In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 53

BETWEEN:

ROBERT GEORGE GREEN MOULDER
Judgment Debtor/Plaintiff

- and -

COX HALLETT WILKINSON (A FIRM)
Judgment Creditor/First Defendant

STEPHEN P. COOK
Judgment Creditor/Second Defendant

MICHAEL ALAN CRANFIELD
Judgment Creditor/Third Defendant

PAUL JEREMY SLAUGHTER
Judgment Creditor/Fourth Defendant

JANET MURRAY SLAUGHETER
Judgment Creditor/Fifth Defendant

RULING

Date of Hearing: **15 April 2024**
Date of Ruling: **25 April 2024**

Appearances: **Plaintiff Robert Moulder in Person**

Michael Taylor, Attorney General's Chambers for the Provost Marshall General

David Kessaram, Cox Hallett Wilkinson Limited, for First Defendant

Paul Harshaw, Canterbury Law Limited, for Second Defendant

Third Defendant Michael Cranfield in Person

Jonathan White, Marshall Diel Myers Limited, for Fourth and Fifth Defendants

RULING of Mussenden CJ

Introduction

1. This matter came before me on the Plaintiff's Summons dated 7 June 2023 for me to recuse myself from any further involvement in this case on the basis of apparent bias (the "**Recusal Summons/Application**").

2. There are two other Summonses that have been issued in this case, which stand adjourned until after the determination of the Recusal Application:
    a. The Plaintiff's Summons for a stay of proceedings dated 23 May 2023 (the "**Stay Summons/Application**"); and
    b. The First Defendant's Summons for an order that the Plaintiff be restrained from bringing any further applications in this action or commencing any new action which arises out of the same facts on which this application was founded without first obtaining the leave of the Court (the "**Vexatious Litigant Summons/Application**").

3. In respect of the Recusal Application, the Plaintiff relies on his affidavit sworn 6 June 2023 ("**Moulder 1**") along with the Exhibit "**RGGM-1**".

Background

4. On 17 February 2010 the Plaintiff launched an action against the Defendants. That action was struck out on 26 November 2010 by (then) Ground CJ. Costs were awarded against the Plaintiff.

5. The Plaintiff appealed the 26 November 2010 order of Ground CJ to the Court of Appeal for Bermuda and his appeal was dismissed on 17 June 2011. Again, costs were awarded against the Plaintiff.

6. On 8 July 2011 the Plaintiff sought leave to appeal to Her Majesty in Council the dismissal of the appeal by the Court of Appeal. That application for leave was dismissed on 14 November 2011 and costs were awarded against the Plaintiff.

7. Mr. Moulder has failed to pay judgment debts owing to the Defendants.

8. Writs of Execution (*fieri facias*) in respect of all three costs orders issued from the Supreme Court on 19 June 2012 were executed by the Provost Marshal General on 25 September 2012 in respect of the Plaintiff's real property known as "Tanglin", 15 Bridge View Lane, Sandy's Parish (the "**Property**"). The Writs of Execution of the Defendants have been renewed from time to time.

9. From the date of 9 August 2012, onwards various Summonses have been issued by one or more Defendants seeking directions for sale of the Property by public auction. On 16 November 2012 (then) Hellman J made an order authorizing the DPMG to take possession and sell the Property by private treaty. On 18 July 2013 Hellman J made an order, *inter alia*, that the said real property of the Plaintiff be sold by private treaty or public auction at the option of the Defendants. Since that time there have been demands to the Plaintiff for money. Also, there have been efforts by the DPMG to sell the Property by private treaty and auction, valuations were made, and an offer of $300,000 was declined by the DPMG as it was far below the market value for the Property. Correspondence flowed between the DPMG and the Defendants/Judgment Debtors. An auction scheduled for 13 April 2019 was cancelled due to a pending hearing in the Supreme Court on 21 May 2019 to settle the

issue of the writ of *vend.ex*. Aside from the declined offer described above, no other offers have been forthcoming for the Property.

10. On 10 August 2021 I ruled that a writ of execution by way of *venditioni exponas* was a part of Bermuda law (the "**Vend.ex Ruling/Matter**").

11. Based on two valuation reports provided to the DPMG on or around 6 January 2014, the open market value of the Property at that time was between BM$550,000 and BM$565,000. By all accounts, the total costs against the Plaintiff amount to approximately more than $800,000, significantly in excess of the 2014 valuations.

The Judicial Oath (the "Oath")

12. The Bermuda Constitution Order 1968 sets out the judicial oath as follows:

> *"I, ..., do swear that I will well and truly serve His Majesty King Charles the Third, His Heirs and Successors, in the office of ... and will do right to all manner of people after the laws and usages of Bermuda without fear or favour, affection or ill will. So help me God."*

The Law on Bias

13. The applicable law on bias as it relates to recusal applications has been considered in a number of cases in Bermuda, including recently in the Court of Appeal in *R v Wallington* [2022] Bda LR 18 where Clarke P stated:

> *"The test*
> *33. It is undoubtedly the case that the test for recusal is the one set out in Porter v Magill [2001] UKHL 67, namely "whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias". Guidance as to the characteristics of this notional observer is to be found in Helow v Home Secretary [2008] UKHL 62 where Lord Hope of Craighead pointed out [2] that the fair-minded observer:*
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> > *"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… 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."*
>
> *And [3]*

"Then there is the attribute that the observer is informed. It makes the point they, 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,"

34. Further in Saxmere Company Limited et al v Wool Board Disestablishemnt Company Limited [2009] NZSC 72 Blanchard J, speaking for the New Zealand Supreme Court, observed:

"The observer must also be taken to understand three matters relating to the conduct of judges. The first is that a judge is expected to be independent in decision-making and has taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated… Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel."

14. Similarly, in *Jackson v Thompsons Solicitors (a firm) and others* [2015] EWHC 218, at para 14 Simon J identified two kinds of bias, namely actual bias and apparent bias. He set out that actual bias is where the decision-maker has a direct pecuniary, proprietary or personal interest in the outcome of the case; or has been directly influenced by a fixed predisposition or predilection towards a party. In respect of apparent bias, at para 18 Simon J stated as follows:

"When considering the question of apparent bias the court's approach is, first, to ascertain all the circumstances which have a bearing on the suggestion that the judge or tribunal was biased, and secondly, to ask itself whether in those circumstances a fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased, see for example Porter v. Magill [2002] 2 AC 357, Lord Hope at [103]."

15. In *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65 at para 66 it stated:

"*A judge must recuse himself from a case before any objection is made if the circumstances give rise to automatic disqualification or he feels personally embarrassed in hearing the case. If, in any other case, the judge becomes aware of any matter which can arguably be said to give rise to a real danger of bias, it is generally desirable that disclosure should be made to the parties in advance of the hearing. Where objection is then made, it will be as wrong for the judge to yield to a tenuous or frivolous objection as it will be to ignore an objection of substance. However, if there is real ground for doubt, that doubt must be resolved in favor of recusal."*

16. In *Athene Holding Ltd. v Siddiqui et al* [2019] SC (Bda) 20 Comm, former Chief Justice Hargun also referred to *Helow v Secretary of State for the Home Department* [2008] 1 WLR, where Lord Hope described the attributes of the "fair-minded and informed observer" as follows:

> "*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.*
>
> *"22. At the risk of stating the obvious, any judge who is invited to recuse himself on the ground of apparent bias must be very careful not to allow any personal considerations whatsoever to contaminate his conclusions. Nevertheless, this should not preclude such a judge from acting with the same level of robustness and proportionate scepticism, where this is necessary, as he would approach any other application. To proceed otherwise would be unfairly to prejudice the other side out of an undue sensitivity to the perception that such robustness may be wrongly attributed to the personal feelings of the judge as opposed to the legitimate demands of firm management with the aim of applying the overriding objective."*

17. In *Athene Holding Ltd.* Hargun CJ also referred to *Locabail* where he stated that the Court of Appeal found

> *"force in observations of the Constitutional Court of South Africa in President of the Republic of South Africa & Others v. South African Rugby Football Union & Others 1999 (7) BCLR (CC) 725 at 753, even though these observations were directed to the reasonable suspicion test:*
>
> > *"It follows from the foregoing that 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. <u>The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or</u>*

pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."" [underlined added]

18. In *Wallington* at paras 35 – 37, Clarke P considered what was bias as follows:

"What is bias?

35. A judge who tries a case, whether civil or criminal, must do so with an open and independent mind. That means that he must, in relation to any particular count in an information, consider the evidence which is relevant to that count and whether in the light of that evidence and regardless of what decision he has made in relation to any different charge, the charge is made out. He must ignore any extraneous considerations, prejudices and predilections - to use the language of Lord Bingham of Cornhill in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 45. A judge is, as the Saxmere Company case confirms, expected to be independent in his decision making. He is to be regarded as biased if he allows extraneous considerations to govern or influence his conclusions; and his judgment may be set aside if there was a real risk that he would do so. That these are the duties of a professional judge is something of which the well-informed observer would be well aware, and which, absent some indication to the contrary, he would expect that the judge could, and would, fulfil.

36. Bias may take many forms. It may arise from some connection (either amicable or hostile) of the judge, or those close to or connected to him, to one of the parties, or to a witness, or because of his membership of some organisation or devotion to some cause. These are some of the classic forms of bias. In the present case the bias, the risk of which is relied upon, is that because the judge finds the defendant's evidence in respect of one charge not credible or worthy of belief he would find, or incline to find, her evidence on another charge incredible as well.

37. If a judge tries two cases against the same defendant, and finds his evidence in each case incredible, he is not to be regarded as biased because he took the same view of the defendant's credibility in the second case as he did in the first; nor is the risk that he might take the same view a grounds for recusal. The position would be different if there was a real possibility that the judge would not, or did not, properly and fully consider and evaluate the evidence in the second case in order to determine whether the evidence of the defendant in that case was not worthy of belief but, rather, decided the second case against the defendant because or largely because he had not believed him in the first.

19. In *Wallington* at para 39, Clarke P cited *Locabail*, using bold type in some parts, where Lord Bingham stated:

"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (KFTCIC v. Icori Estero SpA (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol. 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; ***or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion****; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v. Kelly (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him.* ***The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.*** *In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be." [Bold added]*

The Plaintiff's Submissions

20. Mr. Moulder set out in Moulder 1 that his Recusal Application was based on his encounter with me on 16 December 2021 in an unrelated matter case 2020:No. 312 *Junos, Moulder, & Robinson v Commissioner of Police, Director of Public Prosecutions, Attorney General*

and Her Excellency the Governor (the "**312:2020 Action**"). None of the Defendants in the present case are parties to that case and were not present on 16 December 2021 or apprised of the circumstances in that case. No transcript has been provided in evidence in this application by the Plaintiff of the 16 December 2021 hearing.

21. Mr. Moulder stated that in the 312:2020 Action the plaintiffs seek damages against the defendants arising out of how the plaintiffs' criminal complaints were handled in investigations that took place in 2014 (the "**2014 Investigation**") and in 2019 (the "**2019 Investigation**") (together the "**Investigations**"). He also states that damages are being sought for his eviction and continued attempts by the Deputy Provost Marshall General to sell his Property in the present case. Mr. Moulder asserts that the there was a decision from the Director of Public Prosecutions (the "**Director**") Office that no one would be prosecuted as a result of those Investigations, such decision being made when I was the Director. I should add here that I was the Director for the period April 2016 to December 2020. In any event, the 312:2020 Action was filed in the Supreme Court on 22 September 2020 when I was the Director. In that 312:2020 Action, in respect of damages against the defendants, the first defendant claimed $4.4 million, the second defendant Mr. Moulder claimed $5.5 million and the third defendant claimed $6 million for a total of $15.9 million; with all three defendants claiming additional damages for past and continuing mental anguish, damages for pain and suffering, further aggravated and exemplary or punitive damages plus costs.

22. Mr. Moulder stated that at the hearing of 16 December 2021 he was present to hear an application by the plaintiffs for default judgment due to the failure of the defendants to file a defence. The Order from that hearing shows that the Deputy Solicitor General Mrs. Dill-Francois was present on behalf of the defendants. Mr. Moulder stated that he was surprised that I was the Judge to hear the matter that morning as he claimed it was set to be heard by an assistant registrar. I should add here that the Supreme Court schedule for that morning sets out that it was a regular Thursday morning Chambers sessions when thirteen (13) matters were listed before me for the session (the "**Chambers Session**"). Mr. Moulder did not present any evidence that showed that the matter was to be listed before an assistant

registrar for the Chambers Session, something which does not happen for Thursday morning Chambers in any event. Mr. Moulder submitted that I ignored the plaintiffs' application for default judgment but gave directions to first hear a strike-out application on behalf of the defendants. I will add here that: (i) the Order does show that directions were given for the parties to file affidavit evidence for a hearing to take place in early 2022; and (ii) it does not deal with the plaintiffs' application for default judgment.

23. Mr. Moulder's complaint was that I had inappropriately intervened in that matter which delayed it being heard and further delayed any assessment of damages. He asserted that as I was the Director during the 2019 investigation and when the 321:2020 Action writ was filed, I would have had an interest in preventing the plaintiffs' writ from being successful. Further, he asserted that the possible damages in his favour could have been used by him to avert the sale of his Property.

24. Mr. Moulder stated that in respect of the present case, I am now presiding over the sale of his Property. He is disturbed that I did not include him in previous hearings which were conducted in his absence. He asserted that were it not for him showing up at Court unannounced that his Property may have been sold without his knowledge or input. Mr. Moulder stated that he believes that I showed bias in the 312:2020 Action and that it will spill over into the present matter involving the sale of his Property. Therefore, to avoid the appearance of bias, he is respectfully asking that I recuse myself from any further involvement in this matter on the basis of apparent bias.

25. In his submissions, Mr. Moulder argued that in light of the above circumstances in the 312:2020 Action, it was relevant to the present matter as I exhibited actual bias in that case as I gave what was perceived by the plaintiffs in that case deference and preferential treatment to the Deputy Solicitor General who was representing the defendants rather than make a decision on the application for default judgment. He argued that since 16 December 2021 in the 321:2020 Action, the defendants in that case have failed to prosecute their strike-out application and they have yet to file a defence. Mr. Moulder submitted therefore that my conduct in the 321:2020 Action sent a clear message to him of conscious and actual bias, or a subconscious bias that is so strong that it manifests itself, in any event.

26. Mr. Moulder referred to various extracts from the Bermuda Supreme Court Equal Treatment Bench Book[1] (the "**Bench Book**") as set out below, in particular the underlined portion, to make the point that the hearing(s) are unsatisfactory as he finds them to be unfair:

    a. *"Prejudices of the Court - We all have prejudices and it is best that these are identified and acknowledged. They should not be allowed to influence our judicial decisions. Unwitting (or unconscious) prejudice – demonstrating prejudice without realising it – is more difficult to tackle and may be the result of mere ignorance or lack of awareness.*
    b. *Perceptions of justice - It is a fundamental concept that 'justice must not only be done but be seen to be done'. This imposes positive obligations on judicial office-holders. <u>It is no longer a question of what lawyers or those administering justice perceive – if a hearing is seen as having been unfair by those involved, directly or indirectly, or the public at large, then it has not been satisfactory</u>:*

        "Judges wield huge power over the rest of society. We therefore have a special responsibility to ensure that there can be no possible reasons to think us prejudiced and this entails a positive responsibility to demonstrate our fairness.
    c. *Lord Irvine of Lairg, Lord Chancellor (of England & Wales), September 1999 –*

        "We must not in our conduct of hearings give rise to perceptions of unfair treatment."

        "The quality of judicial decision making is crucial. Neutral application of legal rules is fundamental to high-quality judicial decision making. Decisions based on erroneous perceptions, interpretation or understanding may lead to faulty decisions and thus to substantive unfairness. Inappropriate language and behaviour is likely to give offence and result in a perception of unfairness, even if there is no substantive unfairness. This leads to a loss of authority and, importantly, loss of confidence in the judicial system. Perceptions are important."" [Underline added]

27. Mr. Moulder submitted that irony has not escaped him in that in the 312:2020 Action, the plaintiffs' application for default judgment was not considered by me, but now in the present matter, he stands before me penniless, in respect of an enforced sale of his Property. He queried whether one case has anything to do with the other and referred to the following test, which appears to me to be the approach to be taken for apparent bias as stated in *Jackson v Thompson Solicitors*:

    "The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances

[1] PDF available online at <u>https://www.gov.bm/department/judiciary</u>

would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

28. Mr. Moulder submitted that he was sorry he felt the way he does, but he was unable to shake the feeling that I have a subconscious, unconscious, built-in bias against him in favour of my brothers in the law profession and the government. He completed his submissions by stating that his concerns were about proximity as the individuals involved are a common denominator and the obvious impact of trying these particular cases.

The First Defendant's Submissions

29. Mr. Kessaram for the First Defendant made a number of submissions in support of the Court rejecting the Recusal Application on the grounds of actual bias and apparent bias. In essence, he submitted that there was no factual basis for recusal and further the test for recusal was not met, adding that Mr. Moulder's final submission about proximity, involvement and impact were not part of the test for recusal.

30. First, he stated that the grounds for the Recusal Application appear to stem from my actions when I was the Director and later when I was the Judge in the Chambers Session, both events connected from Mr. Moulder's core accusations against the President and Registrar of the Court of Appeal for some alleged bias, misbehavior and misrepresentation of facts in respect of a number of issues including obtaining court recordings. In any event, his request for court recordings was satisfied in 2018 although the plaintiffs' quest for damages in the 312:2020 Action continues. Mr. Kessaram submitted that there has been no transcript of the Court of Appeal proceedings to show what acts took place there. In the absence of such a transcript or a decision or a judgment, then the allegations set out in the statement of claim in the 312:2020 Action are just mere allegations of Mr. Moulder and his co-plaintiffs, in order to seek millions of dollars from the Government. He argues that pursuant to *Jackson v Thompson Solicitors* there was no factual basis to support the application for my recusal.

31. Second, Mr. Kessaram submitted that Mr. Moulder's Recusal Summons was based on apparent bias although his submissions seemed to frame his argument on actual bias. He argued that there was no evidence to support the allegations of actual bias other than Mr. Moulder pointing to the fact that I refused to give judgment in default in the 312:2020 Action. Mr. Kessaram submitted that in that case, in the knowledge that a strike-out application was underway, then it was proper for the Court to refuse default judgment because even if it was granted, there would have been an application to set it aside. He stressed that a default judgment did not go to the merits of the case but that Mr. Moulder did not want a judgment on the merits, instead wanting a judgment on an administrative point. He argued that litigants in person were not entitled to have the scales of justice tipped in their favour in this way. Therefore, again there was no factual basis for the Recusal Application and in following *Jackson v Thompson Solicitors* in respect of apparent bias, I should seek to find the facts first before going on to consider the test for recusal.

32. Third, Mr. Kessaram submitted that Mr. Moulder has considered the test for recusal as set out in *Porter v Magill* in a wrong manner. In respect of the Recusal Summons, Mr. Moulder stated that based on my role as Director and as Judge in the 312:2020 Action, an informed observer "*could conclude that it could be argued that Mr. Mussenden had at least an apparent bias in seeing to it that Mr. Moulder NOT be awarded damages …*". Mr. Kessaram referred to the case of *Director of Public Prosecutions v Clarke* [2019] Bda LR 46 where the Court of Appeal confirmed that the test was whether a fair-minded and informed observer *would conclude* that there was a real possibility of bias. Mr. Kessaram argued that on that basis, Mr. Moulder has both failed to state the test properly and failed to satisfy it.

33. Fourth, Mr. Kessaram submitted that as a Judge, I would have taken the Oath as set out in the Bermuda Constitution, noting that it should be appreciated that Judges do not take the oath lightly. He referred to *Locabail* stressing that if Judges felt embarrassed by a case then they would recuse themselves without complaint. He also referred to *South African Rugby Football Union*, cited in *Locabail*, where it set out that the Judge must consider an application for recusal in light of the Oath to do right to all manner of people and to administer justice without fear or favour.

34. Fifth, Mr. Kessaram referred to Mr. Moulder's complaint that when appointed to be a Judge after serving as the Director, the Court's position as stated in the 2021 Annual Report was that I would not hear criminal cases, a position which Mr. Moulder argued should extend to also not hearing civil cases commenced against the DPP's office during my tenure as Director. Mr. Kessaram submitted that there was a distinction between criminal and civil cases and thus naturally I should not hear criminal cases that I had overseen. However, the allegation in the 312:2020 Action was that I was the Director when the 2019 Investigation started in relation to officers of the Bermuda Police Service in respect of the 2014 Investigation. He referred to paras 47 to 55 of the Statement of Claim in the 312:2020 Action which set out the alleged link between the two investigations, noting that as I was appointed the Director in 2016, the matters relating to the 2014 Investigation were not relevant. Mr. Kessaram argued that the Statement of Claim makes no reference to me expressly, however in one paragraph it makes reference to a female member of the department who provided reasons to Mr. Moulder as to why no-one was prosecuted arising out of the investigations. More importantly, it sets out no facts or basis for the vague and generalized allegations. Mr. Kessaram submitted that, in any event, the furthest that Mr. Moulder goes in showing my involvement in the matter is to state that I was the Director during the 2019 Investigation. Mr. Kessaram argued that all these circumstances of the Investigations were so remote from the present case where judgment has been given against Mr. Moulder, where costs have been taxed and where the Defendants are seeking to have the judgments enforced against Mr. Moulder.

35. Sixth, Mr. Kessaram submitted that in respect of my tenure as a Judge, no complaint or recusal application was made by Mr. Moulder when I heard and then issued the Vend.ex Ruling in 2021, many months after the 312:2020 Action was filed. He argued that this Recusal Application was just another delay tactic when the judgment creditors have been waiting for more than fourteen years to have the judgment executed. He referred to the Stay Application which he described as another frivolous application. Mr. Kessaram also submitted that although Mr. Moulder has made a demand for his right to a full trial, he has no such right except a right to the due process of the Court. Mr. Kessaram argued that it

was important to note that the allegation of bias was being made by Mr. Moulder who is someone who had demonstrated a penchant for making wild and extravagant claims, who being a litigant in person, is not bound by any code of professional conduct and who is a person who has nothing to lose now that the total amount of judgment debts exceeds the value of the Property in question.

36. Seventh, Mr. Kessaram referred to Mr. Moulder's written submission that he couldn't shake the feeling that I had a subconscious, unconscious, built-in bias against him in favour of my brothers in the law profession and the Government. Mr. Kessaram argued that Mr. Moulder may feel that way but that did not mean that I should recuse myself from the case. He relied on the case of *Helow* where Lord Hope described the attributes of a "fair-minded" and "informed observer" who is "*the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument.*"

37. Eighth, Mr. Kessaram submitted that the Bench Book was not the test for recusal.

The Second Defendant's Submissions

38. Mr. Harshaw for the Second Defendant adopted the submissions of Mr. Kessaram and supplemented them further in support of the Recusal Application being rejected. First, Mr. Harshaw referred to the relief sought in the Recusal Summons that I recuse myself and that the matter be reassigned to another Judge. However, he noted that this matter was near an end save for the enforcement of the costs. He referred to *Moulder v Cox Hallett Wilkinson, Cook, Cranfield Slaughter & Slaughter* [2017] SC (Bda) 58 Civ at para 5 where Kawaley CJ found that a 2010 Action was in large part struck out because "*Mr. Moulder failed to appreciate how narrow a concept fraud is in the legal context. The Defendants effectively contended that the present proceedings were afflicted by the same fatal flaw, a failure to appreciate that the ability of the courts to grant remedies is not open ended but is constrained by established principles of substantive and procedural law.*" Mr. Harshaw argued that in this application, Mr. Moulder again fails to appreciate an understanding of the law.

39. Second, Mr. Harshaw submitted that in respect of the 312:2020 Action, Mr. Moulder had failed to appreciate that the Commissioner of Police is different from the Director and that knowledge of one is not the knowledge of the other. He stressed that Mr. Moulder did not speak to the personal or actual knowledge or involvement of the Director at the time. In those circumstances the complaint should be rejected.

40. Mr. Harshaw referred to the current applications before the Court in this matter. He submitted that in his view, pursuant to proper case management principles, the correct order to hear the applications was the Recusal Application, the Stay Application and then the Vexatious Litigant Application. So too in the 321:2020 Action, the proper order to hear the applications was the Strike-Out Application and then the Default Judgment Application.

41. Mr. Harshaw referred to Moulder 1. He submitted that at para 8, Mr. Moulder made a bold assertion that I would have an interest in preventing the Writ in the 321:2020 Action from being successful. He argued that Mr. Moulder provided no particulars for such an assertion noting that the use of the words "would have an interest" were entirely speculative when any allegations must be founded on facts.

42. Mr Harshaw argued that in light of the failure to provide facts, Mr. Moulder failed on the first stage of establishing the facts before the Court could go on to address the question of whether the test was satisfied. Further, in respect of the test, he argued that it was an objective test and thus the subjective views of Mr. Moulder were irrelevant.

43. Mr. Harshaw referred to Mr. Moulder's comment that I would be overseeing the sale of his Property. He argued that it was incorrect as per the Rules of the Supreme Court Order 46 rule 7(2) every sale in execution of a judgment is under the direction of the Registrar, another judicial officer.

Submissions by the other Parties

44. The Third Defendant Mr. Cranfield and Mr. White for the Fourth and Fifth Defendants adopted the submissions of Mr. Kessaram and Mr. Harshaw. Mr. White added that it was

a cruel irony that Mr. Moulder's statement that he would have used the $5.5 million proceeds of the default judgment in the 321:2020 Action to pay the debts in the present matter flew in the face of his lengthy and continued campaign not to pay the debts.

45. Mr. Taylor made no submissions on behalf of the DPMG.

Analysis of the Recusal Application

46. In my view the Recusal Application should be refused for several reasons. I should note here that Mr. Moulder's Recusal Summons is based on apparent bias. However, in his submissions he seemed also to include some aspects of actual bias. I will deal with each in turn as set out below. For each issue, I take the approach of how a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias.

Judicial Oath

47. I was appointed a Puisne Judge in December 2020 and the Chief Justice in February 2024. On each occasion I took the judicial oath as set out in the Constitution. In doing so I can state quite confidently that I did so with sincerity and that I did not take the Oath lightly. I refer to *Locabail* and to the principle that I should recuse myself from a case if I felt embarrassed by it. Since my appointment as a Judge, I have taken steps to recuse myself from cases where I felt it was appropriate to do so for various reasons and where I felt it was the right thing to do. I have also heard other recusal applications and have determined them based on the facts and the applicable law. In this case, I have no interest in the outcome one way or the other. I rely on the case of *South African Rugby Football Union* to guide me in the assessment of the Recusal Application in light of the Oaths that I took, in particular to do right to all manner of people, including all the parties in this case, and to administer justice without fear or favour. I also rely on the case of *Saxmere Company Limited* where in respect of the conduct of judges, it states that an observer must be taken to understand that a judge is expected to be independent in decision making and that the judge has taken the Oath.

Actual Bias

48. In respect of the assertion of actual bias, I agree with the Defendants that Mr. Moulder has not advanced any facts to support such an assertion. In my view, as a starting point, there is no evidence that I have a direct pecuniary or proprietary interest in this case. However, Mr. Moulder advanced an argument that in the 321:2020 Action I had an interest to prevent the plaintiffs in that case from being successful. I agree with counsel that he did not advance any factual basis to support this other than to lob speculation using the words "*would have an interest*". Further, Mr. Moulder was speaking about the possibility that I would have an interest in the 321:2020 Action and not the present case. To that point, I reject Mr. Moulder's submission that I had inappropriately intervened in the 321:2020 Action because I was assigned to the Chambers Session that morning, as I have been generally since I was appointed as a judge, to hear a list of thirteen (13) cases, generally for directions.

49. In another implied assertion of actual bias, Mr. Moulder suggested that I may be influenced in this case to have a fixed disposition or predilection against him as a result of the decision I made in the 321:2020 Action. I agree with counsel that the highest Mr. Moulder makes this complaint is that I have shown bias in that I refused to give default judgment to the defendants and instead issued direction for a strike-out application hearing with the risk of such bias spilling over to the present matter. In my view, Mr. Moulder has failed to advance an evidence to support his assertion on this point that my decision in 321:20220 Action would affect my decision in the present case. I rely on the case of *Wallington* where it cited *Locabail* [in bold] for the principle that where a judge earlier in the same case or another case had commented adversely on a party or a witness, or found the evidence of a party or a witness to be unreliable, it would not without more found a sustainable objection. In the 321:2020 Action, I did not comment adversely on the plaintiffs or find them to be unreliable. In that case, I exercised my case management powers to give directions for a strike-out application to be heard first. It is simply incomprehensible to consider that that decision in the 321:2020 Action would amount to a bias in that case such that it would spill over into this case as bias in the form of a disposition or a predilection against Mr. Moulder. Additionally, I rely on the view of Clarke P in *Wallington* in para 37 where he stated that

it would not be bias because a judge took the same view in two cases that the evidence of a witness was incredible. Drawing a parallel to the present application, the issues in each case are different and require different considerations of the circumstances. In my view, there is no evidence to support a contention that because I gave directions in the 321:2020 Action that I will be predisposed against Mr. Moulder in the present matter.

50. Mr. Moulder provided no evidence to support his assertion that I was holding hearings in his absence in the present matter.

51. Taking the above three points together, along with accepting that I have taken the Oath, in my view, the assertion of bias fails to meet the test as set out in *Porter v Magill*. Taking an objective view, the fair-minded and informed observer, having considered these facts would not conclude that there was a real possibility of bias.

Apparent Bias

52. I turn to consider the basis for Mr. Moulder's claims of apparent bias. I agree with Mr. Harshaw that Mr. Moulder falls prey to the same set of circumstances as set out by Kawaley CJ in the 2017 Strike-Out Ruling where he stated in essence that Mr. Moulder failed to appreciate an understanding of the law, for example, the proper test for recusal. In any event, the onus is on him to satisfy the Court of apparent bias and I accept that there is a two stage test as set out by Simon J in *Jackson v Thompson Solicitors*. In my view, I agree with counsel for the Defendants that Mr. Moulder has failed to show the facts to allow the Court to ascertain the circumstances which would have a bearing on the suggestion that I was biased in this matter.

53. In respect of the core complaint of the 321:2020 Action and the Statement of Claim in that matter, Mr. Moulder has provided no evidence of the actions of the Court of Appeal of which he complains and he has provided no transcript of any of their proceedings. In respect of my tenure as Director, Mr. Moulder has again failed to show any actions by me in respect of the 2019 Investigation, of course noting that as I was appointed Director in

2016, I had no bearing on the 2014 Investigation. The allegations in the main fail to state the date of the acts of the Director although there was a reference to a female member of the Director's office who had provided some reports. Also, in my view, Mr. Moulder did not speak to the personal or actual involvement of the Director at the material times. In my view, in the present case, Mr. Moulder has failed at the first stage of the approach to apparent bias in that he has failed to provide the facts to allow the Court of when I was the Director to ascertain all the circumstances which have a bearing on the suggestion that I was biased.

54. In respect of my role as a Judge in the present matter, Mr. Moulder took no objection when I heard and issued the Vend.Ex Ruling in this case. It seems to me that if Mr. Moulder really felt that I was biased as a result of being the Director, then the appropriate point to seek recusal was when I was about to hear the Vend.ex Matter. Thus, in considering what a fair-minded and informed observer may conclude, it is worth noting that no objection was taken when I heard the matter. Thus, the factual situation does not support apparent bias on this point.

55. In respect of my role as a Judge in the 321:2020 Action, Mr. Moulder complained that the 2021 Annual Report indicated that I would not sit as a judge in criminal matters because of my role as Director. However, the 321:2020 Action is a civil matter and as already stated, Mr. Moulder has failed to establish any facts about my role as Director in the 2019 Investigation that founded the 321:2020 Action. In my view, Mr. Moulder has cast his net far and wide to try to reel in an aspect of apparent bias in the present case as the acts complained of in the 321:2020 Action are very remote from the issues in the present case which are about enforcement of the judgment debt.

56. In respect of the Bench Book, I reject Mr. Moulder's submissions that sought to elevate the extracts in the Bench Book either as grounds for recusal or as the actual test itself for recusal. The test is as set out in *Porter v Magill*. The Bench Book introduction states "*This Bench Book is designed to help Bermudian judges to fulfil their judicial oath by giving, so far as is humanly possible, the fullest recognition of all litigant's right to equal treatment under the law*." In my view the Equal Treatment Book is a very useful informational guide

to judges in assisting in the performance of their roles. I reject Mr. Moulder's reference to the section on "*prejudices of the court*" as there has been no such evidence of any prejudice of mine against him or at all whatsoever. Further, I do not find any merit in Mr. Moulder's reference to the extract on unfair treatment, as just because I made a decision, that I was entitled to make, that was not in his favour, does not, without more, mean that I was unfair. Judges makes decisions every day, some in the favour of one party and adverse to the other party – it does not mean they were unfair.

57. In respect of Mr. Moulder's evidence that he could not shake a feeling that I had a subconscious, unconscious, built-in bias against him in favour of my brothers in the law profession and the Government, the submission should be rejected wholeheartedly. In doing so I rely on the judicial oath that I took. I also rely on *Saxmere Company Limited* where the Court stated that the observer will take into account that "*Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel.*" Additionally, judges hear cases involving the Government on a regular basis, such cases being decided for or against the Government on the merits of each case.

58. Careful consideration must be given to the Recusal Summons and its inelegant wording *"... could conclude that it could be argued that Mr. Mussenden has at least an apparent bias ...*". So too must careful consideration be given to the evidence of Moulder 1 where he states that he seeks to avoid the appearance of bias as he believed that my apparent bias in the 321:2020 Action had already/or will spill over into the present matter. Again careful consideration must be given to all his submissions. In considering what a fair-minded and informed observer may conclude, it is worth noting that Mr. Moulder started off on the wrong track in the Recusal Summons, continued off track in his affidavit evidence and ended off track in his submissions.

59. Having set out these issues, the question is whether Mr. Moulder has discharged his burden to satisfy me that I should recuse myself in these proceedings. I bear in mind the cautious approach that I should take when considering the application as set out in *Helow*. I remind myself about the approach that the fair-minded observer should take and what should be

considered as relevant in the assessment. I bear in my mind the Oath that I took. I also take guidance from *Athene Holding Limited* to not allow any personal considerations whatsoever to contaminate my conclusions, but to still act with robustness and proportionate sceptism as I would with any other application. In light of all the issues that I have set out, I am not satisfied that a fair-minded and informed observer would conclude that there is a real possibility of bias by me against Mr. Moulder in the present case.

Conclusion

60. I am not satisfied that I should grant the Recusal Application.

61. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendants against the Plaintiff on a standard basis, to be taxed by the Registrar if not agreed.

Dated 25 April 2024

LARRY MUSSENDEN
CHIEF JUSTICE