COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2018/CLE/gen/FP/00208

BETWEEN

WAUGH CONSTRUCTION (BAHAMAS) LIMITED
Plaintiff

AND

ALBURY'S FREEPORT LIMITED
Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Wendell A. Smith for the Plaintiff
Mr. Jacy Whittaker for the Defendant

HEARING DATE: April 8, 2022

DECISION

Hanna-Adderley, J
Introduction

1. The Specially Endorsed Writ of Summons and Statement of Claim in this action was filed on August 23, 2018. The Plaintiff claims against the Defendant damages arising out of a breach of a written construction contract dated February 29, 2016. The Order for Directions was filed on February 21, 2019. The initial trial dates were May 25 and 26, 2020, then subsequently November 16 and 17, 2020, then subsequently August 20 and 31, 2021, then

subsequently February 14 and 15, 2022 and finally April 8, and April 29, 2022 all adjourned having been granted for diverse reasons.

2. The parties herein have retained expert witnesses, to address the issue of whether the Plaintiff constructed the Defendant's building according to architectural and structural drawings provided by the Defendant. The Parties' Expert Witnesses are at odds and so, on March 31, 2021 the Court appointed an Expert Witness, Mr. Adrian Rollins, to prepare a report, after reviewing the expert reports of the parties and documents herein and inspecting the building constructed by the Plaintiff.
3. The Defendant made application by Summons filed on June 11, 2021 for *inter alia*, an Order that the Court issue further directions to the Court Appointed Expert and to allow him to make a further and supplemental report. The Plaintiff opposed the application. By way of a written ruling on January 31, 2022 the Court acceded to the Defendant's application and ordered that the Court Appointed Expert file a supplemental report. The Supplemental Report was filed herein on the 4th of April, 2022.
4. The trial herein was fixed to commence on the April 8, 2022 before me. In addition to it the Expert Witness the Plaintiff intends to call Mr. H. Godfrey Waugh, Mr. Kevin Waugh, Mr. Anton Roberts and Mr. Brian Waugh as witnesses and the Defendant intends to call as a witness Mr. Stephen Albury, and 4 Subpoenas have been served on 4 additional witnesses by the Defendant.
5. That when the Plaintiff was presenting to the Court the material which it had filed and intended upon relying, and prior to the first Witness being called, I disclosed of my own volition (see page 17 line 22 of the transcript) that, while in private practice I acted on behalf of one of the principals of the Plaintiff and a Witness for the Plaintiff, Mr. Brian Waugh, in a matrimonial/divorce matter, approximately ten years ago. Upon asking the Parties if either had any issue with me having done so Mr. Jacy Whittaker, of Counsel for the

Defendant, sought a moment to take instructions from his client. After doing so he told the Court (see page 18 line 28 of the transcript) that:

"MR. WHITTAKER: My Lady, I have spoken with Albury's Freeport Limited and they would take issue with this fact. And they would like the matter to be reassigned.

THE COURT: All right. I will have to see how quickly Justice Forbes could schedule it. My apologies.

MR. WHITTAKER: It is a small community, my Lady.

THE COURT: Yes, you know that.

MR. WHITTAKER: Yes. But I want to make sure I have a job tomorrow."

6. Although I was "comfortable" and had no "hesitation" continuing to hear the case I initially considered transferring the matter to Justice Andrew Forbes provided that he could schedule it expeditiously, but after considering the nature of the disclosure made and, in part, the Plaintiff's position that my past association with Mr. Brian Waugh did not mean that I could not be fair in adjudicating this matter, I determined that I would hear the parties on whether I should recuse myself. The stenographer indicated that she would endeavor to produce the transcript in 2 weeks, by Friday April 22, 2022, and I determined that the parties should file and exchange written Submissions on April 29, 2022 and that I would make my Decision on the written Submissions.

7. By Summons filed April 25, 2022 the Defendant seeks my recusal from hearing and determining the issues in these proceedings on the grounds that there is apparent bias on my part and on the basis of the statements made by me on April 8, 2022 whereby I, acting on my own volition and before the filing of the Summons, as presiding Judge, took the view that the issue of an apparent bias was a matter I needed to raise before the commencement of the trial set before me and sought the parties approval to proceed in light of the issue raised by me. The Summons is supported by the Affidavit of Shakira Clarke filed herein on April 28, 2022.

8. Mrs. Paulia Henry the Stenographer produced the transcript within 2 weeks, that is, on or about April 22, 2022. The same was emailed to the Court at 8:14 p.m. on April 22, 2022.
9. The Defendant relies on its Submissions filed April 29, 2022. The Plaintiff opposes the application and relies on its Submissions filed on April 29, 2022.
10. The Court must determine not whether it is "comfortable" hearing this case or whether it has any "hesitation" hearing the case, but whether a reasonable, objective and informed person would on the facts reasonably apprehend that the Court has not or will not bring an impartial mind to bear on the adjudication of the case and whether there was a real danger or possibility of bias.
11. I have given considerable consideration to this decision and I have decided not to accede to the Defendant's application for the reasons set out below.

The Law

12. In the case **Alan R. Crawford and Sharon M. Crawford v Christopher Stubbs, Shanna's Cove Estate Company Limited, Donna Dorset Major (Trading as Dorset Major** -2015/CLE/gen/00765 The Honourable Madam Justice Indra H. Charles was presented with a recusal application on the basis of apparent bias and at pages 4-7, paragraphs [4] – [9] of her Judgment sets out the law pertaining thereto. I certainly can do no better than to repeat the said relevant passages as follows:

"[4] Citizens of a democratic society are entitled to the right to fair trial by an independent and impartial tribunal. This right is enshrined in Article 20(8) of The Constitution of The Bahamas ("the Constitution") which provides as follows:

> "**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."

[5] As a starting point, a presumption exists that judges are impartial, of high intellectual acumen and imbued with the ability to disabuse themselves of any biases that may exist amongst the majority of the population. In the case of **Bernard E. Evans v. Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees) (A Judgment Creditor) - [2018] 1 BHS J. No. 68 (recently affirmed by the Court of Appeal in consolidated appeals SCCiv App. No. 111 of 2018; SCCiv App No. 128 of 2018; 5 SCCiv App No. 157 of 2018 and SCCIv App. No. 158 of 2018)**, this very Court was presented with a recusal application on the basis of apparent bias. The Court referred to a paper written by Mr. Justice Hayton of the Caribbean Court of Justice which provides some guidance in a recusal application. The learned judge wrote:

> **"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 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 disabuse 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].

[6] Indeed, there is a presumption of impartiality which ought not to be easily rebutted on little or no evidence of apparent bias.

[7] In **Re Bernard E. Evans,** I emphasized that it is the duty of judicial officers to hear and determine cases allocated to him or her and not to accede to any unfounded and unsubstantiated recusal application. At paras [21] to [22] of the judgment, I quoted from **The Queen v Gary Jones** [2010] NICC 39; **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 45 and **Bennett v London Borough of Southwark** [2002] IRLR 407. I can do no better than to repeat those passages:

"[21] In The Queen v Gary Jones [2010] NICC 39, the court issued a reminder that every recusal application must have a proper, concrete foundation and should, therefore, be scrutinised with appropriate care. McCloskey J quoted extensively from Locabail (UK) Ltd, in particular, paragraphs 22 and 24:

"22. We also find great persuasive force in three extracts from Australian authority. In Re JRL, ex p CJL (1986) 161 CLR 342 at 352 Mason J, sitting in the High Court of Australia, said:

'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too

readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.' [Emphasis added]

24. In the Clenae case [1999] VSCA 35 Callaway JA observed (para 89(e)):

'As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.'" [Emphasis added]

[22] In Bennett v London Borough of Southwark [2002] IRLR 407, an advocate had made an application on behalf of the applicant in a race discrimination case for an adjournment, which the Tribunal refused. The advocate, who was black, renewed the application to the Tribunal the following morning, remarking: "if I were a white barrister I would not be treated in this way" and "if I were an Oxford-educated white barrister with a plummy voice I would not be put in this position." The Tribunal members decided that they could not continue to hear a case on race discrimination in which they themselves had now been accused of racism. Accordingly, the Tribunal discharged itself and put the matter over to a fresh tribunal. In the Court of Appeal, Sedley LJ had this to say (at paragraph 19):

"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]

[8] That said, in appropriate cases, such as where there is apparent bias, a judge may accede to an application for recusal. To determine whether apparent bias exists, the Court ought to examine all of the circumstances of the case and ought to recuse itself where the Court determines there was a real danger or possibility of bias. Further, either there is a real possibility of bias or not. If there is, the judge should recuse himself/herself.

[9] When considering all of the circumstances, it must be noted that the fair minded and informed observer is neither complacent nor unduly sensitive or suspicious. In his dissenting judgment in Almazeedi v Penner and Another (Cayman Islands) [2018] UKPC 3, Lord Sumption beautifully puts it this way (at paragraph 36):

"... The notional fair-minded and informed observer whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious or apt to envisage the worst possible outcome. The many decisions in this field are generally characterised by robust common sense." [Emphasis

added]"

13. Justice Charles went on to set out the test for **apparent bias** as follows:

"[26] In **Re Bernard E. Evans**, I comprehensively set out the test for apparent bias at paras [15] to [19]. For present purposes, I will repeat what I said in that case.

[15] 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).

16] In Otkritie 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 concept of bias ...extends ...to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "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 judgment 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: AWG Group Ltd. V Morrison [2006] 1 WLR 1163. However, it is generally undesirable that hearings be aborted unless the reality or appearance of justice requires such a step: Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 45.

[18] In Helow v Secretary of State for The Home 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 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 appellant's support for the PLO and involvement in the legal proceedings against the then Prime Minister. The Court noted that:

> "The basic legal test applicable is not in issue. The question is whether a 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 and learned friends Lord Hope of Craighead and Baroness Hale of Richmond in Gillies v Secretary of State for Work and Pensions [2006] UKHL 2; 2006 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 absorbed 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 at 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]."**

14. In the case **Coral Beach Management Company Limited v Anderson and another** [2014] 1 BHS J. No. 147 The Honourable Madam Justice Estelle

G. Gray Evans (Retired) was presented with a recusal application on the basis of apparent bias and at pages 6-8, paragraphs 49-55 of her Judgment sets out the law pertaining thereto. Again, I can do no better than to repeat the said relevant passages as follows:

"The law on recusal/bias

49 The test for determining whether there is perceived bias was formulated by Lord Phillips MR in Re Medicaments and Related Classes of Goods (2) [2001] I WLR; re-stated in Porter v Magill [2002] 2 WLR 37 at 83H-84A; affirmed in the Privy Council case of George Meerabux v The Attorney General of Belize, Privy Council Appeal No. 9 of 2003; and cited with approval in a number of local cases, including: Stubbs v. Attorney General [2009] 3 BHS J No. 135; 2009 No. 95; Conticorp S.A. and others v The Central Bank of Ecuador et al and others [2009] 3 BHS J No. 126; SCCiv. App. No. 60 of 2009; Bryan Knowles v Regina No. 46 of 2009; Rami Weissfisch v Amir Weissfisch et al No. 53 of 2009.

50 In Magill v Porter, Lord Hope, at paragraph 103, re-stated the test as follows:

> "The question 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."

51 In the George Meerabux case the Privy Council said:

> "The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this in a case such as this, where there is no suggestion that there was a personal or pecuniary interest, is to apply the *Porter v Magill* test. The question is what the fair-minded and informed observer would think." [underline added].

52 Then in the Conticorp S.A. case the Court of Appeal (Dame Sawyer, P, Longley, J.A. and Blackman, J.A.) noted that:

"the word bias when used in connection with judicial proceedings means that the tribunal hearing the matter had either actual bias - in the sense that the tribunal had a personal interest in the outcome of the matter - or perceived bias - in the sense that bearing in mind all of the circumstances which have a bearing on the suggestion that the tribunal was biased, an objective and fair-minded and informed observer would conclude that there was a real possibility or a real danger (which means the same thing) that the tribunal was biased - see Lord Phillips of Worth Matravers MR in the case of In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700 at page 726 to 727". [underline added]

53 As I understand the authorities and the relevant principles, in applying the aforesaid test, the Court is required firstly to ascertain all of the circumstances which have a bearing on the allegation of apparent or perceived bias and then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Court was biased. Flaherty v National Greyhound Racing Club Ltd. [2005] EWCA Civ 1117 at para 27.

54 Over the years, several characteristics have been attributed to the "fair-minded and informed observer". He/she:

(1) is objective and is not to be confused with the complainant, so that "any assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively": Helow v Secretary of State for the Home Department [2008] 1 WLR 2416.

(2) is not a member of the judiciary, nor a member of the legal profession: Gilles v Secretary of State for Work and Pensions [2006] 1 WLP 781.

(3) is "neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at": Johnson v Johnson

(2000) 201 CLR 488, 509, para 53;

(4) is "the sort of person who always reserves judgment on every point until he/she has fully seen and understood both sides of the argument"; Helow v Secretary for the Home Department supra.

(5) knows that fairness requires that a judge must be, and must be seen to be, unbiased; knows that judges, like anybody else, have their weaknesses; will not shrink from the conclusion, if it can be justified objectively, that things they have said or done or associations that they have formed may make it difficult for judges to judge the case before them impartially." Helow v Secretary for the Home Department supra.

(6) is also aware of the "legal traditions and culture of this jurisdiction": Taylor v Lawrence [2003] QB 528, per Lord Woolf CJ.

(7) must be taken to know that judges are trained to have an open mind: El Farargy v El Farargy [2007] EWCA Civ 1149; and must not only be aware of the traditions of judicial integrity and of the judicial oath, but must "give it great weight": Robertson v HM Advocate 2007 SLT 1153.

55 In the case of The President of the Republic of South Africa and others v South African Rugby Football Union and Others, even though these observations were directed to the reasonable suspicion test, their Lordships' opinion expressed at para 48 is instructive:

> "... the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is, a mind open to persuasion by the evidence and the submissions of counsel. [underline added]."

The Recusal Application

15. In support of its Recusal application the Defendant relies on the Affidavit of Shakira Clarke which states in part that states that on April 8, 2022 Mr. Whittaker wrote to the Court Reporter Unit and requested copies of the transcript dated April 8, 2022. On April 22, 2022, Mr. Whittaker wrote to the Clerk of the presiding Judge via email following up on the request for the transcript. Counsel also outlined the difficulties with drafting and finalizing its Submissions relative to the Judge's direction to provide the same as it relates to recusal and apparent bias without having been provided the Court's transcript. That on April 22, 2022 Justice Adderley responded to the email this:

> **"This is not a complicated area of the law and neither is the circumstance raised by the Court. While in private practice, approximately 10 years ago, I represented a witness for the Plaintiff in this case in his divorce. That is all the transcript will say. Brian Waugh is not the Plaintiff. Waugh Construction is the Plaintiff. This case will largely be determined on the evidence of the Experts. I will ensure that you and Mr. Smith will get the transcript this weekend. It is unlikely that I will grant any adjournment."**

16. That later on April 22, 2022 Counsel for the Defendant received the transcript and a copy of the transcript is exhibited to the Affidavit.
17. Ms. Clarke at paragraph 10 of the Affidavit states that she is advised that in the past Justice Adderley has transferred cases with potential bias and or apparent bias to other Judges. Further, she continues " I am advised that these previous cases involved clients that are now represented by our firm and that the Judge, given her previous involvement in private practice, sought to move those matters to other judges to avoid the public perception that there may be some bias or a perceived bias."

Submissions

18. Mr. Jacy Whittaker referred the Court to a plethora of authorities as follows: Resolution Chemicals Ltd v H Lundbeck A/S [2014] 1 WLR 1943; Grant v Teachers' Appeal Tribunal [2006] UKPC 59; Howell v Millais [2007] EWCA720; Sierra Fishing Co v Hasan Said Farran [2015] EWHC 140; R v Sussex Justices *ex p.* McCarthy [1924] 1 KB 256; Porter v Magill [2001] UKHL 67; [2002] 2 AC 357; Flaherty v National Greyhound Racing Club Ltd [2005] EWCA Civ 1117; Helow v AG for Scotland [2008] UKHL 62; [2008] 1 WLR 2416 ;Metropolitan Properties Co (FGC) Ltd v Lannon [1969] 1 QB 577; Locabail v Bayfield [2000] 1 QB 451;Lawal v Northern Spirit Ltd [2003] UKHL 35; [2003] ICR 856;Stubbs v The Queen [2018] UKPC 30 (Bahamas); AWG Group Ltd v Morrison [2006] 1 WLR 1163;Jiminze v London Borough of Southwark [2003] ICR 1176; Hart v Relentless Records [2002] EWHC 1984.

19. The authorities relied on by Mr. Whittaker outline the guiding principles that the Court i.e. the Judge/judicial officer should consider when faced with an application to recuse him/herself. However, what all of the authorities also show is that each case was and is determined on the facts of each individual case. For the most part the authorities provided by Mr. Whittaker are authorities whereby the Court on appeal affirmed the Judge's decision not to recuse. However, the few cases such as **Howell v Mallis, Metropolitan Properties Co (FGC) Ltd v Lannon** and **Stubbs v The Queen** where the Court determined that the Judge/presiding officer should have recused him/herself were all cases that the facts before the Court showed that the Judge/presiding officer could not be seen to be impartial in the determination of the said cases. I do not intend to analyze cases which restate or affirm the legal test but will comment on cases relevant to the issues in this case and Mr. Whittaker's submissions thereon.

20. Mr. Whittaker submits, in part, that the fact that the Judge's connection to Mr. Brian Waugh occurred to the Judge **unprompted** suggests that

there is an appearance of bias and as such, it would be improper for the Judge to continue with the hearing of this trial. I disagree.

21. The fact that I disclosed a connection with a witness in the case unprompted or of my own volition does not in and of itself suggest the existence of an appearance of bias. It is the application of the legal test to the relevant facts which will determine the existence of apparent bias. The transcript at page 7 line 31 to page 17 line 22 clearly demonstrates when and why my connection to Mr. Waugh "occurred" or became apparent to the Court, that is, when Mr. Smith took the Court through the materials upon which the parties intended to rely in the case, inclusive of a Witness Statement from Mr. Brian Waugh. The Judge has a duty to disclose any conflict of interest or circumstance where apparent bias may arise and the I did so of my own volition.

22. Mr. Whittaker argues that the present facts of this case, combined with the fact that other matters that originated around the same time have been transferred to other judges, would lean towards the finding that an apparent bias exists. I disagree.

23. Every case before me where the issue of a conflict of interest or actual or apparent bias arose or arises, was and is considered by me on its own merits, facts and circumstances.

24. Mr. Whittaker submits that it would be wrong to treat recusal for apparent bias as a matter of discretion and if made out it will not matter how inconvenient it is that the hearing has to be relisted or restarted. I agree.

25. The Judge's comfort level or lack of hesitation, or dismay at time wasted is not the legal test. The proper legal test is whether a reasonable, objective and informed person would on the facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case and whether there was a real danger or possibility of bias. Hence my decision to hear the parties on the question

of my recusal.

26. Mr. Whittaker considered the timing of the recusal and referred to my statement at Page 20, Lines 11-12, that, **"... Had we not gone so far I would have to recuse myself"** and submitted that it is important to point out that the Judge, on her own volition, raised this issue and stated that if the issue was disclosed at an earlier stage, she would have recused herself. That the issue of timing is not the fault of the parties, but this statement reflects that had the Judge recalled the acquaintance at an earlier stage, she would have recused herself as she has done in other similar matters involving other past clients in her private practice.

27. As at the time of the filing of the action in 2018, I would have only been sitting on the Bench for approximately 3 years and would have been considered a Junior Judge. It would have been in my contemplation at that time that there would not have been a long passage of time between when I left private practice in May 2015 and the filing of this action in August 2018. It is on this basis that had I been aware from as early of 2018 that one of the principals of the Plaintiff was a former client and would be called as a witness, I would have recused myself, as I had done in certain instances, as there would have been in my view, at that juncture, the possibility of an apparent bias. Junior Judges sometimes have a visceral reaction to applications for recusal. Every Judge's plate is full of other cases waiting to be heard, and as a Junior Judge it would certainly have been easier to refer a matter to another Judge for sometimes the most tenuous of connections but this wrong and dangerous. Mason, J in the High Court of Australia in the case of In **Re JRL ex parte CJL** (1986) 161 CLR 342 at 352, cited with approval in the case of the President of the Republic of South Africa and Others v South African Rugby Football Union and Others Case CCT 16/98, observed that, although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to

sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

28. Mr. Whittaker relied on **Grant v Teachers' Appeal Tribunal** [2006] UKPC 59, the Privy Council on an appeal from Jamaica which stated that if the Judge in a small community, "**is not ready enough to recuse himself, however unbiased and impartial his approach may be in fact, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality, In this connection it is relevant to take into the account the issues in the proceedings**".

29. I found this case particularly helpful though not in the way Mr. Whittaker argued it. The facts of that case were that the claimant was a teacher in a college where he had taught economics, mathematics and statistics to A level students since 1992. Following a series of acrimonious interruptions and exchanges at a staff meeting on 7 September 1998, and in correspondence, and his subsequent refusal to attend meetings with the principal of the college to discuss the academic performance of his students, the principal made a complaint to the Board of Management (the board).

30. The ensuing disciplinary proceedings first held by the board's personnel committee (the committee) in October 1998, and reconstituted in May 1999, eventually resulted in the termination of the claimant's employment. The claimant exercised his right of appeal against the committee's decision to the Teacher's Appeals Tribunal (the tribunal), but was unsuccessful. The claimant brought an application for judicial review, seeking an order of certiorari to quash the tribunal's decision. The major issues were, inter alia: (i) a claim that there had been a breach of natural justice when the reconstituted committee in May 1999, was composed of

the same members as those who had sat in October 1998, and (ii) his allegation that the committee had failed to give preliminary consideration to the principal's complaint, as required by reg 57(1) of the Education Regulations. The claimant's appeal was dismissed. He appealed to the Court of Appeal of Jamaica on a number of grounds, including the same two major issues, but with the addition of a claim that the trial judge was biased. The Court of Appeal agreed with the judge's conclusion that, inter alia, there was no breach of natural justice when the committee was composed of the same members as in October 1998. Likewise it upheld the judge's finding on reg 57(1). On the claim of bias against the judge, the court held that 'there was in effect no real likelihood or possibility of bias to have affected in any manner the decision arrived at by the learned judge'. The claimant appealed to the Privy Council.

31. The PC determined that the appeal would be dismissed. No question had been raised of actual bias or of any pecuniary or proprietary interest on the part of the judge. The complaint had rather been of what one might term apparent or perceived bias, based upon the proposition that because of his friendship with the family of the chairman of the board, there had been a real possibility that the fair-minded and informed observer would conclude that the judge had been biased. In the circumstances, no such degree of acquaintance would have caused the fair-minded and informed observer in Jamaica to conclude that there had been a real possibility or danger of bias.

32. At paragraphs 38 and 39 the Privy Council stated:-

> **[38] It is necessary to bear in mind that these remarks of Lord Bingham were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist. The facts of each case are of prime importance, as he pointed out. Their Lordships are mindful of the problems which may face judges in a**

community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself, however unbiased and impartial his approach may in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the proceedings. As Lord Bingham pointed out in the *Locabail* case, if the credibility of the judge's friend or acquaintance is an issue to be decided by him, he should be readier to recuse himself.

[39] If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he "may have encountered him no more than ten times over the last twenty years". The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman's evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordships do not consider that such a degree of acquaintance in these circumstances would have caused the fair-minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias."

33. The above paragraphs were highlighted to show the considerations of the Court especially in communities found in Jamaica. Further, they

considered the degree of acquaintance which would cause a fair minded and informed observer to conclude there was a real possibility or danger of bias.

34. The population of Grand Bahama is approximately 35,000 people. There are 2 Supreme Court Judges sitting and one is assigned to Criminal matters and one to the Civil side of the Court. I have been the civil Judge for 7 years. I have lived in Grand Bahama for 55 years. I have been employed by several law firms on the island. I was called to the Bar in 1986, and I have been an Attorney for 36 years. I have had hundreds or perhaps a few thousand clients during my 24 years in private practice (I sat as an S & C Magistrate for 5 years and now 7 years as a judge). The same considerations as apply in Jamaica must surely apply in this small community. 11 years ago I took instructions from Mr. Brian Waugh in his divorce matter, where the ground was 2 years desertion. The professional relationship ended with the obtaining of his Decree Absolute. Mr. Waugh is not a personal friend. I do not recall having met with him since the divorce proceedings. He is a fact witness in the case but in his witness statement he describes how the work on the Defendant's property was carried out by the Plaintiff company. Mr. Waugh will be cross-examined and his evidence tested against the evidence of other fact witnesses and the 3 Expert Witnesses and possibly the evidence of 2 engineers who have been subpoenaed by the Defendant to appear at the trial. Any conversations that he claimed to have had with Mr. Stephen Albury appear from his Witness Statement to have taken place in the presence of other witnesses for the Plaintiff. The case is unlikely to turn on the sole evidence of Mr. Brian Waugh, although the Court will be required to some degree to assess his credibility in like manner as all of the other witnesses for the parties. My professional connection with Mr. Waugh in my judgment does not suggest the existence of an apparent bias.

35. Mr. Whittaker submits that upon reading the transcript, the Judge thought it necessary to make the disclosure that she had represented one of the principals in the Plaintiff companies. Upon her inviting the parties to either object or waive the objection, **the Defendant agreed with the Judge that she should recuse herself.** The Court then directed the parties to make submissions on the point. That the mere fact that the Judge sought to have the parties waive the objection should be grounds enough to meet the test of the risk of an apprehension of bias. I disagree with this assertion. The legal test certainly requires more than this.

36. There was no "agreement" between the Defendant and that I would recuse myself. I disclosed the professional relationship and asked the parties if either of them had any issue with it. My disclosure cannot be seen as possible bias as I have a duty to disclose and to provide the parties with an opportunity to proceed or object. In this instance the Defendant objected. The legal test is whether a fair-minded and informed observer would conclude the possibility or real danger of bias not whether the Judge's disclosure amounts to apparent bias.

37. Mr. Whittaker submitted that the Judge demonstrated that she did not have an open mind. He submitted that the Defendant was attempting to obtain the transcripts in this matter and wrote to the Court requesting the same. That The Defendant wrote to the Court's Clerk on April 22, 2022, indicating the attempts to obtain the transcripts and the difficulty it would have in preparing submissions on the issue of bias without the transcripts. That on April 22, 2022, the Judge replied to the Defendant indicating,

> **"This is not a complicated area of the law and neither is the circumstance raised by the Court. While in private practice, approximately 10 years ago, I represented a witness for the**

Plaintiff in this case in his divorce. That is all the transcript will say. Brian Waugh is not the Plaintiff. Waugh Construction is the Plaintiff. This case will largely be determined on the evidence of the Experts. I will ensure that you and Mr. Smith will get the transcript this weekend. It is unlikely that I will grant any adjournment."

38. He submitted that Recusal applications are part of life as a Judge. That the response to the Defendant's indication that the transcripts are necessary may be seen by some as an **irate or contentious response** to a valid concern by the Defendant and may justify or encourage the view that the Defendant cannot reasonably expect a fair hearing. [Emphasis added.]

39. I totally disagree with Counsel's interpretation or impression of my response. What Mr. Whittaker neglected to state was that on April 8, 2022 the Stenographer had already indicated that the transcript would be available in 2 weeks, that is April 22, 2022. Mr. Whittaker's email to the Court read as follows:

"Dear Mr Farquharson

At the last appearance before Justice Adderly, the parties were directed to prepare submissions on the issue of bias that was raised by the Judge. We have made several attempts to obtain the transcripts in this matter with no luck. Copies of our requests to the Court are attached.

We are unable to complete our submissions without the full and complete transcripts of the last appearance. The transcripts are very important to our submissions. As such, the deadline of April 29 to exchange submissions is appearing to be untenable for the Defendant to properly ventilate the issues the Court is faced with.

We would ask that you bring this email and the attachments to the attention of the Judge.

Met vriendelijke groet,
Kind regards,

Jacy."

40. It appeared to me that Counsel was seeking an adjournment prematurely having been told by the Stenographer of the timeline in which the transcript was likely to be received and having agreed the date upon which the Submissions were to be filed and exchanged. My response was certainly not "irate" and my preliminary assessment of the case, sans the evidence, was a fair assessment, based on the Expert and fact witnesses known to me together with the fact that this is a construction case, and cannot reasonably be interpreted as my having already made up my mind concerning the outcome of the case.

41. Mr. Whittaker relied on the case of **Jiminez v London Borough of Southwark** in support of his submission that I had already formed a firm view in favour of one side's credibility where the evidence had not been called. However, when one looks closely at **Jiminez** the case concluded that there was no inevitability that a strongly expressed **conditional view** amounted to a pre-judgement or a closed mind. It was further stated however, that a tribunal expressing a view would be well advised to make it quite clear that the view was preliminary only and that the more trenchant the view expressed the greater the need for clarity. Mr. Whittaker submitted 15 authorities for consideration by the Court on the law relating to Recusal. And those 15 authorities referred to a plethora of other cases on recusal. So, this is an area of the law which over many years has been well traversed and my statement that this is not a complicated area of the was again a fair comment.

42. Mr. Whittaker contended that a heated debate with counsel was part of the justification for recusal in **Howell v Millais** [2007] EWCA720. In **Howell v Millais** the Court agreed that the judge should have recused himself and not simply for the reason stated by Counsel for the

Defendant. The judge in that matter had applied to join the firm to which the first Claimant was a partner but was not successful. Further, the e-mail correspondence between the Judge and another partner of the firm had occurred several days before the hearing with the Judge expressing some disappointment and animosity between the firm and the other partner. During the hearing for the Judge's recusal the Judge sought to cross-examine the partner of the firm and was irate towards Counsel giving submissions. He refused the recusal application. The appeal was allowed with the Court noting the test on the issue of recusal for apparent bias was whether a fair minded and informed observer would have thought that the judge was biased. There was no doubt that the test was satisfied in the instant case. It was not appropriate for the judge to cross-examine T as if he were fighting his own case. The exchanges between the judge and counsel were intemperate and somewhat extraordinary, and demonstrated animosity on the part of the judge towards AG. Those matters, in conjunction with the email correspondence, lent strong support to the submission that the judge had shown strong bias against AG and T. Moreover, the judge had erred in his judgment in the manner submitted by the trustees.

43. Counsel for the Defendant seeks to compare the above case with the instant case. I find it challenging to accept his submission. My response to his e-mail does not rise to the level of the conduct of the Judge in **Howell v Millais**. Further, in the above case the parties would have observed the demeanour and behaviour of the judge and heard his tone towards the parties. However, in the instant case I sent Counsel an e-mail advising of my intention to send the transcript and indicating that I was not prepared to grant the adjournment at that juncture. It is difficult to assess and observe the demeanour of the anyone through an email much less determine the writer's tone. As such I am not of the opinion that the email exchange amounted to an irate or contentious exchange

with Counsel that may prevent the defendant from receiving a fair trial.

44. Mr. Whittaker submitted that the Judge's response above seems to suggest that the transcript of April 8, 2022, is not essential to the bias application as moved by the Court and bypasses the concerns of the Defendant, as raised by the Judge, on whether or not she will recuse herself. He referred the Court to **Sierra Fishing Co v Hasan Said Farran** [2015] EWHC 140, where the court stated that,

> **"[the Judge] gives the appearance of having descended into the arena and taken up the battle on behalf of [the respondent to the recusal application]. He has become too personally involved in the issue of impartiality, and the issue of his jurisdiction, to guarantee the necessary objectivity which is required to determine the merits of this dispute"**

45. Counsel for the Defendant sought to rely on the case above to show that my communication in the instant case amounted to demonstrating that I could not be impartial. In **Sierra Fishing Co** the parties appeared before an arbitrator which the parties objected to the arbitrator sitting on the basis of him not being impartial. It was made known that there were connections between the arbitrator and one of the parties. On the submission of impartiality two main issues arose. First, the claimants submitted that, among other things: (i) there were connections between the arbitrator and another party and the bank that called into doubt the arbitrator's ability to act impartially; (ii) there was a real possibility that the arbitrator would want to decide a jurisdiction issue in the defendants' favour; and (iii) the arbitrator's conduct and attitude raised grounds for doubting his impartiality. The application was allowed. Two aspects of the arbitrator's conduct of the reference gave doubts as to his impartiality: first, his refusal to postpone publishing his award when asked to do so by both sides and, secondly, the content and tone of his communications with the parties. There was nothing wrong with him

putting before the court his evidence on the course of the proceedings, and his evidence in relation to that which was said to raise justifiable doubts about his impartiality; and he was entitled to put before the court his view as to why he should not be removed. However, in doing so, he had to be careful not to appear to take sides, so as to be unable subsequently to judge impartially the rival arguments in the case. The tone and content of arbitrator's communications to the court had clearly been on the wrong side of that line. He had become too personally involved in the issue of impartiality, and the issue of his jurisdiction, to guarantee the necessary objectivity which was required to determine the merits of the dispute.

46. The communication between Mr. Whittaker and I cannot reasonably be said to the level of apparent bias as was found in **Sierra Fishing Co.** I said nothing in the exchanges with Counsel during the hearing or in response to the request for the transcript which would indicate that I had already formed a firm view in favour of one side's credibility where the evidence had not been called.

47. Mr. Whittaker referred the Court to several cases which he submitted were examples regarding the issue of recusal and were relevant to the present case. Particularly that in **Metropolitan Properties Co (FGC) Ltd v Lannon** [1969] 1 QB 577, Lord Denning considered the situation where the Chairman of a rent assessment committee, hearing an appeal by the Freshwater Group against a rent determination, was also advising his father in a separate rent dispute with the Freshwater Group. Lord Denning held (at 600) as follows:

> **"No man can be an advocate for or against a party in one proceeding, and at the same time sit as a judge of that party in another proceeding. Everyone would agree that a judge, or a barrister or solicitor (when he sits ad hoc as a member of a**

tribunal) should not sit on a case to which a near relative or a close friend is a party. So also a barrister or solicitor should not sit on a case to which one of his clients is a party. Nor on a case where he is already acting against one of the parties. Inevitably people would think he would be biased."

48. Well, let us look closer at the case to see whether it speaks to the issue at hand in any other way. While the Court determined in this case that the Chairman of the Committee should have recused himself on the hearing of the application, Lord Denning in the paragraph preceding the one referred to by Counsel above essentially summarized the facts of the case to which the determination was made. Lord Denning stated: **"Test it quite simply: if Mr. John Lannon were to have asked any of his friends: "I have been asked to preside in a case about the rents charged by the Freshwater Group of Companies at Oakwood Court. But I am already assisting my father in his case against them, about the rent of his flat in Regency Lodge, where I am living with him. Do you think I can properly sit?" The answer of any of his good friends would surely have been: "No, you should not sit. You are already acting, or as good as acting, against them. You should not, at the same time, sit in judgment on them."** Based on the summarized scenario in the circumstances, Mr. Lannon should have recused himself as any decision would have directly benefited not himself but his father. More so his sitting while also acting against them (albeit it was his father but admitted that he had provided his father with advice) was a clear conflict.

49. Mr. Waugh is not now my client and he is not the Plaintiff. I have no connection to the Plaintiff company. It was never a client nor was I ever a client of the Plaintiff. I have no pecuniary interest in this case.

50. Mr. Whittaker submitted that in **Locabail v Bayfield** [2000] 1 QB 451,

CA, where Sir Richard Scott V.C., giving the judgment of the Court, held (at [25]) that questions of apparent bias all turned on the precise facts. Having started with this caveat, however, he then went on to give some guidance on possible forms of 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 textbooks, 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 (see *K.F T C. I. C. v. Icori Estero S.p. A.* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 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 C.L.R. 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."

51. Mr. Whittaker asserted that the foregoing guidance was, however, *obiter* given that it was not necessary for the disposal of the various appeals and that it should not therefore be read as setting out binding rules, especially since the Court in **Locabail** emphasized twice in that paragraph that each matter would turn on its facts. The important factor is that where there is doubt, that doubt should be resolved in favor of recusal.

52. **Locabail** is a long standing authority on the legal test to be applied in recusal cases. I note in particular Scott, V.C.'s reference to "**previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him**" as an example of a circumstance in which an objection could not be soundly based. And the Court's observance that: "**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.**" I found this authority helpful to my view in the instant case.

53. In considering whether the test has been met, Mr. Whittaker submitted that the fundamental importance of the underlying principle that justice must both be done and be seen to be done should lead the Court to lean towards recusal. See **Locobail v Bayfield**_at paragraph 25; **Keston Riley** at paragraph 49. Further, he submitted that that is particularly the case where an objection is taken before the substantive hearing has begun and refers the Court to Mummery LJ at paragraph 9 in **AWG Group Ltd v Morrison.**

54. Further, Mr. Whittaker's submissions that the fair-minded and informed observer would therefore consider that there was a real possibility of

bias because of the Judge's substantial and long-standing connection with one of the principals in the Plaintiff company and the fair-minded observer, without any detailed knowledge of the Judge's role or the operation of the previous representation, might consider there to be a real possibility that the Judge might previously have been involved in advising or the Plaintiff's company in some way are speculative and hypothetical.

55. The test for apparent bias as identified above is whether the fair-minded and informed observer being appraised of all of the facts would conclude the judge was biased not an observer who is not well informed as suggested by Mr. Whittaker's use of the words "without any detailed knowledge." Moreover, Mr. Whittaker in his Affidavit in support does not provide any evidence to suggest that there was a substantial and long-standing connection with one of the principals in the Plaintiff company nor does the Affidavit provide any evidence to suggest that at any point the I was previously involved or had advised the Plaintiff company.

56. Mr. Wendell A. Smith, Counsel for the Plaintiff referred the Court to the following authorities: Porter v Magill [2001] UKHL 67; 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; Webb v R (1994) 181 CLR 41; Re: Bernard E. Evans v Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees) (a Judgement Creditor) [2018] BHS J. No. 68 (as affirmed by the Court of Appeal in consolidated appeals SCCivApp. No. 111 of 2018; SCCivApp No. 128 of 2018; SCCivApp No. 157 of 2018; and SCCivApp No. 158 of 2018; Almazeedi v Penner and another (Cayman Islands) [2018] UKPC 3; Helow v Secretary of State for The Home Department and Another (Scotland) [2008] UKHL 62 1 WLR 2416; In the Matter of L-B (Children) [2010] EWCA Civ 1118; Locabail (UK) Ltd

v Bayfield Properties Ltd [2000] QB 451.

57. He submitted that the test for apparent bias is well settled and he relied on the authorities of **Porter v Magill (Supra), 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, **Locabail (Supra) and Re: Bernard E. Evans (Supra)** which state the law in respect of which there is no dispute.

58. Further, he referred the Court to the Australian decision of **Webb v R (1994) 181 CLR 41,** where Deane J identified four categories of cases of apparent bias which include disqualification by interest, where some direct or indirect interest in the proceedings, whether pecuniary or otherwise, gives rise to a reasonable apprehension of prejudice, partiality, or prejudgment; disqualification by conduct, including published statements, either in the course of, or outside, the proceedings; disqualification by association, where the apprehension of prejudgment or other bias results from some direct or indirect relationship, experience or contact with a person or persons interested in, or otherwise involved in, the proceedings; and disqualification by extraneous information, where knowledge of some prejudicial but inadmissible fact or circumstance gives rise to the apprehension of bias. Therefore, it is his submission that the only category that could be deemed relevant is the third, the appearance of bias based on some apprehension of prejudgment or other bias results from some direct or indirect relationship with a person interested or otherwise involved in these proceedings.

59. Mr. Smith contended that as noted above it is assumed a Judge "can disabuse their minds of any irrelevant personal beliefs of predispositions, the judge can be assumed, by virtue of the office she has been selected, to be intelligent and well able to form her own views" and it is evident

that the Court bore this in mind and displayed remarkable integrity in disclosing to the parties that ten years ago she acted on behalf of one of the principals of the Plaintiff of her own volition.

60. In the Privy Council case of **Almazeedi v Penner and another (Cayman Islands)** [2018] UKPC 3 [Tab 6] at paragraph 34 of the Judgment the Board stated:

"The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board's view, and at least in the absence of any such disclosure, a fair minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern and may mean that no objection is even raised. {his emphasis}"

Further, in **Helow v Secretary of State for The Home Department and Another (Scotland)** [2008] UKHL 62 1 WLR 2416 [Tab 7], the issue of the relevance of impartiality and disclosure as it relates to judicial recusal applications was addressed by the House of Lords, at paragraph 23 of the judgement it states: ""**So the hypothetical observer would have to consider whether there was a real risk that these articles, read at 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 expected to be 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 was 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."

58. The other consideration is that Lady Cosgrove did not volunteer a reference to her membership of the Association. Had she disclosed this, the very fact of disclosure could have been seen by a fair-minded observer as a badge of impartiality, as showing that she [had] nothing to hide and [was] fully conscious of the factors which might be apprehended to influence her judgment: Davidson v Scottish Ministers (No 2) 2005 1 SC (HL) 7, paras 19 and 54, per Lord Bingham of Cornhill and Lord Hope of Craighead. Again, however, this can only be one factor, and a marginal one at best. Thus, to take two opposite extremes, disclosure could not avoid an objection to a judge who in the light of the matter disclosed clearly ought not to hear the case; and non-disclosure could not be relevant, if a fair-minded and informed observer would not have thought that there was anything even to consider disclosing. In the present case, I do not consider Lady Cosgrove's failure to disclose her membership of the Association to be a factor which would carry any great weight in the balancing of factors which a fair-minded and informed observer must be assumed to undertake. A fair-minded and informed observer would I think be much more likely to conclude that it never crossed her mind that her membership involved anything which it was relevant for her to disclose." {his emphasis}

61. Therefore, he submitted, that it is clear as evidenced at page 17 Line 22 of the transcript dated the 8th of April, 2022 that the Court unequivocally

had no doubt of its ability to impartially adjudicate the matter herein. Further, that this application by the Defendant appears to be nothing more than an attempt to stall and stymie these proceedings and is nothing more than a delaying tactic. The application ostensibly suggests ipso facto that the Honourable Madame Justice Petra M. Hanna-Adderley, acted for one of the principals of the Plaintiff in an unrelated Matrimonial Court action a fair-minded and informed observer, would conclude that there is a possibility that the tribunal was biased.

62. He referred the Court to the case of **In the Matter of L-B (Children)** [2010] EWCA Civ 1118 where the issue of a Judge disclosing the professional relationship in a recusal application was addressed, the Court stated at paragraph 22:

> **"Where a judge is faced with an application that he should recuse himself on the ground of apparent advice it is in my judgment incumbent on him to explain in sufficient detail the scale and content of the professional or other relationship which is challenged on the application. The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult if not impossible properly to apply the informed bystander test ...".** {**his emphasis**}

63. Mr. Smith submitted further that the parties herein appeared before this Court on an application for the Defendant for an Order that the Court Appointed Expert provide a Further Supplemental Report. As stated above, the Court acceded to part of the Defendant's application showing if (which is denied) the Court had any predispositions or any irrelevant personal beliefs it is capable of disabusing its mind of them, and form impartial views. Moreover, the Defendant has not asserted an intention

to seek leave to appeal the ruling of the Court thereby affirming its belief in the impartiality of the Court.

64. Therefore, it was his submission that a recusal application should be adequately scrutinized and have a proper foundation. The present application appears prima facie to be misconceived and without merit. There is no iota of evidence to support that the fair minded lay-observer would conclude that there is a real possibility of bias. There is no evidence to support that there is and/or could be the appearance of bias or prejudice by the Court, moreover the facts support the contrary and show that the Court has preserved the confidence in the administration of justice, as such the fair minded lay-observer would conclude that there is no real possibility of bias.

65. The submissions laid over by Mr. Smith and the accompanying authorities I find to be persuasive and in line with the general principles the Court considers on an application for recusal. Therefore, I accept Mr. Smith's submissions and adopt them as a part of my reasons for refusal of the Defendant's application.

Analysis and Conclusions

66. Having considered all of the authorities and relevant principles, in applying the said test, the Court must ascertain all of the circumstances which have a bearing on the allegation of apparent or perceived bias and then ask whether those circumstance would lead a fair minded and informed observer to conclude that there was a real possibility that the Court was biased. So, what are the relevant facts? In my judgment they include the following:

(1) I told the parties that I would confirm the timeline in respect to when it was that I represented Mr. Waugh. I believe that the Court may take judicial notice of the documents recorded in the Divorce and Matrimonial Cause List at the Supreme Court Registry. In action 115 of 2011 Family Division, Brian Michael Waugh v Pamela Lys Waugh

(nee Parrott) (the Petitioner filed on the ground of desertion) the following documents, inter alia, were filed in the action:

(i) Petition was filed on October 18, 2011

(ii) Notice of Hearing was filed on December 12, 2011

(iii) The Consent Order was filed on December 15, 2011

(iv) The Decree Nisi was filed on December 19, 2011

(v) Certificate for Making Decree Nisi Absolute filed

(2) I commenced my representation of Mr. Brian Waugh as early of September 2011 in the said action as his Counsel and Attorney in divorce proceedings in which he was the Petitioner and Pamela Waugh the Respondent, while I was a Partner at GrahamThompson, a professional relationship that existed approximately 11 years ago.

(3) The proceedings were uncontested.

(4) The Ancillary Relief matters were settled by a Consent Order.

(5) The professional relationship came to an end in February 2012 with the filing of the Certificate making Decree Nisi Absolute in the divorce.

(6) I have had no personal relationship with Mr. Waugh since and there is no evidence that I have, such association could not reasonably be defined as a "substantial and long standing connection."

(7) Mr. Waugh is a Vice President of the Plaintiff, but he is not the Plaintiff and I have had no relationship whatsoever with the Plaintiff Company.

(8) I was appointed to the Bench on May 1, 2015 having left the employ and my private practice at GrahamThompson.

(9) I have no personal, familial or financial interest in the outcome of this case and no such interest has been alleged.

67. Having examined all of the circumstances of this case, having considered the Submissions of the parties and having accepted the submissions of Mr. Smith, and bearing in mind the observations of Mason, J in Re JRL ex parte CJL supra, I have determined that there is nothing to lead the fair-minded, fully informed observer having the relevant facts, aware of

the judicial oath and the presumption of impartiality, to conclude that there is any real risk, or real danger of bias on my part in hearing this case on the basis of my former professional relationship with Mr. Brian Waugh some 11 years ago.

68. Further, the Defendant's submission that it cannot reasonably expect a fair hearing as the Judge's response to the request for the transcripts may be seen as irate or contentious I find is without merit. Moreover, the Defendant's submissions that there was a real possibility of bias as alleged by Counsel of the Judge's substantial and long-standing connection with one of the principals in the Plaintiff company and a real possibility that the Judge might have been involved in advising the Plaintiff's company, in absence of any evidence are speculative and hypothetical and I find is also without merit. Additionally, the Defendant's submission that the Judge's email outlining her provisional view may show that the Court is not prepared to listen to an open mind to evidence and arguments is without merit. The Defendant's submissions that there are many facts that might influence the Judge not being known to the parties and the fact that the Judge considered the matter to be something that should be formally raised would weigh significantly with the fair-minded observer are also without merit as the test is whether the fair-minded and informed observer being appraised of all of the facts would conclude the judge was biased. Lastly, The Defendant's submission that the Judge sought to have the parties waive the objection for recusal should be grounds enough to meet the test for risk of an apprehension of bias I find is also without merit.

69. The Defendant's application is hereby dismissed.

70. Costs usually follow the event and I see no reason to depart from this general principle. Costs awarded to the Plaintiff to be paid by the Defendant to be taxed if not agreed. The Plaintiff may file its Bill of Costs

within the requisite time but those costs shall not be taxed until the conclusion of the trial.

71. The Defendant is granted leave to appeal this Decision to the Court of Appeal.

Dated this 16th day of May, A. D. 2022

Petra M. Hanna-Adderley
Judge