COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

Bankruptcy and Insolvency
2018/COM/bnk/00073

IN THE MATTER of the Bankruptcy Act, 1870
to the Supreme Court of the Commonwealth of The Bahamas

BETWEEN

MICHAEL PREUSS

Petitioner

AND

RAYMOND ROLLE

Respondent

Before: The Honourable Madam Justice G. Diane Stewart

Appearances: Miss Chizelle Cargill for the Petitioner
Mr Keod Smith for the Respondent

Hearing Dates: December 19, 2019, February 4, 2020.

RULING

Recusal – Attorney Client Relationship – Ambit of Fiduciary Relationship – Actual or apparent bias-Bias against party-Whether real possibility or real danger of bias – Breach of Article 20(8) of the Constitution.

Stewart, J:

1. Mr. Raymond Rolle ("the Applicant") is a practising attorney. In the substantive application by Mr. Michael Preuss for an order that Mr. Rolle be adjudged a bankrupt, his attorney wrote to the Court by letter dated December 2 2019 requesting that I recuse myself.

2. The letter stated:-

> **"The Clerk**
> **Her Ladyship The Hon. Madam Justice Diane Stewart**
> **SUPREME COURT,**
> **Bank Lane,**
> **Nassau, Bahamas.**
>
> **Dear Sir/Madam,**
>
> **Re: Michael Preuss and Raymond Rolle**
> **COM/bnk/00073 of 2018**
>
> **As you are no doubt aware on 22nd October a Notice of Change of attorney was filed in the Supreme Court making the undersigned and our firm the Attorneys for the Respondent, Mr Raymond Rolle ("Mr. Rolle"), to the Petition filed herein on the 6th December 2018 return (with adjournment) on Monday 2nd December 2019.**
>
> **While we have filed a Notice on 28th November 2019 in accordance with the Rules to challenge the said Petition, we are obliged by the practice of law in our Jurisdiction to inform Her Ladyship The Honourable Madam Justice Diane Stewart ("Justice Stewart") that Mr. Rolle is of the view that she should recuse herself from these proceedings in light of the fact that Mr. Rolle filed a Writ of Summons on 4th September, 2019 in Supreme Court Action No. 2019/CLE/gen/01256 he acted for the Plaintiff bringing action against Mr. Richard Lightbourne ("Mr. Lightbourne") and others of Her Ladyship's former firm, Messrs. McKinney Bancroft & Hughes ("MB&H") who, although had already retired from active practice or as an Attorney, for the last year or two continued to be professionally connected with Mr. Lightbourne retired from active practice continued on with MB&H as a Consultant.**
>
> **Therefore , in circumstances, AND, in defence of the Plaintiff bringing this matter to Justice Stewart's attention so that, if she should recuse herself, the matter can be urgently placed before another Justice of the Supreme Court.**

We have been instructed to and do so hereby request a metting in Chambers with Justice Stewart and Counsel for the other side to discuss this matter to have it resolved without having to ventilate it in open court.

Thank you for your courtesies herein
Yours Sincerely

Commercial Law Advocates
Keod Smith"

3. By Notice of Motion filed December 09, 2019 as the Applicant seeks an Order that I recuse myself from the hearing of or in relation to the Bankruptcy action on the following principal grounds:

1. **The Respondent's constitutional right to a fair hearing as guaranteed by or under Article 20(8) of the Constitution has been, is being or is likely to be infringed or violated, or threatened to be infringed or violated if Justice Stewart continues to preside over these proceedings; and**

2. **That there is or has been the presence or possibility of bias or the appearance of bias on the part of Justice Stewart against the Respondent, which bias would likely affect the obtaining by the Respondent of a fair hearing or of fair hearings in this Bankruptcy Action, and more particularly, the following.**
    a. **Right up to the date of her appointment as a Justice of the Supreme Court on 2nd October, 2018, Justice Stewart worked for many years as a Partner (believed to be an equitable Partner) of the law firm of Messrs. McKinney Bancroft & Hughes ('MB&H) where she served for many of those years as Partner with Mr. Richard Lightbourne ("Mr. Lightboure"); and**

    b. **When Mr. Lightbourne retired from active practice at MBH as a Partner, he continued on with that firm as a Consultant or "Of Counsel" which time period overlapped with the last years with Justice Stewart's partnership at MBH; and**

    c. **On 4th September 2019, the Respondent herein as Counsel for the Plaintiff in Supreme Court Action No. 2019/CLE/gen/01256 ("Fraud Action"), Ms. Rosamund Sandbrook, was singlehandedly responsible for driving the Fraud Action to be filed against Mr. Lightbourn and MBH. By the Fraud Action, it is alleged, inter alia, that the Defendants therein committed negligence and/or fraud and/or undue influence and/or was unjust enriched as a result if their wrongdoing. The period when these causes of action arose,**

occurred during the period when Justice Stewart would have serve as Partner of MBH; and

d. **As the Fraud Action remains extant, with the Defendant's Defence not yet having been filed with the pleadings not yet having been closed or deemed to have been closed at this point, there is a good chance that the Defendants can be found to be liable for what is alleged in the Statement of Claim of the Fraud Action. If so, it would mean that the Respondent would be seen as having caused such determination to have happened. This would have direct negative consequence on Justice Stewart who, as Partner of MBH at all material times, would be liable for acts or interaction of her former fellow Partners and MBH, the firm in respect of which she was a Partner.**

e. **At this stage of her long-standing career as an Attorney-At-Law now culminating in her ascension to the Bench as Justice of the Supreme Court, it would be seen by a lay person fully advised of all of the facts, that Justice Stewart would not be able to divorce herself from the personal belief that the Respondent sought to and did injure her by going after her former Partner (Lightbourne) and the law firm in which she sat as Partner in relation to activity that happened when she was ostensibly responsible for the alleged fraudulent actions of her said former Partner and/or law firm if not determined in the trial of the Fraud Action as having participated in the acts alleged.**

AND TAKE FURTHER NOTICE that the Respondent seeks an Order that the Petitioner herein do pay the Respondents costs of this application on a full indemnified basis.
DATED this 6th day of December, A.D. 2019

Commercial Law Advocates
Keod Smith

4. The Applicant filed an affidavit on the same day in support of the application. He stated:-

> **"I, Raymond A. Rolle, of the Western District of the Island of New Providence one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows:-**
>
> 1. **I make this Affidavit in support of my Notice of Motion filed herein on 6th December 2019 seeking the recusal of Her Ladyship The Honourable Ms. Justice Diane Stewart ("Justice Stewart") from hearing or otherwise**

presiding over this Action for the reasons set out as what I consider would give the appearance of bias.

2. I am Counsel and Attorney-at-Law in the Chambers of Raymond A. Rolle & Co. having been called to the Bahamas Bar on 29th October 1996.

3. Sometime in mid-2007, I was engaged by Ms. Rosamund Sandbrook ("Ms. Sandbrook") who had me review and advise as to a complaint she would level against Mr. Richard H.R. Lightbourne ("Mr. Lightbourne") for negligence and/or fraud and/or undue influence and/or undue enrichment. I knew Mr. Lightbourne to be a Partner at the law firm of Messrs. McKinney Bancroft & Hughes ("MBH") at the time where he was working as an Attorney-at-Law upwards of thirty (30) years. I learnt in recent months that MR. Lightbourne, although is in formal retirement form the firm, continues to work there as a Consultant.
I now produce and annex hereto marked as exhibit "RAR-1" a photocopy of the website of an excerpt of MBH.

4. I had also become aware that since from about 1996 until 2nd October 2018, Justice Stewart, prior to ascending to the Bench, served at MBH as an Associate and eventually a Partner in that law firm.

5. That said, when Justice Stewart was called to the Bahamas Bar and made a part of MBH, she was quoted in The Bahamas Investor publication as say "I LOVE this firm" which makes me verily believe that she was and continues to have an allegiance to MBH that is second to no other entity that she has ever been involved with or attached to.
I now produced and annex hereto marked as exhibit "RAR-2" a photocopy of the said publication.

6. In that said publication, MBH, without concurrence of The Bahamas Bar Association, saluted Justice Stewart for her outstanding contribution to the Bahamian legal profession during her time with them. This gave me the impression that they were showing a closeness and respect as between her and MBH that she would take umbrage with anyone who is a part of challenging the integrity of that firm, or any of its Partners, whether verbally or in Court proceedings.

7. Both Mr. Lightbourne and Justice Stewart would jointly served as Partners of MBH at the same time for a period prior to me taking steps with and for Ms. Rosamund Sandbook as the Plaintiff in Supreme Court Action No. 2019/CLE/gen/01256 for negligence, fraud, presumed undue influence and unjust enrichment ("The Fraud Action") against Mr. Lightbourn and MBH. This Action arises out of the said complaint made to The Bahamas Bar in 2007.

I now produce and annex hereto hereto marked as exhibit "RAR-3" a photocopy of the Amended Writ of Summons filed therein on 28th October 2019.

8. My instructions from and in relation to Ms. Rosamund Sandbrook comes through her Attorney, Mr. Mike Fothagill, by virtue of a Power of Attorney dated 12th April 2016 and recorded in the Registrar General's Department in Volume 12567 at pages 169 to 171.
I now produce and annex hereto marked as exhibit "RAR-4" a photocopy of the said Power of Attorney.

9. On 6th September 2007 a complaint made for and on behalf of Ms. Rosamund Sandbrook based on my legal advice and recommendation, was lodged with The Bahamas Bar Association against Mr. Lightbourn and the firm MBH.
I now produce and annex hereto marked as exhibit "RAR-5" a photocopy of the said Bar complaint.

10. From at least that time, I am satisfied that the whole of the firm of MBH, especially its Partners (inclusive of Justice Stewart), were well aware of my efforts which challenged the integrity of each Partner who made up of the firm whether as an equity or salaried Partner.

11. It was not until 2nd October 2018 that Justice Stewart was appointed to and sworn in as a Justice of the Supreme Court ("Justice Stewart"), some time after she would have known of my efforts as Counsel against Mr. Lightbourne and MBH in the Fraud Action.

12. As a Pro Se Party in these Bankruptcy proceeding herein, I reminded Justice Stewart about the Fraud Action and that in light of her connection to Mr. Lightbourn and the firm of MBH as a Partner, she ought to recuse herself and send the Fraud Action back to the Registrar for that Action to be reassigned to another Justice of the Supreme Court, for adjudication.

13. To my surprise, Justice Stewart, told me that I would have to make a formal application before her in Open Court, for her recusal.

14. In the meantime, I was able to secure the professional services of Mr. Keod Smith ("Mr. Smith") to become my Attorney in these bankruptcy proceedings.

15. Mr. Smith concurred with me in stating that as my newly Attorney of record, he would and did formally write to Justice Stewart to inform her of my intentions to seek her recusal. In his letter dated 2nd December 2019, Mr. Smith said that his writing to her was the proper process to take so as to allow her as the Judge to step away from the case without much, if any,

negative fall-out toward the Court if she thought that she ought to have recused herself.
I now produce and annex hereto marked as exhibit "RAR-6" a photocopy of the letter of 2nd December 2019.

16. **Mr. Smith's effort in Open Court to convince Justice Stewart to adjourn to Chambers so that he could carefully explain the nature of my intended recusal application without rancor, was met with rejection by Justice Stewart. She directed him to proceed with the recusal in Open Court and gave him, and therefore, me a very short period within which to file the necessary Motion and supporting Affidavit; within four (4) days on or before the end of Friday 6th December 2019. Justice Stewart refused to allow Mr. Smith the following Monday after the weekend so as to accommodate his schedule with respect to other matters he had to contend with. Mr. Smith argued that the Monday would not have prejudiced anyone but allow him more time to properly consider and prepare for Court.**

17. **As such, therefore, this Affidavit is to support my application that Justice Stewart should stand as being recused from these proceedings from my fear that she would exhibit biasness against me given her apparent fawning sycophantic behaviour towards Mr. Lightbourn and the firm of MBH over the years of her working with them.**

18. **I have been told by Mr. Smith and do verily believe that in the premises Justice Stewart should recuse herself and not hear the Bankruptcy proceeding involving me. It is in the interest of justice that she recuse herself.**

19. **The matters deposed to in this Affidavit are either within my knowledge (in which case they are true) or are based upon information supplied to me by others (in which case I identify the source of the information and state those matters are true to the best of my knowledge and belief).**

Sworn to at
Nassau, Bahamas
this 6th day of December, 2019"

5. The grounds relied on by the Applicant are that his constitutional right to a fair hearing as guaranteed under Article 20(8) of the Constitution has been or is being or is likely to be infringed or violated, and that there is or has been or the possibility of bias or the appearance of bias against the Respondent should I hear the bankruptcy application.

6. In his submissions counsel for the Applicant advised the court that the Writ had not been served on Mckinney Bancroft and Hughes (the firm), neither had the complaint made to the Bahamas Bar Association been heard, but the existence of the writ had been brought to the attention of the firm and Mr. Lightbourn.

7. The Applicant's application seeking my recusal from the further hearing of the substantive bankruptcy matter is based on the fact that because he presently acts as counsel for a plaintiff in an entirely separate action, namely **Supreme Court Action No. 2019/CLE/gen/01256** ("the Writ Action") filed on October 8th, 2019 which alleges inter alia fraud as against a former partner and my former firm, that I am unable to exercise impartiality in the dispensation of these extant proceedings. In support of this claim he refers to an article in The Bahamas Investor which was published in 2010 where I was quoted as saying that "I loved the firm".

8. It is a fact that I was a partner in the firm until my resignation in October 2018 to assume a position as a Judge of the Supreme Court. It is also a fact that Mr Lightbourn was a partner and subsequently a consultant in the firm and also that I was quoted in the Bahamas Investor in 2010 as saying that I loved the firm. Finally it is a fact that the Applicant is not a party to the Writ Action but is the counsel for the plaintiff in that action.

9. The crux of the Applicant's evidence is that because of my prior working relationship with Richard Lightbourne and the firm, this ipso facto equates to my taking **"umbrage with anyone who is a part of challenging the integrity of that firm, or any of its partners, whether verbally or in court proceedings".** This assumption is primarily based upon my commentary that I loved the firm in a 2010 publication of The Bahamas Investor and that I would have been a partner during the time in issue in the action, and that I would have known of the 'matter'. These are the facts in the Applicant's opinion which give rise to the possibility of bias.

10. A complaint was filed with the Bahamas Bar Association in 2007 on behalf of the Plaintiff in the Writ Action against Mr Lightbourn. This complaint has not been heard as confirmed by counsel for the Applicant.

11. The December letter was written by Mr. Smith as counsel for the Applicant who was retained prior to the date of that letter and not as set out

in the Applicant's affidavit. The only indication that the Applicant intended to make the recusal application was in October when he personally sought an adjournment to instruct new counsel and indicated that **'another issue might arise with respect to recusal of yourself in relation to this matter. He further stated 'there is an issue that may arise, my Lady, that Mr. Smith will address'.**[1]

No further information was given until the letter of the 2nd December.

12. The bankruptcy proceedings started in 2019 with the first hearing before me fixed for July 2019.The Applicant was present and represented at the first hearing and did not raise any concern of bias or the appearance of bias although his representation of the Plaintiff had been ongoing, as well as the complaint would have been filed with the Bar Association.

13. The hearing was adjourned to August at the request of the Applicant which was granted. The August hearing was also adjourned to October at the request of the Applicant to pursue settlement discussions which was granted. There was no issue raised at this adjourned hearing of my bias or the appearance of bias. At the October hearing the Applicant foreshadowed that there would be a recusal application but again did not indicate the basis for his concern of bias. After the Petitioner requested that a formal application be made the Court gave directions for the filing of the recusal application by the 22 November and adjourned the hearing to the 2nd December.

14. The Applicant did not comply with the directions given but had his attorney write the letter seeking my recusal which was received on the morning of the hearing. At that hearing the Court then directed the Applicant to file his application and further adjourned the hearing to the 6th December 2019.

ISSUES

15. The issues for determination are:

1. Whether there is a breach or possibility of a breach of Article 20(8) of the Constitution if I hear the bankruptcy application.

2. Whether I should recuse myself on the basis of bias or apparent

[1] See transcript of October 25th, 2019; Page 5 Lines 16-19

bias.

BREACH OF ARTICLE 20 (8)

16. Article 20(8) of the Constitution states;-

> **"(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

The issue therefore is whether this court is independent and impartial. In order to determine this the issue of bias must be considered and determined bearing in mind the facts pertinent to this application.

BIAS

17. The Applicant relies on a number of authorities in support of his application starting with **Porter v Magill [2002]2 AC 357** where of Lord Hope stated that:-

> **"The court recalls that in order to establish whether a tribunal can be considered as 'independent', regard must be had inter alia to the manner of appointment of its members and their term on office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence."**
>
> **"As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect."**
>
> **"The concepts of independence and objective impartiality are closely linked..."**
>
> **"In both cases the concept requires not only that the tribunal must be truly independent and free from actual bias, proof of which is likely to be very difficult but also that it must not appear in the objective sense is lacking these essential qualities."**

18. Also, the Applicant relies on the importance of the appearance of independence as set out in **El Faragy v El Faragy [2007] EWCA Civ 1149** where LJ Ward referred to **Porter v Magill** and stated;-

> **"There is no dispute about the law. In Lord Hope's words in paragraph 103 in Porter v Mcgill: the question is to whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Mr. Randall also directs our attention to paragraph 63 in Lord Hope's speech in Millar v Dickson [2001] UK PC D4, [2002} 1 W.L.R. 1615 where he referred to:-**
>
> > **... the fundamental importance of the convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done."**

19. He submits that a party seeking the recusal need not demonstrate the possibility of bias to the standard of the balance of probabilities but only show that it is more than merely fanciful.

20. He further relies on the test to determine bias or the appearance of bias as enunciated in **Re Medicaments and Related Classes of Goods (No 2) [2001]1 WLR 700** where Lord Phillips stated:-

> **"The court should first ascertain all the relevant circumstances and then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility or real danger, the two being the same, that the tribunal was biased."**

21. The Applicant also submits that because I have not given any sworn statement or denied the allegation that I should recuse myself. While it is true that I had not provided any sworn statement I did confirm to the parties that I was a partner in the firm until 2018 and that I was unaware of the Writ Action.

22. There has been considerable jurisprudence on recusal applications in this jurisdiction and I am gratefully assisted by the concise summary of the same by my learned sister Charles J in **Bernard E. Evans v Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund (By Everil Clarke,Andrea Culmer and Steve Hepburn in their capacity as Trustees) (A Judgment Creditor)[2018] 1BHS J No 68** which

I adopt here. She started by referring to Mr. Justice Hayton paper entitled **"Recusing yourself from a case"** where he wrote:-

> 14. **"Becoming a judge starts with a memorable swearing-in ceremony. A judge will swear (or solemnly affirm) that he will faithfully exercise his office without fear or favour, affection or ill-will – and perhaps in accordance with the relevant Code of Judicial Conduct or Ethics if there is one. The judge hearing will also be well aware of a citizen's fundamental constitutional rights to a fair and public hearing by an independent and impartial tribunal, judicial independence in itself being a means of ensuring impartiality, the two concepts being closely linked.**
>
> **By virtue of their professional background leading up to their appointment, judges are assumed to be persons of "conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. It must be assumed that they can diabuse their minds of any irrelevant personal beliefs or predispositions". The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views." Judges should be selected as independent-minded persons of intellect and integrity. Thus there is a "presumption of impartiality" which carries considerable weight." (Emphasis added)**

She then continued by referring to various authorities:-

> 15. **"The test for apparent bias is well-settled. The question to be asked is "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Per Lord Hope in Porter v Magill [2001] UKHL 67 at para. 103. See also The Rt. Hon. Perry G. Christie, Prime Minister of the Commonwealth of The Bahamas et al v The Queen and the Coalition to Protect Clifton Bay et al (SCCivApp No. 63 of 2017).**
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> 16. **In Oktritie International Investment Management v Mr. George Urumov [2014] EWCA Civ. 1315, the Court of Appeal regarded this as a fundamental principle of English law and went on to state:-**
>
> **It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concepts of bias... extends... to any real possibility that a judge would approach a case with a closed mined or, indeed, with anything other than an**

objective view; a real possibility in other words that he might in some way have "pre-judged" the case.

17. "The learned authors of Blackstone's Criminal Practice 2009 note that the right to an impartial tribunal is protected by the rule that provides for the judge's disqualification or the setting aside of a decision if on examination of all the relevant circumstances there was a real danger or possibility of bias. It is the judge's duty to consider and exercise judgement on any objection raised which could be said to give rise to a real danger of bias. Disqualification for apparent bias is not discretionary; either there is a real possibility of bias, in which case the judge is disqualified, or there is not;"

18. "In Helow v Secretary of State for The Department and Another (Scotland) [2008] UKHL 62, the appellant, a Palestinian by birth, averred that her family were supporters of the Palestinian Liberation Organisation (the PLO"). More particularly, she was actively involved in the preparation of a lawsuit brought in Belgium, alleging that the then Prime Minister was personally responsible for the massacre in the Sabra and Shatila camps in Lebanon in September 1982. She alleged that she was at risk of harm not only from Israeli agents, but also from Lebanese agents and because of her links with the PLO; from Syrian agents. On that basis, she claimed asylum in Scotland but her application was refused by the Home Secretary and, on appeal, by the Adjudicator. The appellant was refused leave to appeal by the Immigration Appeal Tribunal. She then lodged a petition in the Court of Session seeking a review of that refusal. The petition was considered by Lady Cosgrove. The appellant did not criticize Lady Cosgrove's reasons for dismissing her petition. Instead, she launched an attack on the ground that that it was vitiated for "apparent bias and want of objective impartiality". She did not suggest that the judge could not be impartial merely because she is Jewish. Rather the contention was that, by virtue of her membership of the International Association of Jewish Lawyers and Jurists, the judge gave the appearance of being the kind of supporter of Israel who could not be expected to take an Impartial view of a petition for review concerning a claim for asylum based on the appellants support for the PLO and involvement in the legal proceedings against the Prime Minister. The Court noted that: The basic legal test applicable is not in issue. The question is whether fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased, by reason in this case of her membership of the Association: *Porter v Magill [2001] UKHL 67; [2002] 2 AC 357*. The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or

she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para. 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para. 53, which was approved by my noble learned friends Lord Hope of Craighead and Baroness Hale of Richmond in *Gillies v Secretary of State for Work and Pensions [2006]* UHKL 2; SC(HL) 71, paras 17 and 39"

19. The House of Lords found that the fair-minded and informed observer would not impute to the judge the published views of other members because she was a member of the Association. The appellant also contended that the observer would think that by reading the journal which the Association publishes, the judge might well have absorbs the most extreme views expressed in its pages by a process of osmosis so that there is a real possibility that, as a result, she would be biased in dealing with the appellant's petition. In dismissing the appeal, Lord Rodger of Earlsferry had this to say [at para. 23]:

"So, the hypothetical observer would have to consider whether there was a real risk that these articles, read and perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially. In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge is biased. Taking all these matters into account, I am satisfied that the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case." (Emphasis added)

23. Further in **Otkrita International Investment Management Ltd. And Others v Urumov** Lord Justice Longmore held:-

13. **There is already a certain amount of authority on the question whether a judge hearing an application (or trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one of other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the Applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact sensitive...**

The issue in this case is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there exists a real possibility that I was biased? The test for apparent bias requires consideration of a "possibility", applying the information known to and attributes of the hypothetical observer.

24. The crucial fact which has a bearing on the issue of bias in this application is that the Applicant is not a party in the Writ Action but simply an attorney providing legal services; a task which can be changed at any time by the Plaintiff in that action. He has no interest in the litigation and therefore cannot meet the test of the appearance of bias. Further I do not accept that relying on a statement made 10 years ago adds any substance to the claim. Bearing in mind what was said previously in the authorities referred to, unless there is credible evidence to the contrary, there is always a presumption of impartiality.

25. The principles of law concerning allegations of bias in recusal applications as approved by the Court in ***Locabail (UK) Ltd. v. Bayfield Properties and others (2000) 1 All ER 65*** are instructive[2].

There it is stated that;-

> **"in considering whether there is a real danger of bias on the part of a judge, everything depends on the facts, which may include the nature of the issue to be decided" [emphasis added].**

[2] See in detail the Ruling of Bain, J in *The Queen v The Right Hon. Perry G. Christie et al. PUB/JRV 12 OF 2013* at paragraph 70. See also a recent recapitulation of this principle by Thompson, J in Supreme Court action *Fred Smith et.al v. Peter Nygard et. al. 2019/PUB/con/00005* at paragraph 30.

The Court further stated that a recusal application cannot ordinarily be soundly grounded upon the following:-

> **"That where apparent bias was asserted it was for the reviewing court, personifying the reasonable man with knowledge of the relevant circumstances and adopting a broad approach, to assess whether there was a real danger of bias; that in making that assessment the court might properly inquire whether the judge knew of the matter relied on as undermining his impartiality, since ignorance would preclude its having influenced his mind and dispel any such danger; that; although the judge could not be cross-examined or required to give disclosure, the reviewing court might properly receive, but not necessarily accept, a statement from him as to his state of knowledge, but not as to its effect on him since that issue was for the court, not the judge, to assess (post, pp. 475D-E, 476H-477C, E-478A).**

26. The court further referred to the text established in **Reg. v Gough (1993) A.C. 6** where Lord Goff stated:-

> **"In conclusion, I wish to express my understanding of the law as follows. I think it possible, and desirable, that the same test should be applicable in all cases of apparent bias, whether concerned with justices or members of other inferior tribunals, or with jurors, or with arbitrators. Likewise I consider that, in cases concerned with jurors, the same test should be applied by a judge to whose attention possibility of bias on the part of a juror has been drawn in the course of a trial, and by the Court of Appeal when it considers such a question on appeal. Furthermore, I think it unnecessary, in formulating the appropriate test, to require that the court should look at the matter through the eyes of a reasonable man, because the court in cases such as these personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time. Finally, for the avoidance of doubt, I prefer to state the test in terms of real danger than real likelihood, to ensure that the court is thinking in terms of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that they might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him..."**

27. Would the reasonable and fair-minded observer, who is neither complaisant or unduly suspicious conclude that I am biased or would be biased because I made a statement 10 years ago that I loved the firm and that someone who is not appearing before me or who is not a party before me is suing that firm, and that that action is not before me? I think not. The

fact that the Applicant is performing a service for that person does not give him any interest or further any right to utilize that relationship for his own benefit.

ATTORNEY CLIENT RELATIONSHIP

28. The relationship of attorney and client is one of a fiduciary nature. As such, the ambit of the relationship is not to be unduly and conveniently stretched in efforts of providing shelter for the attorney when defending himself in litigation brought against him in his personal capacity. Such an attempt is inconsistent with the attorney's obligation to act in good faith concerning his dealings with the client.

29. In **Bethel v. Commonwealth Bank Ltd. - [2009] 3 BHS J No. 115**, the court relied on the judgement of Lord Woolf MR in **A-G v Blake [1998] 1 All ER at 833** when opining upon the nature of fiduciary duty between an employer and employee. The same holds true for the attorney client relationship which too is premised on trust and confidence arising out of the context of one party undertaking to act in the interests of another. There he opined at 842 that:-

> **"The core obligation of a fiduciary of this kind is the obligation of loyalty. The employer is entitled to the single-minded loyalty of his employee. The employee must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third party without the informed consent of his employer. (emphasis added)"**

30. The same principles apply to the attorney client relationship in that the attorney must act in the utmost good faith and must not place himself in a position where his duty and his interest may conflict. A fortiori the attorney is not permitted to act for his own benefit in relation to his fiduciary duty. There is nothing before me evidencing any concern of the plaintiff in the Writ Action. The Writ Action is not before me.

31. As such, the present application infringes the single minded loyalty owed by the Applicant to the Plaintiff in the Writ Action. Clear duplicity in the loyalty owed is demonstrated by the submission that because he represents that plaintiff in a wholly separate claim not brought in his name and without any interest in the same but only as a result of the establishment of the fiduciary

relationship of attorney-client gives him the right to make this application. This attempt does not represent an act of good faith on behalf of the Applicant in relation to this action or the Writ Action.

32. This application must fail as the facts grounding the application fall squarely in the category of matters not contemplated as a sound basis for substantiating the test for allegations of bias in recusal applications.

33. The Applicant's interpretation of my 2010 statement and my being a partner of the firm during the time alleged in the Writ Action as "fawning sycophantic behaviour toward Mr. Lightbourn and the firm" which would result in my "exhibiting biasness "against the Applicant are baseless and offensive. The facts as alleged in paragraph 12 of his affidavit are untrue as the record of the court proceedings will show. I am satisfied that this is an attempt to have the application removed from my court and heard elsewhere. I adopt the statements of Sedley L J in **Bennet v London [2002] EWCA Civ 223** where he stated:-

> **"Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation." (Emphasis added)**

34. There is no evidence that I continue to have a professional nexus to the firm since assuming judicial office in 2018.

35. In all the circumstances, I determine that this application infringes the loyalty owed by the applicant to his client in the Writ Action. It violates the fiduciary duty owed therein by his attempt to utilize that action as a weapon of litigation for his own benefit. The Applicant has no interest in that action, all of the interest belongs to that Plaintiff. This recusal application is without merit as there is no evidence before me of any bias or appearance of bias on my part toward the Applicant.

36. Litigants are reminded that recusal applications are not to be made lightly as they hit at the very bedrock of justice. Such applications should only be made in warranted and genuine circumstances which would lead the fair-

minded and informed observer to conclude that there was a possibility that the tribunal was biased against the Applicant. Those circumstances are not applicable here.

37. The application is dismissed with costs to the Petitioner to be taxed if not agreed.

Dated this 6th day of May, A.D., 2020

The Honourable Madame Justice G. Diane Stewart
Justice of the Supreme Court
The Commonwealth of The Bahamas