[2022] JMCC Comm 24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00050

BETWEEN	**YULANDE CHRISTOPHER T/A YULANDE CHRISTOPHER & ASSOCIATES AND THEN THOMAS AND CHRISTOPHER LAW PARTNERS**	**CLAIMANT**
AND	**GREGORY DUNCAN**	**1ST DEFENDANT**
	GLOBAL DESIGNS AND BUILDERS LIMITED	**2ND DEFENDANT**

IN CHAMBERS IN CHAMBERS BY VIDEO-CONFERENCE

Ms. Yualande Christopher instructed by Yualande Christopher & Associates, Attorneys-at-Law for the Claimant

Mr. Gregory Duncan in his personal capacity and on behalf of Global Design and Builders Limited.

Heard: July 27th 2022

Civil procedure - Application for recusal - Whether judge disqualified by reason of conflict of interest - Apparent bias.

CRESENCIA BROWN BECKFORD, J

[1] The Defendants filed Notice of Application to Set Aside Default Judgment on February 25, 2022 **("the first application")** and Notice of Application to set aside Default Cost Certificate and Discharge of Final Charging Orders on March

1, 2022 **("the second application")**. Both Applications came before me for hearing on May 17, 2022. After hearing Submissions from both parties I ordered that the first application be struck out with costs to the Respondent. The Defendants also made an oral application for extension of time to file Points of Dispute, in effect an application for an adjournment, in the second application. After hearing submissions, the application was refused. I thereafter heard submissions on the second application and the matter adjourned for the court to consider the application. My decision was fixed for delivery on July 27, 2022.

[2] On July 25, 2022, late in the afternoon as I was engaged in a trial, and less than two **(2)** days before this court was set to deliver judgment, I received the Defendants' Application for Court Order filed July 22, 2022 for this court to recuse itself in this and all matters because of conflict of interest. The grounds on which the Defendants seek the order are as follows:

> *The GROUNDS of which the Applicant/Defendants seeks the Order(s) are as follows.*
>
> 1. *That the said judge has connections with Mrs Marjorie Shaw Currie and when she was an Director in 2014 & Mrs Rose Davis Logan and when she was in 2014/2015 a Authorized Officer of COK and RBC/SAGICOR BANK respectively. Mrs Shaw Currie has maintained direct connection with Mr. Rohan Townsend who has being serving COK and Ms Jade Hollis's interest at the same in 2014 and throughout these years as a high-ranking member of COK's decision making body.*
>
> 2. *Mrs Shaw Currie also was serving Ms Hollis's, my Ex-Wife's and COK's interest at the same time she was a director of COK in 2014. Mrs Rose Davis Logan is the person who refused to release my certificate of titles to me in 2014, when instructed to do so while she was at RBC and as the authorized officer who signed my loan document on behalf of RTBB and RBC.*
>
> 3. *Mrs Yualande Christopher is Hollis's sympathizer and has expressed directly to me that she would not handle any of Hollis's matters on my behalf because, in 2014 commitment was made to Hollis by parties over tears and wine. Hence our request as per our July 15, 2022 Affidavit.*

[3] **Rule 11.14 of the Civil Procedure Rules ("CPR") 2002 (as amended on the 3rd of August 2020)** provides that:

> *11.14 The court may deal with an application without a hearing if -*
>
> *(a) no notice of the application is required;*
>
> *(b) the parties agree;*

(c) the court considers that the application can be dealt with over the telephone or by other means of communication;

(d) the parties have agreed to the terms of an order -

(i) which does not come within rule 27.11(1); and

(ii) the application (or a copy of the application) is signed by the attorneys-at- law for all parties to the application; or

(e) the court does not consider that a hearing would be appropriate.

Having regard to the fact that this application was filed more than two months after hearing the matter, and having regard to the nature of the matter and the allegations contained therein, I considered that a response could only be given by me. There would be no purpose to holding a hearing involving the parties. I therefore proceeded to consider the application without a hearing in keeping with **CPR Rule 11.14 (e).** The Notice of Application is not supported by any affidavit, but the application was presented with an Affidavit of Gregory Duncan filed July 15, 2022. In Paragraph 5, Mr. Duncan stated:

> *…in disclosing that conflict, the Hon Justice C Brown Beckford admit being aware of my application to recuse herself and does not deny the conflict but refuse to address the issues.*

I categorically deny that the Defendant made any mention of any conflict of interest at the hearing of the two applications, the subject of this judgment when they were heard on May 17, 2022.

[4] I refer to the grounds filed in the Notice of Application for Court Orders. Save that I was formerly a partner in the law firm of Brown and Shaw, the firm in which Ms. Marjorie Shaw is still a partner, I have no knowledge of the matters mentioned by the Defendant. I have not been a partner in the firm since about the year 2005 when I joined the Bench and since then I have not been, and am not concerned with, or aware of the matters that are handled by the firm. I am also not aware of the organizations with which Ms. Shaw is associated or any Directorships that she may hold even though I have remained a close colleague and friend of Ms. Shaw. Indeed, it is my practice, and I believe this to be well known, to recuse myself from any contentious matter in which Ms. Shaw appears so there can be no apprehension of apparent bias.

[5] I am well acquainted with Mrs. Rose Davis Logan, us having studied together. I am not aware of the details of her employment. The other persons mentioned therein are not known to me. At the time of hearing this matter, I had no knowledge of any connection or association of Ms. Marjorie Shaw or Mrs. Rose Davis Logan had with the Defendants or with COK Sodality Co-Operative Credit Union **("COK")** Ltd. Save that I adjudicated in a matter between the Defendants and COK being Notice of Application for Sale of Land in Claim Number 2018CD00316 in which I delivered my decision on June 15, 2022, I am not aware of the connection of COK to this matter. I point out that nowhere in the applications placed before me in this matter is COK, save for payment made by the Attorney to it, Brown and Shaw, Ms. Marjorie Shaw or Mrs. Rose Davis-Logan mentioned. Specifically, the letter of April 24, 2014 addressed to one Mrs. Corol Anguin attached to this application was not a part of the file. Nor were the other letters also attached.

[6] Sometime after I had handed down my decision in the COK matter. I became aware that the Defendants had filed an Application for Court Orders for Redetermination of Court's Decision. That application, filed June 15, 2022 was placed before me on July 13, 2022. The Defendants' submissions, filed July 12, 2022, raised for the first time the allegation of conflict of interest on account of my 'association with Mrs. Marjorie Shaw Currie, having connection and to this matter and COK to be declared'. I refused the Application for Court Orders for Redetermination of Court's Decision on the basis that it was misconceived as it was said to be brought pursuant to **CPR Rule 47.3. (Rule 47.4** was the relevant rule). **Rule 47.1**, which dealt with the scope of **Part 47**, provides:

> *(a) variation of the terms of a judgment for payment of a specified sum of money as to the time and method of payment; and*
>
> *(b) suspension of orders for the seizure and sale of goods and orders of delivery and possession.*

Rule 47.4 dealt with the procedure for compliance with Part 47. It provides:

> *(1) The judgment creditor or the judgment debtor may apply to the court to re-determine the decision.*
>
> *(2) The application may not be made more than 14 days after the date of service of the court's order under rule 47.3(6).*

(3) The registry must fix a hearing and give the judgment creditor and judgment debtor not less than 7 days notice of the date, time and place of the hearing.

[7] I advised Mr. Gregory Duncan that I was aware of the Defendants' allegations of bias but I would not address them as the Application before me was, as I said, misconceived, and the matter already having been determined, his appropriate recourse was an appeal. I will point out that in those submissions Mr. Duncan did not go so far as to challenge my integrity, nor did he make the assertions he now has about Ms. Shaw. These allegations now made, which came to my attention less than two **(2)** days before judgment was to be delivered, therefore could not have been in my contemplation as I considered this matter.

[8] I have reminded myself of the considerations on an application such as this. I was guided by the Judgment of Phillips JA (Ret) in the matter of **Carrol Ann Lawrence-Austin v The Director of Public Prosecutions** [2020] JMCA Civ 47. I reproduce below portions that were of particular assistance to me.

> *[34] Lord Hope of Craighead in **In Re Pinochet**, in accepting that "one of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered", made it clear that "[i]n civil litigation the guiding principle is that no one may be a judge in his own cause; nemo debet esse judex in propria causa". The second guiding principle is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to done" (see **R v Sussex Justices**). In **In Re Pinochet**, Lord Browne-Wilkinson suggested that there were two ways in which a person could be conceived of as a judge in their own cause, he stated: "... First [the principle] may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial ..."*
>
> *[36] The law is well settled with regard to the test for apparent bias. It has moved away somewhat from the approach laid down in **R v Gough** [1993] AC 646 in the speech of Lord Goff of Chieveley, where the test was formulated in the headnote as "whether, in all the circumstances of the case, there appeared to be a real danger of bias". The current test is found in the well-known statement of the Lord Hope of Craighead in **Porter and v Magill** [2002] 1 All ER 465, where he stated that the reference to "real danger" should be deleted as it no longer served any useful purpose, and that the question should now be "whether the fair-minded and informed observer, having considered the*

facts, would conclude that there was a real possibility that the tribunal was biased".

[37] ***In Helow v Secretary of State for the Home Department and another*** *[2008] 1 WLR 2416, Lord Hope of Craighead gave clarity to the concept of the fairminded and informed observer, in paragraphs 1-3 of his judgment. He stated: "1 ... the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to. 2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially. 3 Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment." [38] In spite of that comprehensive description of the fictitious fair-minded informed observer, as stated by Mason CJ and Mc Hugh J in the leading judgment in Webb v The Queen [1994] HCA 30, it remains important: "... to keep in mind that the appearance as well as the fact of impartiality is necessary to retain the confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality." [39] So, although it is an objective test of the circumstances, it is the "court's view of the public's view, not the court's own view, which is determinative" (see Webb v The Queen).*

[39] So, although it is an objective test of the circumstances, it is the "court's view of the public's view, not the court's own view, which is determinative" (see ***Webb v The Queen****).*

[41] It is important, then, for the court to ascertain all the circumstances, and then to ask whether those circumstances could lead the fair-minded observer to conclude that there was a real possibility that the tribunal was biased. In paragraph [86], Lord Phillips set out what those were. He stated: "The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not

> *have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fairminded observer would consider that there was a real danger of bias notwithstanding the explanation advanced.*
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> *[42] In the Privy Council case of the* ***Attorney General of the Cayman Islands v Tibbetts*** *[2010] UKPC 8, Lord Clarke speaking on behalf of the Board, endorsed the statement of Mummery LJ (with whom Latham and Carnwath LJJ agreed) in* ***AWG Group Limited v Morrison*** *[2006] EWCA Civ 6, where he also put the test in this way: "The test… is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility… that the tribunal was biased'."*

[9] Based on the facts as I have set them out, I categorically refute the Defendants' allegations of a lack of impartiality on the basis of my association with Ms. Marjorie Shaw and or Mrs. Rose Davis-Logan since to my knowledge at the time of hearing the applications, and remains so today, neither had anything to do with this matter. I most strenuously repudiate the Defendants' allegations of a lack of integrity and deem them a scurrilous attack on my character. I utterly reject any assertion of actual bias.

[10] The test for recusal for apparent bias 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'*. Having carefully considered the matter, I am of the view that a fair minded observer would not have concluded, having regard to the allegations made by the Defendants, and the facts outlined, that there was a real possibility that the tribunal was biased. Accordingly, the application to recuse myself from this and all matters involving the Defendants **on this basis** is refused. Having regard to the nature of the application, I would make no order as to costs.

ORDER

1. Notice of Application for Court Order filed July 22, 2022 is refused.

2. No order as to costs.

3. Permission to Appeal refused.