsel for the plaintiff, Mr Thomson SC, referred to ***Inform Group Ltd v Fleet Card (NZ) Ltd*** [1989] 3 NZLR 293 (***Inform***). Proceedings concerning the supply of computer services came before the High Court of New Zealand for trial limited to the question of liability on the claim and counterclaim. During the trial it was further ordered that it would be confined to whether there was a breach of contract. The judge held that Fleet Card was in breach of contract and the proceedings were adjourned for a further hearing on an inquiry as to damages and for hearing of the counterclaim. Fleet Card applied, amongst other things, for an order directing that the further trial of the proceedings be heard before a different judge on the basis that in the trial decision the judge had not accepted the evidence of Fleet Card's general manager and there would be a reasonable possibility of bias on the judge's part, or, at least, an impartial observer might have a reasonable suspicion that the judge would be biased. Hillyer J refused the application stating that where, as in that case, the trial is continued, it would be wrong

for the judge to be changed simply because he has had necessarily to express an opinion one way or the other as to the credibility of a particular witness. An appeal was dismissed. In delivering the judgment of the New Zealand Court of Appeal Richardson J said it was particularly relevant that in accordance with the procedures and practices of the court the trial was proceeding in stages in circumstances where it is implicit that the same judge should ordinarily deal with the whole case through to its determination. His Honour said that while there may be circumstances where in a split trial findings of the judge following the first hearing could lead a reasonable bystander to suspect the predetermination on the judge's part if the judge were to hear the further stage of the proceedings, that was not such a case (299).

19 The present matter is readily distinguishable from that in ***Inform***. An application to determine the nature and extent of an asset or in order to facilitate realisation of the asset under s 86(1) of the CJEA brought in aid of execution of a judgment is relevantly a separate proceeding from the proceedings giving rise to the judgment sought to be enforced. In this case the CJEA application concerns the interest of Earlmist in the Silkchime Property. That was not an issue in the proceedings leading to the judgment and no evidence was adduced of the circumstances giving rise to Earlmist's alleged interest. Indeed, Earlmist was not a party to those proceedings. An application for orders under s 86 of the CJEA must be in an approved form supported by an affidavit: *Civil Judgments Enforcement Regulations 2005* (WA) reg 54(1). The application may be heard by a judicial officer other than the judge who pronounced the judgment sought to be enforced.

20 As I have said, in ***Warwick v Earlmist*** I found that there was a real possibility that my participation in that case might lead to a reasonable apprehension of prejudgment because of the character and gravity of my findings about the testimony of Mr Carey and Mr Patrick Ho in ***Warwick v Silkchime*** and the similarity of some of the issues in that action and some of the issues in ***Warwick v Silkchime***. The issues concerning the credibility of Mr Carey arose in each case in strikingly similar circumstances. Those two factors are present in this case. As the Court of Appeal of England and Wales said in ***Locabail*** 'if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal' (480). In view of the issues concerning the credibility of Mr Carey and the authenticity of the instruments in question in ***Warwick v Silkchime [No 2]*** and in these CJEA applications and in having regard to my decision in ***Warwick v Earlmist*** I would, as an act of prudence, recuse myself from hearing the CJEA applications. However, the plaintiff says I

should not recuse myself from hearing the CJEA applications for two further reasons. I will now consider those reasons.

Waiver

21 An objection to the constitution of a court on the ground of apprehended bias may be waived: ***Smits v Roach*** (2006) 227 CLR 423 (***Smits***) [43] (Gleeson CJ, Heydon & Crennan JJ); ***Vakuata v Kelly*** (1989) 167 CLR 568, 572 (Brennan, Deane & Gaudron JJ). If a party to civil proceedings, or the parties legal representative, knows the circumstances giving rise to the disqualification of the judge but acquiesces in the proceeding by not promptly taking objection, it will likely be held that the party has waived the objection: ***Smits*** [43], [61] and [125]; ***Vakuata*** (572, 577 - 579, 587 - 588).

22 Silkchime and Earlmist concede that their solicitor and counsel at all relevant times were aware of the facts potentially giving rise to an application for disqualification but did not make an application until 'the eleventh hour', that is 10 days before the scheduled hearing of the CJEA applications.

23 The concession by Silkchime and Earlmist is properly made. The circumstances said to give rise to the allegation of apprehended bias, that is the findings I made in ***Warwick v Silkchime [No 2]***, were published on 1 August 2012. Since then:

(a) Warwick filed the CJEA application on 10 November 2015;

(b) on 8 March 2016 the CJEA application was listed for hearing before me on 4 August 2016;

(c) Earlmist applied for, and on 11 March 2016 I allowed, a recusal application in proceeding CIV 2477 of 2011: ***Warwick v Earlmist***;

(d) on 26 April 2016 Warwick and Earlmist filed their statement of facts, matters and contentions;

(e) there were directions hearings before me in this proceeding on 11 August 2016, 18 August 2016, 20 September 2016 and 20 October 2016;

(f) on 21 October 2016 and 21 November 2016 Mr Carey filed affidavits in opposition to the CJEA application;

(g) on 1 December 2016 Silkchime and Earlmist filed their outline of submissions; and

(h) on 5 December 2016 Mr Carey filed an affidavit in support of an application to adjourn the hearing which was then listed to be heard by me on 8 and 9 December 2016. The hearing was adjourned to 20 March 2016.

24 In most cases where a party has been held to have waived the right to invoke the rule against bias, the circumstances giving rise to the disqualification application or the party becoming aware of those circumstances has occurred in the course of a trial. However, the principle of waiver is not confined to those situations. For example, in ***JSC BTA Bank v Ablyazov*** [2012] EWCA Civ 1551 (***Ablyazov***) the Court of Appeal of England and Wales affirmed the decision of the trial judge refusing to recuse himself as trial judge following his finding of contempt against a defendant on the grounds there was no real possibility of bias and the defendant's failure to make a recusal application earlier in the proceedings had been an unequivocal, informed and voluntary waiver of his right to make such an application [92]. The trial, which was expected to last three months, had been imminent when the defendant made his application. The judge had had a long and extensive involvement with the case and in contempt proceedings had disbelieved the defendant's evidence on oath and found him guilty of contempt of court for failing to disclose his assets in breach of a freezing order. The Court of Appeal said that the question was whether the defendant's failure to request recusal earlier in the proceedings, while still participating, was consistent with his subsequent application [88]. The defendant had participated, not merely stayed silent, in proceedings before the judge and thereby waived his right to apply for the judge to recuse himself.

25 Silkchime and Earlmist acknowledge that they have, through their counsel, attended in court on numerous occasions since making the application which resulted in ***Warwick v Earlmist*** and since the delivery of reasons for judgment in ***Warwick v Earlmist*** without raising the apprehended bias issue. Nevertheless, Silkchime and Earlmist submit that they ought not be taken to have waived their entitlement to apply for recusal for the following reasons. First, this is not a case where the party making the application has complained of the matter only after being unsuccessful at trial. Secondly, shortly after the delivery of judgment in ***Warwick v Earlmist***, there was a falling out between Silkchime and Earlmist and their solicitors which resulted in Silkchime and Earlmist having to engaged new solicitors and counsel. Thirdly, there are

numerous proceedings pending before this court between these and related parties arising out of the failure of the Westpoint Group of companies. Fourthly, it was necessary for the work which needed to be done in regard to those matters to be prioritised, including dealing with matters where there existed a default in complying with the court's directions. Fifthly, Mr Carey's non-expert evidence in these proceedings was only completed on 21 October 2016. Sixthly, the issue was the subject of discussion between Mr Carey (on behalf of Silkchime and Earlmist) and counsel in November 2016 when counsel asked why a recusal application had not been made in these proceedings, to which Mr Carey responded that the recusal application in CIV 2447 of 2011 had been made on the recommendation of his prior solicitor and that he did not know why a recusal application had not been made in these proceedings. Seventhly, shortly thereafter Mr Carey had open heart surgery and was unable to give the matter any real attention until February 2017 when he undertook a full analysis of the issues in his evidence compared to the trial in the original action in preparation for the hearing of the CJEA applications.

26 A party may waive a right to apply for recusal by the conduct of his solicitor or counsel notwithstanding that the party itself was not aware of the circumstances giving rise to the right to apply for recusal or did not turn its mind to whether or not such an application should be brought. In ***Smits*** senior counsel for the plaintiffs at the trial was aware of the facts potentially giving rise to an application for disqualification but decided not to make an application at a permissible time. The High Court held that that decision bound the plaintiffs and it was irrelevant whether the plaintiffs themselves were unaware of the relevant facts at that time: [45] (Gleeson CJ, Heydon & Crennan JJ).

27 In order to be binding a waiver must be informed and unequivocal. Silkchime and Earlmist had full knowledge of the circumstances giving rise to their right to apply for a recusal through their solicitors and counsel. Silkchime and Earlmist do not submit otherwise.

28 Waiver may be inferred from a party's conduct and from silence with regard to the objection coupled with continued participation in the proceedings, see eg ***JSE BTA Bank v Ablyazov***. Waiver is a voluntary and intentional relinquishment of a known right, claim or privilege and hence an intention to waive rights is a requirement of waiver. However, the defendant's subjective intention is not a necessary element of waiver. The test is whether there has been an objective manifestation of choice; a party's intention is to be objectively deduced from its conduct: ***Tropical***

Traders v Goonan (1964) 111 CLR 41, 55 (Kitto J); ***Sargent v ASL Developments*** (1974) 131 CLR 634, 646 (Stephen J).

29 The conduct of the defendant and third party to which I have referred is an objective manifestation of an intention to waive any right to invoke the rule against bias.

Special circumstances of this case

30 I have decided that, notwithstanding that Silkchime and Earlmist have waived their right to apply for recusal, I should in the exercise of my case management powers refer the CJEA applications for hearing by another judge. There are five matters which lead me to that conclusion. First, if there was no question of waiver, I would have recused myself from hearing the CJEA applications. Secondly, I decided in ***Warwick v Earlmist*** to recuse myself from hearing that proceeding in circumstances which are similar to those which arise in these proceedings. Public confidence in the court will be maintained by a consistent approach. Thirdly, Silkchime and Earlmist waived their right to apply for recusal by reason of the conduct of their solicitors and counsel. That conduct by their solicitors is inconsistent with the conduct of the solicitors applying for recusal in CIV 2477 of 2011 and inexplicable on the material before the court. Fourthly, Warwick and Earlmist's application for recusal has caused the listed hearing date for the CJEA applications to be lost. The applications may now be heard as quickly by another judge as may be heard by me. Fifthly, my familiarity with the CJEA applications is primarily with the procedural steps that have occurred and not with the merits of the application.

Conclusion

31 The proceeding will be referred to the CMC list allocation judge for reassignment to another judge of the court.