In The Supreme Court of Bermuda

CIVIL JURISDICTION

2023: No. 347

BETWEEN:

GAYLE ANN VENTURES

Plaintiff

- and -

CLARIEN BANK LIMITED

First Defendant

ALEXANDRA N WHEATLEY

Second Defendant

GEOFFREY BELL

Third Defendant

RULING

Date of Hearing: **3 April 2024**
Date of Ruling: **13 August 2024**

Appearances: **Plaintiff Gayle Ventures in Person with her McKenzie Friend Ms. LeYoni Junos**

Izabella Arnold, Walkers (Bermuda) Limited for the First Defendant

Ben Adamson, Conyers Dill & Pearman Limited, for Second and Third Defendants

RULING of Mussenden CJ

Introduction

1. This matter came before me on the Plaintiff's Summons dated 10 January 2024 for me to recuse myself from any further involvement in this case and for the matter to be reassigned to an independent judge from outside the jurisdiction. (the "**Recusal Summons/Application**"). There were a number of reasons set out in the Recusal Summons:
    a. That I, as the Chief Justice, work intimately on a daily basis with the Registrar of the Supreme Court Ms. Wheatley and I am jurisdictionally subordinate to Justice of Appeal Bell.
    b. That I allowed counsel Mr. Kevin Taylor for the First Defendant to make disparaging and prejudicial statements about the Plaintiff Ms. Ventures and her application.
    c. That I allowed Mr. Taylor to speak of his own knowledge of the distinguished careers of the Second and Third Defendants and his opinion of the allegations against them.
    d. That I appeared to align myself with the opinion of counsel when I advised Ms. Ventures to "*take on board*" the statements of counsel and warned her of serious potential costs implications against her in the likelihood of her being unsuccessful.
    e. That Ms. Ventures' perception was that she had been blocked and silenced towards the end of the hearing and that her McKenzie Friend Ms. Junos was wrongly accused of arguing her own case.
    f. Because Mr. Taylor had failed to disclose his own involvement in the matter complained of, it fell to Ms. Junos to attempt to expose Mr. Taylor's conflict, however his failure led to me being exposed to and influenced by Mr. Taylor's unprofessional attack on Ms. Ventures.

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 First Defendant's Summons dated 8 January 2024 and the Second and Third Defendants' Summons dated 18 December 2023 for an application to strike-out the matter (the "**Strike-Out Applications**").

3. In respect of the Recusal Application, the Plaintiff relies on her two affidavits sworn 9 January 2024 and 3 April 2024 along with their exhibits which included a transcript (the "**Transcript**") of the Chambers session on 30 November 2024 in respect of this matter and a complaint dated 8 January 2024 to Her Excellency the Governor (the "**Complaint**") along with two tables analyzing various parts of the Transcript of what I said and what Mr. Taylor said in the hearing ("**Table 1**" and "**Table 2**").

Background

4. The Plaintiff by way of Originating Summons dated 16 October 2023 claims against the Defendants in respect of the circumstances of an appeal to the Court of Appeal, a Certificate of Non-Compliance and the actions of the Defendants in relation to the appeal. She seeks various declarations in respect of her claim that her constitutional right to the protection of the law, in particular her right to a fair and impartial hearing and her right to appeal as of right, is being contravened by the Defendants.

5. The Originating Summons came on before me for its first hearing on 30 November 2023 in a Thursday morning Chambers session. The previous day, by email correspondence with the Registry, I had agreed Ms. Ventures' request to have Mrs. Junos act as her McKenzie Friend due to Ms. Ventures' medical conditions.

6. The complaints in the Recusal Summons as set out above, generally arise from that first hearing in Chambers when Mr. Taylor appeared for the First Defendant and Ms. Junos appeared as the McKenzie Friend for Ms. Ventures. The Second and Third Defendants did not appear and they were not represented by counsel at that Chambers hearing.

The Judicial Oath (the "Oath")

7. 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

8. 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,"*
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> *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:*
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> > *"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."*

9. 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]."*

10. 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."*

11. 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."

12. 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:*
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> > *"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 pre-dispositions.</u> 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]*

13. 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.

14. 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]*

15. In *Piper et al v Commission of Inquiry* [2024] CA (Bda) 6 Civ, referring to Wallington, Clarke P stated as follows:

"The proper application of these rules is of great importance both in general and, in particular, in a small jurisdiction such as Bermuda. ... At its worst, too ready acceptance of claims for recusal will come close to a situation where the parties can select the judge who is to sit, simply by criticizing all the other judges: see Chadwick LJ in Triodos Bank NV v Dobbs [2005] EWCA Civ 468 at [7]."

16. In the 2006 Guidelines for Judicial Conduct provide as follows:

"21. Judges are independents in the performance of their judicial functions, not only from the other branches of government, but also from each other. Judicial decision-making is the responsibility of the individual judge, even in a collegiate appellate court. The Chief Justice (nor, indeed, the Senior Magistrate at the summary level) has no authority over the discharge of judicial functions by other Judges."

The Plaintiff's Submissions

17. Ms. Ventures submitted in her skeleton argument for this hearing that she had relied on further evidence to support her application that I should recuse myself from this matter as follows:
    a. On 11 December 2023 I was appointed to act as Chief Justice followed by my substantive appointment as Chief Justice on 8 February 2024 when I made remarks including that I "*pledged to be an advocate for the registrar*".
    b. The Second Defendant has been appointed since 11 December 2023 to be an acting judge by the Governor after consultation with me.

c. Acknowledgement of receipt of the Complaint, in respect of this matter, from the Executive Officer of Government House and a further letter dated 20 March 2024 stating that the Judicial and Legal Services Committee (the "**JLSC**") had been unable to address the complaint against me due a recent judgment *Junos v The Governor of Bermuda* [2024] CA (Bda) 4 Civ which deemed that the JLSC were acting unlawfully. Ms. Ventures took issue with the fact that the Governor had appointed me to be Chief Justice while her complaint was pending against me and that the JLSC was in limbo in respect of handling the complaint.

d. On 24 January 2024 industrial action was taken by court employees staging a sit-out' and later a 'sit-in' for unaddressed grievances revolving around complaints against the Registrar.

18. Ms. Ventures submitted that when taking into account her summons, affidavit evidence and the above facts, a well-informed observer would conclude that since the first hearing of her Originating Summons on 30 November 2023, that not only did I conduct the hearing with apparent bias in favour of the Second and Third Defendants, but in my roles as Acting Chief Justice and then Chief Justice, by giving consent to the Second Defendant to act as an acting judge, I have demonstrated apparent bias against Ms. Ventures and I have prejudged her allegations against the Defendants, consciously or unconsciously. She argued that if any thought had been given to the complaint against the Registrar then I would not have supported her to be appointed to be an acting judge.

19. Ms. Ventures also submitted that it was unfortunate that counsel for the Second and Third Defendants had used these recusal proceedings to attack her ability to have a McKenzie Friend speak for her, noting that over a number of years, Ms. Junos had been given permission by the Court of Appeal and some judges of the Supreme Court to be a McKenzie Friend.

20. Ms. Junos submitted that although the Second and Third Defendants had been personally served but had not appeared, I had assumed that the Attorney-General's Chambers was going to represent them. In essence, she stated that I allowed Mr. Taylor to make

disparaging remarks about Ms. Ventures' case and to defend the Second and Third Defendants. She submitted that I refused to let her summarize the case and I advised Ms. Ventures to 'take onboard' the comments of Mr. Taylor and that I warned Ms. Ventures about the potential of costs (particularly indemnity costs) if she loses which I could foresee. She argued that I could not un-hear what I had heard and that my demeanour had changed towards Ms. Ventures after Mr. Taylor's comments. As a result of the foregoing, Ms. Junos submits that I gave an appearance of bias and I appeared to align myself with the statements of Mr. Taylor.

21. Ms. Junos submits that I restricted her from speaking of her first-hand knowledge of Mr. Taylor in the Court of Appeal but allowed Mr. Taylor to speak from his knowledge on the distinguished careers of the Second and Third Defendants. She complains that I admonished her in respect of her role as a McKenzie friend for Ms. Ventures, reminding her that she was present to speak about Ms. Ventures' case, not about her knowledge of some other matter and then making allegations against Mr. Taylor in respect of that other matter. As a result, Ms. Junos submits that I wrongly accused her of pursuing her own agenda rather than assisting Ms. Ventures. To this point, Mr. Junos stated that she did not handle this part of the hearing correctly. She stated that she was trying to explain about Mr. Taylor's use of the Court of Appeal rule, but in response to my question about whether she was speaking about the present case or some other case, she replied in error that it was in other cases. She stated that she has filed an affidavit to clarify that point and she has apologized to Ms. Ventures about that error. She stated that she understood why I admonished her although she maintained that she was not pursuing her own agenda.

22. Ms. Junos referred to Table 2 which set out statements made by Mr. Taylor which she says I allowed him to make. The table also listed Ms. Ventures perceptions and thoughts at the time when she says she was being verbally attacked which included that she felt that she had no right to make her claim, her application was a disgrace and should not be heard, her matter will be thrown out before it is heard, that she should not be allowed to exercise her constitutional right to appeal and why was I allowing Mr. Taylor to make these statements. Ms. Junos submitted that these comments were an inappropriate personal attack on Ms.

Ventures rather than on her case and that I was being influenced by Mr. Taylor's statements even if unconsciously and that it showed an appearance of bias.

23. Ms. Junos submitted that I had used the term "*take on board*" three times to Ms. Ventures and/or Ms. Junos in the hearing which meant that I had clearly aligned my statement with Mr. Taylor's comments and that Ms. Ventures should take them as instructive and act accordingly, and according to the Complaint there was an unmistaken inference that Ms. Ventures should drop the whole case.

24. Ms. Junos 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:

> *"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.""*

25. Ms. Junos submitted that the hearing was seen as unfair by Ms. Ventures and thus, per the Bench Book, it was unsatisfactory, further arguing that perceptions are important and it was also important what the parties think.

<u>The Second and Third Defendants' Submissions</u>

26. Mr. Adamson submitted that Ms. Ventures claim for recusal contended that no Bermuda judge can deal with a claim against other senior members of the Bermuda judiciary. He made the following points:
    a. The proposition can be tested by applying it to other jurisdictions, for example, whether in England Wales, would claims involving UK judges be dealt with by judges from outside the UK, the answer being in the negative.

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

b. Judges deal with claims which involve criticisms of other members of the judiciary all the time – that is the very nature of an appeal.
c. In so far as the argument that Bermuda is a small jurisdiction, the argument goes both ways, as Clarke P pointed out in *Piper*.
d. All judges swear an oath of office which has meaning. Bermuda Judges routinely have to deal with grave allegations against senior officers with considerable influence. The oath protects them from concerns about such influence. As a result, no one objects to Bermuda judges dealing with the most serious claims against Government Ministers.

27. Mr. Adamson referred to *Burgess v McNeil* [2018] SC (Bda) 35 Civ at [28] – [33] where Subair Williams J summarised the legal principles in relation to McKenzie Friends, the essence being:
    a. The McKenzie Friend does not exist as such and has neither status or rights. The only relevant right is that of the litigant to reasonable assistance.
    b. The 'reasonable assistance' may take many forms. A McKenzie Friend may for instance sit next to the litigant in Court to take a note or quietly make suggestions.
    c. A McKenzie Friend, a lay person, does not without more have a right of audience and should only in 'exceptional circumstances' be permitted to address the Court.

28. Mr. Adamnson submitted that Southey AJ endorsed the restrictive approach to advocacy by McKenzie Friends in *Moulder v Commission of Inquiry into Historic Land Losses in Bermuda* [2022] SC (Bda) 59 Civ when he refused to allow the plaintiff's McKenzie Friend to appear as an advocate, noting at para 8(d) that "*advocacy rights are restricted for good reason*".

29. Mr. Adamson referred to the policy of the English Courts, contained in *Practice Guidance (McKenzie Friends: Civil and Family Courts)* [2010] 1 WLR 1881, which is to the same effect, noting that the present case is not an exceptional one:

    "Courts should be slow to grant any application from a litigant for a right of audience or a right to conduct litigation to any lay person, including a [McKenzie Friend]. This is because a person exercising such rights must ordinarily be properly trained, be

under professional discipline (including an obligation to ensure against liability for negligence) and be subject to an overriding duty to the court. These requirements are necessary for the protection all parties to litigation and are essential to the proper administration of justice."

30. Mr Adamson submitted that I had adjourned a Thursday Chambers' matter of a first appearance because the Second and Third Defendants were not present. He rejected Ms. Ventures' argument that the 'ordinary person' would not be treated in this away, arguing that it is a standard practice to adjourn a first appearance and then later on inquire about the non-appearance. He advanced that it would be unusual to proceed in the absence of the Defendants and thus it was sensible to adjourn the matter. He concluded that the reasonable observer would know that it was a routine decision of the Court in a Thursday Chambers' hearing.

31. Mr. Adamson rejected the complaint about what Mr. Taylor had submitted to the Court. He argued that Mr. Taylor made standard submissions, laying down a marker about the case and giving a warning to Ms. Ventures, especially in a case with claims about a conspiracy and fraud. He argued that it would be unusual for a Court to stop Mr. Taylor from making his submissions. He concluded that the reasonable observer would know that this is how a barrister would conduct himself in doing his job.

32. Mr. Adamson submitted that a reasonable observer would know, that in the circumstances, it was standard for the judge to give a costs warning to Ms. Ventures. He argued that although Ms. Junos had referred to the Bench Book section on the 'Perceptions of Justice' [pages 4], it was also important to consider the sections on 'Unrepresented Parties' [page 14] and 'Ways to Help' [page 16] where it set out that the aim was to ensure that the unrepresented parties understand what is going on and expected of them at all stages of the proceedings, including before during and after any attendances at a hearing. It was also necessary to ensure that the process was explained to them in a manner that they could understood. Thus, he argued that the Judge had a duty to point out to Ms. Ventures, the risks of bringing her claim and possible costs consequences, including indemnity costs, which can arise as a result of bringing an unsuccessful claim based on fraud. He concluded

that the reasonable observer would accept that the judge had a duty to inform Ms. Ventures of such consequences.

33. Mr. Adamson submitted that Ms. Ventures was conducting a granular examination of the words used by me in the Thursday Chambers hearing. He argued however, that a fair reading of the transcripts showed that there was nothing that indicated that I had made up my mind or had reached any view on the matter, but on the contrary the transcript showed that I had gone to some length to explain what Ms. Ventures was embarking upon.

34. Mr. Adamson referred to Ms. Ventures' submissions about her complaint to the Judicial and Legal Services Committee not being resolved and her evidence that she may apply for judicial review about the way the Governor has handled a complaint against me. He argued that it was unreasonable that every time a complaint was made against a judge, that that judge should recuse himself from a case, noting that there was a significant risk to the justice system of such an approach.

The First Defendant's Submissions

35. Ms. Arnold supported the submissions of Mr. Adamson.

Analysis of the Recusal Application

36. In my view the Recusal Application should be refused for several reasons. I should note here that as I understand it, Ms. Venture's Recusal Summons is based on both actual and apparent 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

37. First, in *Moulder v Cox Hallett Wilkinson and Ors* [2024] SC (Bda 14 Civ I dealt with a recusal application. There, I wrote a paragraph about my Oath upon taking office. I repeat that paragraph in the next paragraph in this Ruling.

38. I was appointed a Puisne Judge in December 2020 and the Chief Justice in February 2024. On each occasion I took the 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 Oath 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.

Fact of a Complaint

39. Second, I reject the contention that I should recuse myself in this case simply because Ms. Ventures has made the Complaint against me to the Governor, which remains unresolved whilst the role of the JLSC is being addressed. I bear in mind the case of *Piper* and the statements of Clarke P about the proper application of the rules in a small jurisdiction. If every time a complaint was made against a judge, that judge had to recuse himself from the case, then there is a risk that complaints could be made for that very purpose. It would even be open to malicious, frivolous, weak complaints or ones without merit. The Court should protect itself from such a risk and it should apply the proper rules for an application for recusal, not just acting on the fact of a complaint. In respect of the handling of a complaint against a member of the Judiciary by the Governor and the JLSC, there are procedures for that in one form or another and the status of a complaint should not be a reason for recusal.

Bias

40. Third, I reject the submissions of Ms. Ventures that I have demonstrated apparent bias against her because I supported the appointment of the Second Defendant to be an acting judge whilst the present case is underway. The Court has regular business to attend to in judicial administration and in respect of hundreds of cases that pass through the justice system. Part of the business is appointing people in acting roles at various levels on a routine basis as the need arises. A need has arisen to appoint the Second Defendant as an acting judge for an ongoing period of time. In my view, such an appointment to support the wider needs of the justice system, in no way demonstrates an apparent bias against Ms. Ventures and neither does it show any favoritism to the Second Defendant. To that point, I reject the assertion that such an appointment shows that I have prejudged the allegations against the Defendants, consciously or unconsciously.

41. In respect of the above two points, a fair-minded and informed observer would be aware of the business of the Courts and complaint procedures. Thus, in my view, 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.

42. Fourth, a fair-minded and informed observer would be knowledgeable about the purpose of Thursday Chambers sessions in the civil courts which is to hear briefly about a case or application and then to issue directions for the progression of the matter to a hearing. Such an observer would also know that on a first appearance, the judge holding Chambers is most unlikely to hold a view of the matter, having not heard or seen evidence or submissions on anything in the case. Such an observer would also know that the Judge would expect the parties to come to Chambers having had some discussion on proposed directions or with agreed directions, sometimes in a draft order. In respect of the non-appearance of the Second and Third Defendants it is not unusual to adjourn a matter, with or without directions, and seek an explanation at a subsequent appearance.

43. Fifth, Ms. Junos takes issue with the comments of Mr. Taylor. In my view, despite Mr. Taylor not being counsel for the Second and Third Defendants, I do not agree that his comments affected me in any form. These Courts are adversarial and making tactical or

strategic comments as well as drawing battle lines are not unusual. I regarded Mr. Taylor's comments as putting down a marker about the case and that it was comments directed at the case, for which he appeared as counsel for a party, rather than a personal attack on Ms. Ventures. Ms. Ventures may not have liked hearing the comments but she chose to bring the matter and to make the serious claims that she did, and thus, she should be prepared for robust responses to the claims. In my view, there was nothing unusual about Mr. Taylor flagging up what he considered to be serious allegations with a high bar of proof and its consequences in the form of costs, including about indemnity costs if unsuccessful. To that point, judges hear preliminary comments from counsel about the opponent's case on a routine basis without it rendering the proceedings unfair or the judge being biased.

44. Sixth, Ms. Ventures takes issues with the words I stated when I addressed her, namely using the words "*take on board*" what Mr. Taylor had said at the hearing. I reject this complaint as it is the duty of the judge to draw to the attention of Ms. Ventures the consequences being contended by Mr. Taylor if she was unsuccessful in her claim, especially in a claim where fraud was being alleged. My use of the words "*take on board*" was for the purpose of ensuring that Mr. Ventures considered what had been said in Court. I refer to the Transcript produced by Ms. Ventures [at page 10 lines 9 - 15] where I stated in essence that Ms. Ventures should take on board what Mr. Taylor said, discuss it with her advisors and when the matter is heard again, we will deal with any applications. I also told Ms. Ventures that she should take on the information that I told her about costs and that: (i) I was impartial; (ii) these are serious allegations; and (iii) there are consequences if she was not successful on the serious allegations or the matter in total. In my view, it is incredulous to conclude that my statements were a directive to Ms. Ventures not to proceed with her claim or that it would be dismissed before it was even heard. I refer to the Bench Book where the Court has a duty to ensure that unrepresented parties understand what is going on and what is expected of them at all stages of the proceedings, with the explanation given in a manner that they can understand.

45. In my view, in respect of the above two points, 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.

46. Seventh, Ms. Ventures takes issue with how I addressed Ms. Junos. Based on the Transcript and the exchange between Ms. Junos and me, I took issue with what I perceived was her reference to Mr. Taylor in some other cases, rather than speaking as a McKenzie Friend for Ms. Ventures in the present case. Ms. Junos has in her submissions conceded that she answered my question on that point incorrectly. A judge has a role to manage his Court, and having without reservation granted Ms. Ventures' request to have Ms. Junos as her McKenzie Friend, it was my duty to ensure that Ms. Junos complied with her role. In my view, based on the facts at that time, I quite rightly admonished her for stepping outside of her role. I bear in mind the case of *Burgess v McNeil* where Subair Williams J outlined the role of McKenzie Friends, the *UK Practice Guidance on McKenzie Friends* and the case of *Moulder* where Southey AJ remarked that "*advocacy rights are restricted for good reasons*". An informed observer would be familiar with the role of a McKenzie Friend. In my view, taking an objective view of this point, the fair-minded and informed observer, having considered these facts would not conclude that there was a real possibility of bias.

47. Eighth, Ms. Ventures relies on the Bench Book to state that because she thought the hearing was unfair therefore it was unsatisfactory. I reject any of Ms. Junos' 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 Bench Book is a very useful informational guide to judges in assisting in the performance of their roles. Thus, it is useful in a number of areas including the areas highlighted by Mr. Adamson on 'Unrepresented Parties' and 'Ways to Help' where the aim was to ensure that unrepresented parties understand what is going on and expected of them at all stages of the proceedings. In light of the reasons stated, 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.

48. Ninth, I reject Ms. Ventures' submissions that I should recuse myself because I am subordinate to Bell JA as he is a Justice of Appeal. The fair-minded and informed observer

would know that the business of the Court of Appeal is to hear appeals from the rulings and judgments of the judges of the Supreme Court. That is their principal purpose. In as much as the Supreme Court is subordinate to the Court of Appeal and is bound to follow and give effect to the judgments and orders of the Court of appeal, that hierarchical relationship does not undermine in any way the independence of a judge of the Supreme Court. Further, such an observer would be mindful of the Oath that judges take. I rely on the *2006 Guidelines for Judicial Conduct* where it states that judges are independent in the performance of their judicial functions, not only from other branches of government, but also from each other. Thus, Bell JA has no authority over the discharge of my judicial functions and the reverse is equally true, with none of us having any such expectations whatsoever.

49. Tenth, I reject Ms. Ventures' submissions that I should recuse myself because I work intimately on a daily basis with the Registrar of the Supreme Court. I would not apply the word "intimately" to the relationship, with a better description being that it is professional relationship with respect to our roles in the justice system. To that point, I refer to the Court of Appeal case of *Junos* where the panel consisted of justices of appeal other than the President who had most likely recused himself since he was the chair of the JLSC which protocol was the subject of the appeal. There, the three justices of appeal did not recuse themselves from the appeal because of their working relationship with the President; instead they were true to their judicial oaths, heard the appeal and rendered the judgment of the Court which essentially was not in favour of the authority of the JLSC as it was understood to be.

50. I also reject Ms. Ventures' assertion that when I said upon my appointment as Chief Justice that I "*pledged to be an advocate for the registrar*", it means that am biased towards the Registrar. I have reviewed the Royal Gazette article[2], which is no doubt where Ms. Ventures obtained that quote. Amongst my full remarks, the article states "*I pledge to be an advocate for the bench to enable us to be equipped with the tools and resources to allow us to serve the people of Bermuda efficiently" Mr Justice Mussenden said. I also pledge to*

[2] https://www.royalgazette.com/general/news/article/20240209/larry-mussenden-sworn-in-as-chief-justice/

be an advocate for the registrar and court staff as they work towards delivering excellent services to court users. I also pledge to work with Her Excellency the Governor and others to ensure that the independence of the judiciary is maintained and developed." Thus, it is unfortunate that Ms. Ventures chose to cherry-pick those few words that she did, but put in the correct context, my remarks speak for themselves and thus the fair-minded and informed observer, having considered these facts would not conclude that there was a real possibility of bias towards the Second Defendant.

51. Eleventh, taking the above two points together, in my view, the assertion of bias fails to meet the test as set out in *Porter v Magill*. In doing so I rely on the Oath that I took. I also rely on *Saxmere Company Limited* where the Court commented on the independence of the judge in decision-making and the application of the Oath to do right to all manner of people after the laws and usages of Bermuda without fear or favour, affection or ill-will. Additionally, as an example, judges hear cases involving the Government and Ministers on a regular basis, such cases being decided for or against the Government and Ministers on the merits of each case.

52. Twelfth, having set out these issues, the question is whether Ms. Ventures has discharged her 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 and reasons 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 Ms. Ventures in the present case. Therefore, I dismiss her Recusal Application.

Conclusion

53. I am not satisfied that I should grant the Recusal Application and therefore I dismiss it.

54. 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 an Assistant or Acting Registrar if not agreed.

55. In respect of the Strike-Out Applications, if the parties are not able to file a consent order for directions within 7 days, then I direct the parties as follows:
    a. Submit within 14 days from the date of this Ruling agreed dates in October and November for one day to hear the Strike-Out applications.
    b. Defendants have leave to file any affidavit evidence in support of the Strike-Out Applications within 14 days.
    c. Plaintiff has leave to file any affidavit evidence in reply within 14 days thereafter.
    d. Skeleton arguments and case authorities to be submitted 3 days before the hearing.
    e. Liberty to apply in respect of these directions.
    f. Counsel for the Second and Third Defendants to file and serve an Order for these directions for the Strike-Out Applications.

Dated 13 August 2024

LARRY MUSSENDEN
CHIEF JUSTICE