Neutral Citation Number: [2025] CA (Bda) 2 Civ

Civil Appeal No. 40 of 2022
Civil Appeal No. 36 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ASSISTANT JUSTICE SOUTHEY
CASE NUMBER 2021: No. 29

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 11/12/2024 – 11/13/2024

Before:

THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, THE HON GEOFFREY BELL
and
JUSTICE OF APPEAL, THE RT HON DAME ELIZABETH GLOSTER DBE

- -

Between:

CIVIL APPEAL No. 40 of 2022

LEYONI JUNOS

Appellant

- and -

THE PREMIER OF BERMUDA

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondent

CIVIL APPEAL No. 36 of 2023

ROBERT GEORGE GREEN MOULDER

Appellant

- and -

COMMISION OF INQUIRY INTO THE HISTORIC LOSSES OF LAND IN BERMUDA

Respondent

The Appellants appeared as Litigants in Person
Mr Ryan Hawthorne, of Trott & Duncan Limited, for the Commission of Inquiry
Ms Lauren Sadler-Best of the Attorney General's Chambers, for the Premier of Bermuda

Hearing date(s): 12 – 13 November 2024
Date of Judgment: 31 January 2025

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Judicial review - delay - duty to act promptly - extension of time - renewed application for recusal - application for review of earlier judgment - relevant criteria - lack of exceptional circumstances - leave to apply for judicial review refused

JUDGMENT

SIR CHRISTOPHER CLARKE P

1. On 12 and 13 November 2024 we were scheduled to hear the appeals of Ms Junos and Mr Moulder in which they claimed that they should have been given leave to apply for judicial review of decisions made by the Commission of Inquiry into Historic Land Losses of Land in Bermuda ("the Commission"). Before we could embark on that hearing it was necessary for us to consider a renewed application contained in a Notice of Motion dated 7 November 2024 filed by Ms Junos and Mr Moulder that I and Justices of Appeal Bell and Kawaley should reconsider recusing ourselves from all aspects of this matter for a number of reasons which relate to the

sequence of events since the first application was made by the Appellants for the recusal of the three of us in the November Session of 2023.

2. The membership of the Court which was due to sit on the two current appeals was myself, and Justices of Appeal Bell and Gloster. Any possible recusal on the part of Justice of Appeal Kawaley does not, therefore, have, presently, to be considered. It is not suggested that Justice of Appeal Gloster should consider recusing herself.

3. The appeals in the several cases which relate to the Commission have a fairly long and complicated history. They are, in the case of the present appellants (Ms Junos and Mr Moulder), appeals from the decisions of Assistant Justice Southey KC ("Southey AJ") given on 5 August 2022. Since the application for reconsideration of recusal is based on complaints about how events have developed in relation to these appeals it is convenient to recount some of the history in this judgment.

4. There have been five different appeals, namely:

   (i) Appeal No 36 of 2023 in which the appellant is Mr Robert Moulder and the Respondent is the Commission;

   (ii) Appeal No 39 of 2022 in which the appellant is the Commission and the Respondents are Mr Piper and Mr Davis;

   (iii) Appeal No 40 of 2022 in which the appellant is Ms Leyoni Junos - who is a co-administrator of the Civil Justice Advocacy Group, and the Respondents are the Premier and the Commission;

   (iv) Appeal No 41 of 2022 in which the appellant is Mr Myron Piper and the Respondents are the Premier and the Commission;

   (v) Appeal No 41A of 2022 in which the appellant is Mr Raymond Davis (otherwise known as Khalid A Wasi) and the Respondents are the Premier and the Commission;

   The appeals which are currently before us are Appeal No 40 of 2022 (Ms Junos) from the decision in Case 179 of 2022 and Appeal No 36 of 2023 (Mr Moulder) from the decision in Case No 178 of 2022.

5. At a hearing between 15 and 17 November 2023 we (that is myself and Justices Bell and Kawaley) heard submissions from the parties as to how to progress these appeals. For that purpose, it was necessary to consider, inter alia, whether the appeals were ones which had been brought in time; whether the appellant required

leave to appeal; whether, if an extension of time or leave was needed it should be given and, if so on what terms; and how matters should progress for the future. It was also necessary to determine whether Protective Costs Orders ("PCOs") and a waiver of fees should be granted.

6. At the beginning of the hearing in November 2023 all three members of the Court were invited by one or more of the individual appellants to recuse, or consider recusing, themselves. We heard extensive argument on that point at the conclusion of which we indicated that we declined to recuse ourselves and would give our reasons for declining to do so in our judgment in relation to the progress of the five appeals.

7. By a Notice of Motion dated 6 December 2023 in Appeals 40 (Ms Junos) and 41 (Mr Piper), but not in Appeal 36 (Mr Moulder) – Ms Junos and Mr Piper applied for leave to appeal to the Privy Council against the refusal of Bell JA to recuse himself. The Notice of Motion began with these words:

> "*The appellants are not yet in receipt of a written judgment, ruling or reasons on the refusal to recuse, but since the 21-day appeal period is at hand, they are filing the Notice of Motion for leave out of caution of being deemed out of time"*

And ended with the words:

> *"And the Appellants reserve the right to respond more fully and more specifically to the written reasons for the refusal of the recusal applications once they are made available by the Court"*

8. As is apparent from its terms:

   (a) The Notice of Motion was filed out of an abundance of caution in order not to fall foul of the expiry of the 21 days' time period for applications to the Court of Appeal for leave to appeal to the Privy Council laid down in section 3 of the Appeals Act 1911.

   (b) There was a real possibility that, after our judgment which included the reasons for the refusal of recusal was handed down, the appellants would wish to respond more fully to the reasons as specified.

   In those circumstances it might be thought inappropriate for the Court to issue a ruling on the Notice of Motion for leave without giving the appellants the opportunity sought in the Notice of Motion to respond to our judgment giving reasons for refusing recusal. So far as I am aware no request was made after 6

December 2023 for a ruling on the Notice of Motion to be given before the judgment which contained the ruling on recusal was delivered.

9. On 22 February 2024 we handed down our ruling in all five appeals. The Ruling is substantial (104 paragraphs) and deals with a number of issues. It included:

   (a) The reasons for our declining to recuse ourselves - paragraphs 5 to 19;

   (b) A history of the course of the proceedings in each of the five appeals - paragraphs 20 to 54;

   (c) Determinations that the Davis appeal was only in time if a document dated 18 August 2022 was to be treated as a notice of appeal; that the Piper appeal was four days out of time and that the Junos and Moulder appeals needed, but did not have, leave to appeal from the Supreme Court – paragraph 56;

   (d) Determinations that Mr Moulder's Notice of Appeal insofar as it raised a number of complaints was out of time – paragraph 69;

   (e) A grant to Mr Davis of leave to file within 28 days a Notice of Appeal from the judgment of the Supreme Court of 5 August 2022 in Case No 29 of 2021; and a grant to Mr Piper of an enlargement of time until 20 September 2022 for the filing of his Notice of Appeal from the same judgment(which had already been filed on that date) but only on the grounds that the Commission was or acted ultra vires - paragraph 57;

   (f) A decision that Ms Junos required leave to appeal from the judgment of 5 August 2022 in Case No 179 on the ground that the decision was (contrary to her submissions) interlocutory (paragraphs 59 to 65).

   (g) The grant to Ms Junos of leave to appeal the decision of 5 August 2022 but only in respect of her application (which Southey AJ had denied) for leave to seek judicial review on the ground that the appointment of the Commission was ultra vires section 1, or that the Commission acted ultra

vires section 6 of the Commissions of Inquiry Act - paragraph 66;

(h) The grant to Mr Moulder of leave to appeal the decision of 31 May 2023 in Case No 178 but "*only in respect of his application for leave to seek judicial review on the grounds that the Commission's reasons for making no recommendation in his case were flawed because there was no basis for refusing to consider (i) matters that followed the order of this Court returning Mr Moulder's land and (ii) criminality and, thus, making no recommendation in his case*"; and not insofar as he sought to challenge the decision of the Commission to hear his evidence in camera or the vacation of all orders of the judge "penalizing [Mr Moulder] with indemnity costs or general costs" – paragraph 70;

(i) A decision that in relation to the appeals of Messrs Davis, Piper Junos and Moulder the Court should:

(i) waive the requirements to make a deposit under Order 2 Rule 9 or to make a deposit or give security by bond under Order 2 Rule 10 or pay the fee for settling the Record or a hearing fee; and

(ii) make a PCO order in the terms set out in paragraph [85] – in fact the relevant paragraph was [84] paragraph [80] – [84]

Those terms were as follows:

"*I would, therefore order that, in the event that any of the appeals in Appeals 40, 41, 41A of 2022, or in the appeal by Mr Davis against the decision of October 22 2022, or in Appeal No 36 of 2023 is dismissed, no order for costs shall be made against the unsuccessful appellant, save in relation to any costs that have been incurred because of a failure by the relevant appellant to act reasonably or to comply with orders of the Court. In addition, the Court reserves the right, in the case of any of the appellants, to revoke or vary the Protective Costs Order in relation to all future costs in the event that, in the judgment of the Court, the behaviour of the relevant appellant justifies the making of such an order*."

(j) A decision that Counsel for the Commission should assume responsibility for settling the Records in the appeals.

10. The judgment recorded – paragraph 88 - that there was no hope of the appeals being heard in the March session but that the Court very much hoped that they would be heard in June. I recorded that the Davis/Piper appeals and the Commission's appeal needed to be heard together. I also observed that I would add the Junos appeal to that list because it did not seem to me that it raised additional considerations to those that were set out in the other three appeals which all concerned whether the appointment of the Commission was ultra vires the Premier or whether the Commission acted ultra vires its powers. I made no order as to when the several appeals should be held,

11. At paragraphs 91 and 92 I said the following:

> "*91 It is of the greatest importance that the parties cooperate to the highest degree with the Court and each other in order to enable the Court to determine as soon as can be done the essential issues as to the validity of the Commission or its approach. They should avoid, as far as possible, raising ancillary or tangential issues or crawling over old history, insofar as that distracts from the core issues. The Court needs to have the relevant material assembled in proper order and provided to it in sufficient time to allow for proper consideration. The submissions need to be as clear, concise and structured as is possible. In this field, the likelihood of success is not measured by the size of submissions but by their quality. Nothing is worse that the intermittent provision of materials, disregard of timetables, last minute production of documents previously available and submissions that are opaque, meandering or difficult to follow.*
>
> *92. In order to keep these appeals on track, it is necessary (a) that the Registrar should monitor the process of preparation, holding whatever case management conferences are necessary; and (b) that the parties should comply with directions given by the Court and communicate with it where necessary. In the latter respect, there appears to have been a noticeable failure by some of the appellants, which is unhelpful to the Court and to the advancement of the appellants' cases. If such failure persists, the relevant appellant may find that he or she is held liable for the costs attributable to it or that the PCO is revoked for future costs, or that his or her appeals are stood out of the list."*

12. No Notice of Motion for leave to appeal the judgment of 22 February 2024 to the Privy Council has ever been filed.

13. I had left Bermuda at the end of the third week in November 2023 and did not return until Friday 1 March 2024. A copy of the Notice of Motion of 6 December 2023 was provided to me, in an email from the Registrar, on 14 December 2023.

14. On 6 March 2024 we held a hearing in the matter of *Junos v The Governor of Bermuda*, a case concerning the ambit of the powers of the Judicial and Legal Services Committee. At the very end of the hearing, I told Ms Junos that Justice Bell would not be sitting in June; and I said that, in those circumstances the matters raised in the petition were moot and I would hope that in those circumstances it would not be necessary for her to seek leave to appeal to the Privy Council. Ms Junos asked for this question to be communicated to her and Mr Piper in writing. The terms in which I spoke appear in the transcript, of the hearing, the relevant passage in which is attached[1] (together with the email correspondence referred to in the next paragraph), in the course of which I said that I thought it would be polite to let Ms Junos know what the position was about the June hearing.

15. On the same day an email was sent by the Assistant Registrar to Ms Junos. Ms Junos replied the same day. She made the point that the recusal applications were directed to the hearing in November 2023 and not only the anticipated future hearings. I follow that point, which my observations on 6 March 2024 had not addressed; but, in circumstances where no application has been made for leave to appeal from the decision of 22 February 2024 it is debatable as to what relief would be available from the Privy Council (if it decided that Bell JA should have recused himself) in relation to the directions given in that judgment regarding the June hearing.

16. Ms Junos said that she and Mr Piper would discuss "*this new development in light of the recent judgment of the Court of Appeal*" [i.e. the judgment of 22 February 2024] and that she and Mr Piper would respond in the near future.

17. It does not appear that any response was made thereafter to the email of the Assistant Registrar of 6 March 2024.

18. In the light of the 22 February 2024 judgment Counsel for the Commission embarked on the task of settling the Records for the appeals. Ms Junos contributed to the process: see the email chain on 20 and 21 March 2024, which is at Tab 6 of the chronological bundle provided for the present hearing.

19. On 15 March 2024 Acting Justice Wheatley, sitting as a single judge of the Court of Appeal, held a procedural hearing, which was attended by both Ms Junos and Mr Moulder at which she ordered, inter alia, that the submissions of each of them should be filed and served on or before 19 April 2024 and that each party should at the same time send a copy of their Authorities to the Attorney General's Chambers. The

[1] Line 16 on page 10 should read "*that if the position is that it is moot*"

appeals were to be fixed for mention on 24 April 2024. The submissions of each Respondent were to be filed and served on or before 10 May 2024. The order noted that Counsel for the Commission had suggested that 5 days might be insufficient for the hearing of these appeals and proposed that they be set down for 7 days.

20. The mention took place on 24 April 2024 at which Mr Moulder appeared in person and Ms Junos did not appear. I understand that she may have been unwell. Acting Justice Wheatley ordered, inter alia, that the Junos and Moulder submissions in Civil Appeals 40 of 2022 and 36 of 2023 should be filed and served within 21 days i.e. by 15 May 2024. The Respondents were to file their submissions in response within 21 days thereafter. The order also provided that these appeals would be set down for two days in the November session "*unless the President otherwise orders*". I have made no such order, nor have I been requested so to do. Nor was any application ever made that Ms Junos or Mr Moulder should not have to comply with the order of 24 April 2024 for the provision of skeletons.

21. It does not seem to me surprising that Acting Justice Wheatley made the order that she did. In the absence of any submissions the Junos and Moulder matters could not readily be determined in June.

22. The hearings in March and April were not short and in the course of them attempts were made to get everything in order. And, as something of last resort, the question of separating the appeals was raised.

23. On 15 May 2024 a Notice of Motion was filed in Appeals 40 and 41 of 2022 and 39 (semble a mistake for 36) of 2023 by Messrs Junos Piper and Moulder seeking a review of the judgment of 22 February 2024 pursuant to Order 2/28 and Order 2/35 of the Rules of the Court of Appeal of Bermuda. I received a copy of this notice when in London. I did not give any instructions as to how it should be dealt with. In the event the application was not determined in the June session.

24. The Notice of Motion was made under Order 2/28 and Order 2/35 of the Rules of the Court of Appeal of Bermuda. Those rules provide as follows:

> "2/28 Review of judgment
>
> The Court shall not review any judgment once given and delivered by it save in accordance with the practice of the Court of Appeal in England
>
> 2/35 Matters not expressly provided for
>
> 35 Where no other provision is made by these Rules the procedure and practices for the time being in force in the Court of Appeal in England shall

apply insofar as not inconsistent with these Rules and the forms in use therein may be used with such adaptations as are necessary."

25. Order 52 Rule 30 of the Civil Procedure Rules in England and Wales reads as follows:

> "VII REOPENING FINAL APPEALS
> Reopening of final appeals
> 52.30
> (1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless—
> (a) It is necessary to do so in order to avoid real injustice;
> (b) The circumstances are exceptional and make it appropriate to reopen the appeal; and
> (c) There is no alternative effective remedy.
> (2) In paragraphs (1), (3), (4) and (6), "appeal" includes an application for permission to appeal.
> (3) This rule does not apply to appeals to the County Court.
> (4) Permission is needed to make an application under this rule to reopen a final determination of an appeal even in cases where under rule 52.3(1) permission was not needed for the original appeal.
> (5) There is no right to an oral hearing of an application for permission unless, exceptionally, the judge so directs.
> (6) The judge must not grant permission without directing the application to be served on the other party to the original appeal and giving that party an opportunity to make representations.
> (7) There is no right of appeal or review from the decision of the judge on the application for permission, which is final.
> (8) The procedure for making an application for permission is set out in Practice Direction 52A.

26. Section VII of Practice Direction 52 A provides as follows:

> SECTION VII – REOPENING APPEALS (RULE 52.30)
>
> 7.1 A party applying for permission to reopen an appeal or an application for permission to appeal must apply for such permission from the court whose decision the party wishes to reopen.
>
> 7.2 The application for permission must be made by application notice and be supported by written evidence, verified by a statement of truth. A copy of the

application for permission must not be served on any other party to the original appeal unless the court so directs.

7.3 Where the court directs that the application for permission is to be served on another party, that party may, within 14 days of the service on him of the copy of the application, file and serve a written statement either supporting or opposing the application.

7.4 The application for permission will be considered on paper by a single judge.

27. A preliminary question arises as to whether what is now being sought is the re-opening of a "*final determination of any appeal*". In my judgment it is. The Order is headed "*Reopening of final appeals"* The rule, itself, does not, however, refer to a determination of a final appeal but to "*a final determination of <u>any appeal</u>*": Order 52 Rule 30 (2). And "*appeal*" includes (sic) any application for permission to appeal. Given that what we had to consider was whether or not there should be permission to appeal the refusal of permission to apply for judicial review, and what we decided was that there should be limited permission, the case would seem to come within the section, even though Ms Junos contended that she did not need permission. We proceeded as if she had sought it. In any event I shall proceed on the assumption that this is so, despite Ms Junos' submission that there was no final determination of any appeal (in which case her application of 15 May 2024 was invalid).

28. As is apparent the rules and practice in procedure in England and Wales require that a party who seeks a re-opening of an appeal needs to seek permission from a single judge who will determine the matter on the papers and whose decision is final. No application for permission was made. The Notice of Motion called for the parties to attend before the "*fully constituted Court of Appeal*" and plainly did not contemplate a determination by a single judge on the papers.

29. In order to progress matters, we indicated to the parties that we would consider the application under Order 2/28 and 35 and determine (a) whether to give leave; and (b) if we did, whether to grant a remedy and, if so, what remedy it should be.

30. Thus, the position from mid-May onwards was that there was an extant, albeit defective, application to the full court for review of the decision of 22 February 2024, for the making of which permission had not been sought. The Court had not responded to that application nor had Ms Junos inquired as to what was happening in relation to it.

31. What had not changed was the fact that there was an order of the Court that the submissions of Ms Junos and Mr Moulder should be filed by 15 May 2024 and that the appeals would be heard over two days in the November session. No application was ever made for Ms Junos and Mr Moulder to be released from the order to provide

submissions. On 30 May 2024 the Assistant Registrar sent an email to, inter alios, Ms Junos and Mr Moulder, to confirm that these appeals would not be heard in the June session and that "*as highlighted at the hearing in March, and taking into account the availability of the Court, there is not sufficient time to hear the Commission of Inquiry matters involving Ms Junos and Mr Moulder in June*" and that the intention was to have these matters heard in the session following.

32. No submissions were thereafter provided by either Ms Junos or Mr Moulder.

33. On 11 October 2024 the Court handed down judgment in the Piper and Davis cases. The Court held that the appointment of the Commission of the Inquiry on the terms on which it was in fact appointed was not *ultra vires* the Premier and that, contrary to the decision of Southey AJ, the Commission had wrongly excluded consideration of Mr Davis' case.

34. On 18 October 2024 the Acting Registrar emailed the parties in the current appeals drawing their attention to the decision of 11 October 2024 and asking Ms Junos (a) what remained of her case now, given that the Court had found in favour of Mr Davis and Mr Piper, and (b) whether the parties intended to file further submissions to address the matters that remained in issue. The email said that, if so, the Court would need to receive the submissions very soon.

35. On 28 October 2024 the Acting Registrar wrote again to record that she had not yet received a response and that the appeals were scheduled to proceed on Tuesday – Wednesday 12-13 November. The email indicated that, if the appeals were to proceed, the Court must receive a response by 4.00 pm that day.

36. On 29 October 2024 Ms Junos emailed to advise the Court that the reasons for the delay in responding were multiple and of deep concern over how the Court had handled the whole matter. She raised two issues. The first was that neither she nor Mr Moulder were prepared to file skeleton arguments until the issues raised in the application for review were addressed. The second was that evidence in her Appeal Record was said to be pertinent to the *ultra vires* issues but was excluded from consideration by separating her appeal so as to be heard in the November session.

37. I would observe that, prior to 29 October 2024 Ms Junos had not, so far as I am aware, indicated to the Court that she took this position; nor had she made representations in May 2024 or, so far as I can tell, thereafter, that her case should not be heard in the November session but earlier. In an email of September 16 2024 the Acting Registrar advised her that we intended to hand down in October a judgment in the Davis and Piper case, and that that decision would be binding on the Court of Appeal. It was not suggested by Ms Junos that we should postpone any such hand down until the determination of her appeal against the refusal of leave to apply for judicial review or

the determination of that application if leave was given. Any such delay could have been very substantial.

38. On 30 October 2024 the Acting Registrar sent to the parties a note from me in which I said (at paragraph [17]) that the parties must notify the court forthwith as to (i) whether they intended to proceed with the appeals; and (ii) in the case of Ms Junos the basis of her doing so given the decision of the Court made on 11 October 2024; and (iii) as to when the parties would provide their submissions for the appeal.

39. To that Ms Junos replied that she intended to proceed with her appeal, and assist Mr Moulder with his, whether before the current Court of Appeal, or a differently constituted Court of Appeal or the Privy Council. She intended to argue that the Report of the Commission was ultra vires section 6 in that it did not represent the result of a full, faithful and impartial inquiry into the matters specified in their commission. When she would produce submissions would depend on whether there had to be argument on the extent to which her appeal was alive; whether she would be allowed to assist Mr Moulder; and whether the Notice of Motion for Review filed on 15 May 2024 was going to be properly heard.

40. On 1 November 2024 Ms Junos, Mr Moulder and Mr Piper sought leave to appeal from our decision of 11 October 2024. There seem to me to be problems with that application, so far as Ms Junos and Mr Moulder are concerned, since the judgment was given in Civil Appeal No 39 where the Commission was the appellant and Messrs Davis and Piper were the Respondents; and in Cases 41 and 41 A where Mr Piper and Mr Davis were the appellants and the Premier and the Commission were the Respondents.

41. On 5 November 2024 we handed down judgment in the case of *Junos v The Governor of Bermuda*. Since Mr Junos was present in Court, as were counsel for the Premier and the Commission, we asked her what the position was about skeletons and other matters. She informed us that she intended to file an application for a stay of the current appeals. She also told us that she intended to seek the recusal of myself and Justice Bell from sitting on this appeal. She also indicated that she had filed a complaint against me with the Governor under the Judicial and Legal Services Protocol.

42. Having heard from the parties we made an order requiring Ms Junos to serve by close of business on Thursday 7 November 2024:

    (a) Her intended application for a stay together with her submissions in support;

(b) Her intended application for the recusal of myself and Justice Bell; and

(c) Her submissions in support of the application dated 15 May 2024 for the court to review the judgment delivered inter alia in these appeals on 22 February 2024.

The second of these items was filed on 7 November 2024 but not the other two, We also ordered Mr Junos and Mr Moulder to file their submissions relating to the substance of the two appeals listed for hearing on Tuesday 12 and Wednesday 13 November 2024 by close of business on Friday 8 November 2024 with the respondents to file their submissions by close of business on Monday 11 November 2024. We received written submissions from the Respondents only.

Recusal

43. On November 7 2024 Ms Junos and Mr Moulder filed a Notice of Motion for the "renewed recusal" of myself and Justices Bell & Kawaley.

44. The matters that were said to require such recusal are the following:

(a) The three of us (myself, and Justices of Appeal Bell and Kawaley) effectively stayed any decision on Ms Junos' application for leave to appeal to the Privy Council from our decisions not to recuse ourselves for 3 months until after we released our judgments on 22 February 2024 – the intention being to make Ms Junos' applications moot. This allowed Justice Bell to sit on something in respect of which his recusal was sought.

(b) On 6 March 2024 I raised the issue of the outstanding Notice of Motion for leave to appeal to the Privy Council and "*improperly tried to influence and bully Ms Junos to withdraw her Notice of Motion to appeal*". Justices Bell and Kawaley "*sat mute in agreement".*

(c) The three of us "*held a Protective Costs Order approved in the February judgment as a threat over the head of all the Appellants to deter them from availing themselves of any rights they had as appellants to consider and take advice during the post judgment appeal period*".

(d) The appellants were then forced into a timetable set by Acting Judge Wheatley claiming to be sitting as a single Justice of Appeal, who had no authority as an acting judge or a single justice of appeal to preside over the hearings to settle the record and make orders on case management – duties

which were in the exclusive jurisdiction of the Registrar, as acknowledged in the February judgment.

(e) Acting Judge Wheatley did not have the jurisdiction of the Registrar of the Supreme Court during the hearings held on 15 March and 24 April 2024 and therefore had no jurisdiction to make the orders she made including the order to move the current appeals to the November hearing.

(f) Acting Judge Wheatley can only have presumed to act without jurisdiction on these matters with the full knowledge and arrangement of myself and Justices Bell and Kawaley.

(g) During the 24 April hearing Acting Judge Wheatley ordered that a case management hearing should take place in respect of the first and second appellants (i.e. Ms Junos and Mr Moulder) in June or July and that a Notice of hearing would be sent to them. No notice was ever sent, and no such hearing was scheduled.

(h) The Notice of Motion of May 15 2024 was *"deliberately and consciously ignored*" by me for 5 months. The appellants do not believe that the Registrar or the person appointed to act as Registrar during this period would not have responded without an instruction from me.

(i) I, with the participation and agreement of Justices Bell and Kawaley "*premeditatively decided*" to exclude from the February and October judgments (i) the history of the delay of these proceedings by the Judiciary and the fact that all civil and commercial judges in the Court below were conflicted; and (ii) the material evidence of Mr Robinson – Justice Bell being particularly determined that such evidence be excluded, supported by myself and Justice Kawaley.

(j) All the above issues are said to be illustrative of judges "*who cannot be true to their oath of impartiality and are more interested in protecting the image of the judiciary than protecting the public interest*."

45. Justice Bell and I declined the invitation to recuse ourselves. My reasons are as follows.

46. I cannot accept that a fair minded and fully informed observer would conclude on the facts that there was a real possibility of bias on my part. As to the matters referred to above:

(i) The Notice of Motion was filed on 6 December 2023 within the 21-day period and, itself, contemplated that further submissions in support would or could be made after the decision giving reasons was handed down – a process which would be fruitless if an adverse ruling on leave had already been given. Further it was not the delay in providing reasons for recusal which made the application moot. Insofar as reliance is placed on Justice Bell participating in the November 2023 hearing and the February 2024 decision, the delay either (a) did not render the application moot because, if leave is given either by us or by the Privy Council, and the Privy Council determined that Justice Bell should have recused himself, then it could set aside some or all of the decision of February 22 2024 (whether it would do so seems to me questionable); or (b) it was rendered moot because of the failure, in the events which happened, of the present appellants to seek leave to seek to appeal to the Privy Council from the decision of February 22 2024. Further, having declined to recuse ourselves we were entitled to continue with Justice Bell sitting (no application was made that we should not do so), and, even if we had given reasons for our decision refusing leave as early as December 2023, the participation of Justice Bell would still have continued. Even if the Privy Council had given leave, any hearing of the appeal and the giving of judgment thereon would in all probability have taken several months at least. It would not have been right to delay the delivery of a judgment on the matters the subject of the November 2023 hearing, pending any determination of the recusal question by the Privy Council and no application was made that we should do so.

(ii) Nothing that I said on 6 March 2024 was improper, let alone bullying. I was entitled to ask Ms Junos whether, in the light of the fact that Justice Bell would not be sitting in June, she sought to proceed with the application for leave to appeal to the Privy Council. The inquiry was repeated in an email on the same day and a response was promised *"in the near future, once we have fully reviewed the recently released judgment*" which never came. In relation to that Ms Junos relies on the Notice of Motion of 15 May 2024.

(iii) The Protective Costs Order made by us was particularly favourable to its beneficiaries, protecting them from any order to pay costs in the event that their contentions failed. It was perfectly proper for it to provide that it should not apply "*in relation to costs that have been incurred because of a failure by the relevant appellant to act reasonably or to comply with the orders of the Court"* and that it

might be removed for the future "*in the event that, in the judgment of the Court, the behaviour of the relevant appellant justifies the making of such an order*." This was necessary in order that the Court would not be bound by the PCO however badly the Appellants behaved. The PCO was never used to deter the Appellants from taking advice and cannot sensibly have been understood as doing so.

(iv) Acting Justice Wheatley made the orders she made in her capacity as an Acting Justice. She was entitled so to do. Section 3 (3) of the *Court of Appeal Act 1964* provides that a judge of the Supreme Court may exercise any of the powers of a single Justice of Appeal; and section 14 of the same Act provides that, to the extent prescribed by the Rules, the powers of the Court of Appeal to hear and determine any interlocutory matter may be exercised by any Justice of Appeal in the same manner as they may be exercised by the Court of Appeal. Order 2/38 provides that a single Judge of the Court of Appeal may hear, determine and make orders on any interlocutory application. Ms Wheatley's position had changed since February 2024. On 29 February 2024 the Acting Governor approved her appointment to act as Puisne Judge for the period 4 March to 29 March 2024. This appointment was later extended to 3 May 2024 and then to 31 May 2024.

(v) Acting Justice Wheatley made the orders that she made without reference to me following hearings at which the parties were either present and made representations or could have been. Neither I nor, I am sure, Justice of Appeal Bell, knew that she would be acting without jurisdiction (not least because she was not) nor did we arrange that she should do so.

(vi) I understood that Judge Wheatley would conduct the case management hearings. It was wholly appropriate that she should do so since she had been involved in case management of these appeals for some time. Endeavouring to move matters forward. I played no part in the hearings (and was off island). Nor did Justice Bell.

(vii) I know not why a case management hearing was not convened after the order of 24 April 2024. I do not recall when I first saw the order that the appeals would be set down for 2 days in the November session unless otherwise ordered by me.

(viii) As I have said I did receive a copy of the Notice of Motion of 15 May 2024, when I was in England. (Justice Bell did not receive a copy). I

accept that I did not immediately address my mind to what action should be taken in respect of it; and that, not having done so, I failed to come back to the question. As can, I hope, be appreciated I had a heavy workload of preparation for the June session. and during it. It is not correct that I gave any instructions to anyone not to respond to it. In retrospect I regret (a) that I did not revert to the question as to what should be done in respect of it, for which I apologise; (b) that, so far as I recall, no one in the Court administration referred the question as to what was to be done to me again; and that (c) Ms Junos did not contact the Court administration on the point either; nor did she notify the Court that she would not comply with the order to file submissions until this Notice of Motion had been disposed of or seek a variation of the order for the provision of submissions.

(ix) As I have also said, the Notice of Motion was, in fact, defective in that it invited consideration by the full court and was not supported by written evidence verified by a statement of truth. Lastly, even if the Notice of Motion of 15 May 2024 had been addressed with extreme expedition – itself problematic because the Court would probably have required the application to be in proper form and the COI would probably need to be given the opportunity to consider the application - there was in the absence of skeleton arguments no realistic prospect of the appeals being heard in June.

(x) I did not "*premeditatedly*" decide to exclude from the February 22 2024 judgment the history of the delay to these judicial proceedings and the conflict of all civil and commercial judges in Bermuda, in order not to expose an extraordinary state of affairs in the judiciary. The February judgment had to deal with a number of issues relating to the progress of the five appeals. It took a long time to write and was substantial in itself. It would have served no useful purpose to set out the past history which was well known. Further, and in any event, there is nothing improper in judges being conflicted. Similar considerations apply to the October 2024 judgment.

(xi) Nor did I do the same in relation to Mr Dilton Robinson. I referred to his witness statement submitted to us by Mr Davis in paragraph [7] of my February judgment and the fact that he was not a party to any proceedings against the Commission. There was no need for me to do more in either the February 22 or October 24 judgments. There is also a reference to the evidence of Mr Dilton Robinson on which Ms Junos relied at paragraph 97 of the judgment of Justice Bell. Mr Robinson's claim to the Commission was ultimately withdrawn,

(xii) Lastly, I do not regard myself as conflicted because Ms Junos has filed a complaint with the Governor in relation to myself, Justices Bell and Kawaley, and Acting Justice Wheatley and because I am Chairman of the Judicial and Legal Services Committee. A judge complained about under the Protocol who is a member of the Committee is to have no involvement with the complaint.

47. It is entirely incorrect to say that I cannot be true to my judicial oath of impartiality. I have endeavoured to reach fair decisions in relation to the myriad procedural questions that have arisen in five separate appeals. In relation to the two current appeals I have been endeavouring, without much success, to ensure that these two appeals are in fact determined and that the Court has the submissions needed to enable it to address them.

The Notice of Motion of 15 May 2024

48. The matters complained of in the Notice of Motion of 15 May 2024 for review of the judgment of 22 February 2024 under Order 2/28 and Order 2/35 of the Court of Appeal Rules are, in short, the following:

The Court ran roughshod over the Appellants' right to appeal.

(i) The Court of Appeal issued a verbal ruling of refusal to recuse on 15 November 2023 and immediately proceeded to sit on matters without advising the Appellants of their right to appeal the refusal to recuse and without consideration of the 21-day period within which the Appellants had a right to consider appealing the ruling.

(ii) The Court chose not to act on the 6 December 2023 application for leave to appeal for three months and Justice Bell was allowed to influence and contribute to the judgment when the full court knew that the Appellants were trying to appeal his involvement in the November hearing. This means that the full court is of itself compromised.

(iii) On 6 March 2024 the Court improperly attempted to verbally influence Ms Junos to withdraw the application for leave to appeal to the Privy Council.

(iv) The Court set a direction hearing on 15 March 2024 to advance the appeals before the 21-day appeal period had expired and thus before the Appellants had proper time and opportunity to understand the import of the details of the Ruling and seek advice.

The Court amended /limited the Appellants grounds of appeal without due process.

(v) The Court in its February 2024 judgment limited the appellants ground of appeal without explanation or clarification by the Court on this and without there having been discussion about the Appellants' grounds of appeal in the November session.

(vi) This goes against natural justice and the Appellants' right to be heard on issues such as conflicts of interest and apparent or actual bias of the Commission.

The Court issued a ruling on the papers as to whether leave to appeal was required from the lower court in judicial review matters.

(vii) The court issued a ruling on the papers on whether leave to appeal was required from the lower court in judicial review matters. Ms Junos had expressed concern to the court that oral argument should be made, and the Court appeared to have made up their minds.

(viii) In the written judgment Ms Junos discovered that the Court had ignored the second part of her written emailed submission which clarified the Application Test for judicial review and where she showed that the Bermuda practice is contrary to the practice in England.

(ix) Ms Junos was challenging the default practice in Bermuda and should have had her arguments fully considered in a proper full hearing.

(x) Although the issue could be said to be moot because the court in fact granted leave the issue is one of immense importance to be properly decided in the public interest.

The Court made a decision which impacted the Appellants' right to be heard while not having the full facts and arguments before them.

(xi) The Court made decisions which impacted the Appellants' right to be heard while not having the full facts before them. Thus the Court questioned Ms Junos' standing to present the evidence of Mr Dilton Robinson and to assist Mr Moulder and it is unclear whether she will be able to assist Mr Moulder

(xii) In the case of Mr Piper, the Court wrote in paragraph [32] that the judge of the court below had found that the misdirection of the Commission was "immaterial in the case of Mr Piper" because the Commission was willing to consider his case and the dispute that followed was about procedure. The Court then stated "It is not clear to me whether or not that is so". In spite of this in paragraph 57 (h) the Court restricted Mr Piper to the relief sought in paragraph 4 (1) of his Notice of Appeal namely that the Commission was or acted ultra vires but not otherwise. Therefore, Mr Piper was being silenced as to how he was actually treated by the Commission.

(xiii) In the case of Mr Moulder, he was "*systematically abused and gaslighted by the Commission and has been restricted to one narrow point*".

49. As is apparent some of these contentions mirror what is said in support of the invitations to recuse. The first point to make about them is that some of them deal with matters that occurred before or after the February 22 2024 judgment and, for that reason, would not seem to impugn the judgment itself. Further, there are, as it seems to me, a number of points to be made in relation to these contentions, namely the following:

(i) Having given its decision on recusal with reasons to follow the Court was entitled to proceed with the November 2023 hearing. No application was made that it should not do so; and, if it had been suggested that the hearing should be postponed until the Privy Council had issued a ruling, it is highly doubtful that the Court would have thought it right to postpone a hearing in relation to the five appeals until then. Further the Court was not required to advise the appellants of their right to seek leave to appeal and it would appear that Ms Junos was, or became, well aware of it anyway.

(ii) The Court continued to sit despite the existence of the 6 December Notice of Motion. As I have said, that notice itself contemplated that it would be supplemented with further contentions following the delivery of the 24 February 2024 judgment. No request was made after the filing of that Notice of Motion for a ruling on the application for leave to be given before the hand down of the 22 February 2024 judgment, or for the February judgment to be postponed until the Privy Council had ruled on any application. Further the Court has not deprived Ms Junos of a right to appeal. It has refused leave (as it was entitled so to do) and it

will be for the Privy Council, if application is made to it, to decide whether to grant leave to appeal to it.

(iii) There was nothing improper in the Court asking Ms Junos on 6 March 2024 whether she intended to proceed with the application for leave to appeal from the refusal to recuse. And when the request was made by email a response was promised but never came.

(iv) There was no reason why the Court should not set a directions hearing on 15 March, which was, in fact, the day after the date on which the 21-day period after February 22 expired (2024 being a leap year).

(v) - (vi)
Given its decision that the parties needed leave to bring their appeal, the court was entitled to decide the extent to which such leave should be given. It did so when no application had in fact been made by Ms Junos or Mr Moulder for leave to appeal the refusal of leave to seek judicial review, so that the Court could have refused relief on that ground alone. The decision to grant leave, much out of time, was a form of assistance to Ms Junos (as it was to Mr Moulder). Further, it was apparent from the applications for leave what matters the parties sought to raise (and this had been the subject of consideration by the Supreme Court).

(vii) – (x)
The Court considered the argument of Ms Junos that she did not need leave to appeal and rejected it: but also gave leave. The point is therefore to some extent moot so far as the present parties are concerned.

Ms Junos contends that we were wrong to decide that leave was needed to appeal the refusal of leave to apply for judicial review, and complains that I did not refer to that part of her submissions contained in her email of 20 November 2023 headed "*Ms Junos Current Position After Having to Re-Visit the Issues*". I would observe (i) that those submissions related to the law in Northern Ireland, the United Kingdom and Hong Kong, where the rules are not the same as in Bermuda; and (ii) that in England permission to appeal is needed from the Court of Appeal: see Order 52.8. In Northern Ireland the rules expressly provide that leave shall not be required for an appeal to the Court of Appeal from an order refusing an application for leave to bring judicial review. In Hong Kong a refusal of leave to apply for judicial review is expressly excepted from the requirement to obtain leave to appeal to the Court of Appeal; see [46] of *H v Director of Immigration* FACV Nos 1 & 2 of 2020.

The decision on whether leave was required was made after consideration of the English authorities cited by Ms Junos: in the light of which it did not seem to me necessary to have further oral argument.

(xi) I referred to the evidence which Mr Robinson had supplied to Mr Davis; and the affidavit of Mr Robinson of 7 May 2020, on which Ms Junos relied, which was handed to the Court in November 2023, was considered by Bell JA at paragraph 97 of the February 2024 judgment in the part thereof dealing with the refusal of recusal on his part. The Court has indicated that it will allow Ms Junos to act as a McKenzie friend to Mr Moulder and consider the evidence of Mr Dilton Robinson. The sequence of events in respect of Mr Robinson's engagement with the Commission appears at pages 117 to 132 of Ms Junos' Record of Appeal. No useful purpose would be served by recounting that sequence in any detail. In brief, Mr Davis sent Mr Robinson's statement to the Commission in support of his case. The Commission decided to treat Mr Robinson separately from Mr Davis and allocated him a case number. The Commission told him that his case did not fall within the Commission's remit because it was a commercial case (like that of Mr Davis). But the Commission invited him to be a witness and to produce a range of documents. The matter ended with Mr Robinson declining to give evidence to the Commission if he was not to be granted standing, because he felt that the process was wrong and that the Commission was doing the people of Bermuda a disservice.

(xiii) The case of Mr Piper is not presently before us and in any event since Mr Piper needed leave to proceed out of time the Court was entitled to limit the matters on which he could proceed.

(xiv) The Court was entitled to grant Mr Moulder limited leave to appeal so as to include the points that Southey AJ had found arguable, and not to include the matters for which he had refused leave in August 2022: see check below.

50. The legal principles applicable to CPR 50-53 were set out by the English Court of Appeal in *Municipio de Marian v BHP Group PLC* [2021] EWCA Civ 1156, by reference to earlier authority, as follows:

> "60 The Court of Appeal (Sir Keith Lindblom SPT, Coulson and Andrews LJJ) revisited CPR 52.30 in R (Wingfield) v. Canterbury City Council [2020] EWCA Civ, [2021] 1 WLR 2863 ("Wingfield"), on the basis that "the clear message of [Goring] has still not been understood". At [61], five principles were extracted from the authorities as follows:

> "(1) A final determination of an appeal, including a refusal of permission to appeal, will not be reopened unless the circumstances are exceptional (Taylor v Lawrence).
> (2) There must be a powerful probability that a significant injustice has already occurred, and that reconsideration is the only effective remedy (Taylor v Lawrence,.. Re Uddin).
> (3) The paradigm case is fraud or bias or where the judge read the wrong papers (Barclays Bank v Guy, Lawal).
> (4) Matters such as the fact that a wrong result was reached earlier, or that there is fresh evidence, or that the amounts in issue are very large or the point in issue is important, are not of themselves sufficient to displace the fundamental public importance of the need for finality (Lawal).
> (5) There must be a powerful probability that the decision in question would have been different if the integrity of the earlier proceedings had not been critically undermined (Goring…)."

51. It is clear from the authorities that CPR 32.50 is, as Mr Hawthorne for the Commission put it, not a second bite at the cherry, a rehearing or a substitute for an appeal. The test cannot be interpreted so strictly that review of a judgment is impossible: but it is apparent that the threshold for the exercise of the power of renewal is a high one. The circumstances in which a determination can be set aside are exceptional. It is not sufficient, for instance, simply to say that the judge made what the applicant regards as an error of law (although that might be so if the judge read the wrong papers).

52. It does not seem to me that the facts of this case are so exceptional as to make it appropriate to reopen the appeals or that it is necessary to do so in order to avoid real injustice, or that they fit within the five principles set out above. I would therefore refuse Ms Junos and Mr Moulder leave to review the judgment of February 22 2024.

53. Ms Junos also placed reliance on Order 2 Rule 35. I do not regard that Rule as being of any assistance to her. Order 2, Rule 35 provides:

> "*Where no other provision is made by these rules, the procedure and practices for the time being in force in the Court of Appeal in England shall apply insofar as not inconsistent with these rules".*

As to that, there is another provision made by the rules, which is that contained in Order 2 Rule 28, that the court shall not review any judgment once given and delivered save in accordance with the practice of the Court of Appeal in England. So, even if , despite the existence of Order 2 Rule 28, you could look at Order 2, Rule 35, the relevant procedures and practices for the time being in force in the Court of Appeal in England are those contained in Order 52, Rule 30 and the practice note which relates to it.

The appeals seeking leave from the Court of Appeal to apply for judicial review.

Ms Junos

54. In our judgment of February 22 2024 we gave Ms Junos leave to appeal the decision of 5 August 2022 which refused her leave to apply for judicial review but only in respect of her application for leave to seek judicial review on the grounds that the appointment of the Commission was ultra vires section 1 or that the Commission acted ultra vires section 6 of the Act.

55. In retrospect the use of the expression "*acted ultra vires section 6 of the Act*" was potentially unclear. The claim in relation to section 1 was that the appointment of the Commission was beyond the powers of the Premier in that, so it was said, the Premier did not have the power under section 1 to appoint a Commission which, in effect, had a free hand to decide what it would, or would not, investigate. (Item 3 of the Relief in fact seeks a declaration that the COI acted ultra vires Section 1 (1), whereas if anyone acted ultra vires it was the Premier). Section 6, however, does not in terms confer powers; it specifies the obligation of the Commissioners to make a full faithful and impartial inquiry into the matters specified in their commission, and may be regarded as the mandate given to the Commissioners.

56. The phrase "*acted ultra vires section 6*" appears in paragraph 1 of the grounds on which relief is sought by Ms Junos, which reads as follows:

> *"The Report of the Commission into Historic Losses of Land in Bermuda (COI) is* ***ultra vires section 6 of the Commissions of Inquiry Act 1935*** *("the Act"),* ***in that it does not represent the result of a full, faithful and impartial inquiry into the matter specified in their commissions (the Terms of Reference in the Official Gazette) and is therefore not in the public interest.*** *The Report points to systemic procedural unfairness, political bias, important omissions and plain untruths – some examples to be given in the Applicant's first affidavit – which taints the entire credibility of the Commission and its findings*".

57. Ms Junos appears, therefore, to have been using the phrase *"ultra vires section* 6" as including actions or omissions which were in breach of the Commissioners' duties under section 6 of the Act. But the words "ultra vires" section 6 convey something more than simply acting in breach of section 6.

58. The expression "*ultra vires section 6*" can be taken to cover cases in which the Commission excluded a complaint even if it thought that it did fall within its remit or might do so, the exclusion being *ultra vires* because the Commission had no power to limit its actual remit by refusing to consider whether cases that fall within it or

might fall within it in fact did so . That was certainly the prime case in respect of which I contemplated that Ms Junos might be given leave to seek judicial review. (Such a position is different to the case in which the Commission concludes (wrongly) that the case is not within its remit). Mr Hawthorne submits that the expression "ultra vires section 6" in our judgment cannot be viewed as meaning no more than that there was a breach of the duty under section 6. I agree.

Delay

59. Ms Junos' Notice of Application to apply for judicial review was filed on Monday 13 June 2022. This was (only just) within the six-month period, given that that period expired at the previous weekend.

60. Southey AJ declined to grant leave to apply for judicial review because of the delay. In his judgment of 5 August 2022, following a hearing on 15 July 2022, he set out the relevant provisions as follows:

> "*Delay*
>
> *12. Section 68(1) of the Supreme Court Act 1905 provides that:*
>
> > *The Court may refuse to grant leave for the making of an application for judicial review, or to grant any relief sought on the application, if it considers that—*
> >
> > *(a) there has been undue delay in making the application; and*
> >
> > *(b) the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.*
>
> *13. Order 53, rule 4(1) of the Rules of the Supreme Court Act 1985 (GN/1985) ('the Supreme Court Rules') provides that:*
>
> > *An application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*
>
> *14. It is clear from the language of order 53, rule 4(1) that an application must be made promptly even if it is made within 6 months (Perinchief v Public Service Commission et al (Civ All No 6 of 2009). The primary requirement is promptness".*

61. There is, in fact, an additional subsection of section 68 namely:

> (2) *Subsection (1) is without prejudice to any enactment or Rule of Court which has the effect of limiting the time within which an application for judicial review can be made.*

62. Southey AJ concluded that the application was out of time and time should not be extended. What he said was this:

> *"16. The fact that the application was made within 6 months does not mean that it was prompt. There is no evidence that explains why this application was lodged on the very last day of the 6 month time limit. In oral argument, Ms Junos argued that it was practice in Bermuda that a claim merely needed to be lodged in 6 months and she was not aware of the requirement for promptness. She also argued that the report was long and it was published while COVID was still a factor.*
>
> *17. I have concluded that this application is out of time as it was not brought promptly:*
>
> *a. The reality is that I have no evidence explaining delay. References to the length of the report and COVID (which are not evidence) do not explain why it took 6 months to draft relatively short papers. 6 months is a relatively long period to draft pleadings.*
>
> *b. The judgment in Perinchief makes it clear what the law is. The law requires promptness. It is difficult to see how I can find that the practice can be as described by Ms Junos. I have no evidence of that practice and it would be contrary to the law.*
>
> *c. Ms Junos says she was not aware of the law. Again this is not evidenced. In any event I do not see how that can be relevant to the assessment of promptness. At most it is relevant to whether time should be extended*
>
> *18 Given that I have found that the claim is out of time, I have to consider whether to extend time. I have concluded that time should not be extended for the following reasons:*
>
> *a. The complete absence of any attempt to explain why the application was not brought earlier. Even assuming that Ms Junos was unaware of the requirement of promptness (and there appears to be no evidence of*

> *that), that does not mean she was not obliged to comply with the Supreme Court Rules. She plainly had some awareness of those rules as she was aware of the 6 month time limit.*
>
> *b. The lack of particulars in the grounds is a matter that weighs against an extension of time. Fairness to the Respondents requires a properly particularised application. That implies it is potentially unfair to extend time. Further, the delay in bringing these proceedings cannot be explained by time spent on a careful piece of drafting.*
>
> *c. The findings below regarding standing. I have found that the Applicant has standing to bring limited claims. However, the fact that she has no standing to bring the wider aspects of her claim weighs against an extension of time. It means that, at most, this will be a narrow claim.*
>
> *d. The findings below regarding merits. It appears to me that the merits are far from being sufficient to justify an extension of time.*

As to standing Southey AJ said this:

> *19 Rule 3(7) of the Supreme Court Rules provides: The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*
>
> *20. In general sufficient interest arise when someone is affected by a decision that is challenged (R (Badmus) v Secretary of State [2020] EWCA Civ 657 at [78].*
>
> *21. Consistent with the need for someone being affected, in recent years there has been consideration of whether there are better placed challengers when determining whether a person has standing (e.g. R (Jones) v Metropolitan Police Commissioner [2021] 1 WLR 519 at [61] – [62] and R (D) v Parole Board [2019] QB 285 at [110]). That is hardly surprising, if persons are allowed to challenge decisions when others more directly affected bring no challenge, there is no way of knowing whether those more directly affected object to the decision in question. The existence of a better placed challenger is a relevant factor but not necessarily determinative (R (Hammerton) v London Underground Ltd [2002] EWHC 2307 (Admin) at [201]).*
>
> *22. The Courts have recognized the possibility of public interest applications, particularly where insisting on a particular interest would*

potentially prevent the review of the legality of a decision (AXA General Insurance Ltd v HM Advocate [2012] 1 AC 868 at [170]).

23. Applying the case law above, it appears to me that Ms Junos lacks standing to bring many of the challenges that she seeks to bring. As I have already indicated, it appears to me that many of her complaints relate to the treatment of individual cases, although it is said that those cases are said to be examples of a flawed approach. Those are cases where the individual who complained to the Commission of Inquiry has a more direct interest in the proceedings. It appears to me that they cannot be made into a systemic challenge by seeking to link a number of cases together. It appears to me that the nature of a challenge does not change by adding additional challenges. Ms Junos argued that those individuals could not bring an application but I have no evidence of that."

63. Mr Hawthorne for the Commission drew our attention to the decision of the Privy Council in *C-Care (Mauritius) Ltd v Employment Relations Tribunal* [2022] UKPC 58 and the guidance contained in it on the role of appellate courts with regard to refusals of leave based on promptness. In that case the Board stated as follows:

> *10 It is well established, as indeed RSC Order 53 rule 4 says, that there is no fixed time limit of three months for bringing a judicial review claim. The primary requirement is that the claim must be brought "promptly". If an application made within three months does not satisfy this requirement, leave for the claim to be brought is liable to be refused: see, e.g., Mauritius Shipping Corporation Ltd v Employment Relations Tribunal [2019] UKPC 42; [2020] 1 All ER 844 ("Mauritius Shipping Corporation"), para 8.*
>
> *11 The term "promptly" requires an evaluative judgment to be made by the first instance court, having regard to the particular context and the specific facts of the case. An appellate court will only intervene if the first instance court has misdirected itself or reached a conclusion which it could not rationally reach in the circumstances of the particular case. As stated in Mauritius Shipping Corporation, para 12, there is "a high hurdle" for an appellant to surmount when seeking to show that the first instance court has erred in a decision to refuse leave for a judicial review claim to be brought, on the grounds that the application was not made promptly. The burden to show that a claim has been brought promptly rests on the claimant, since it is the claimant who asserts that it should have leave to bring its claim and the relevant information pertaining to the question whether it has acted promptly will be in its knowledge. This does not mean that the claimant has to adduce evidence about this in*

> *every case. It is entitled to wait to see if the defendant raises promptness as an issue. But the claimant has to be prepared to demonstrate that it has brought its claim promptly if it is challenged on that score. If the defendant objects that the claim has not been brought promptly, as the respondent and co-respondents did in this case, the onus will be on the claimant to explain what it has done and that it has acted with the appropriate promptness to be expected in the circumstances.*
>
> *15 Prejudice or detriment likely to be suffered as a result of delay, either by the defendant public authority or by others affected by a decision by it in their favour, may be a highly relevant factor when considering whether a judicial review claim has been brought with requisite promptness: see, e.g., Maharaj v National Energy Corporation of Trinidad and Tobago [2019] UKPC 5; [2019] 1 WLR 983, para 37. That is because, if it is likely that delay in bringing proceedings may result in prejudice or detriment to others, there will be a particular reason to expect the claimant to take action quickly. But the requirement of promptness applies in all cases and it cannot be reduced merely to a question of whether there has been prejudice or detriment to another person. It does not follow from the fact that prejudice or detriment is a relevant factor that an absence of prejudice or detriment means that the requirement of promptness is removed.*
>
> *16 In the present case, the Board is satisfied that the Supreme Court was entitled to conclude that the appellant's judicial review claim had not been brought promptly, and accordingly was entitled to refuse to grant leave for that claim to proceed. The Supreme Court did not misdirect itself and the conclusion it came to was properly open to it."*

64. Mr Hawthorne also drew attention to the fact that Ms Junos was well aware that the Commission took issue with her application not having been made promptly. In the Respondents' skeleton argument of 11 July 2022 the point was clearly taken that the application was out of time and that there was no basis to extend it. No application had been made for an extension nor excuse put forward in relation to the delay. Reliance was placed on the dicta of Huggins JA in *Re Waxoyl Limited* [1995] Bda LR 5 as to the need for an explanation for the delay and reasons which would tend to excuse it. Ms Junos filed a second affidavit following those submissions on 14 July 2022 (ROA 9/58) which did not address the question of promptness or advance any reasons or factors upon which the Court could exercise its discretion to extend time.

65. Mr Hawthorne submits that Southey AJ made no error of law in relation to delay and promptness. The burden of demonstrating promptness rested on Ms Junos. She did not seek to persuade Southey AJ that the application was filed promptly. She

relied on what she claimed to be the practice in Bermuda that an application for judicial review had to be made within 6 months of (in this case) the Report. This was wrong as a matter of practice and law: see *Perinchief* and *C-Care*. Southey AJ rightly concluded that there was no evidence before him upon which he could exercise his discretion to extend time. The Court of Appeal is in the same position having no evidence on which it could conclude that the application for judicial review was made promptly or any evidential basis upon which it could extend time. In any event the question is whether the judge was in error on the basis of the material that was before him.

66. Ms Junos repeated to us that she thought that she had a six-month window for bringing an application for leave to seek judicial review, that the substantial 500 plus page report took a long time to go through; and that, if she had known that she did not necessarily have a full six months, and that the interpretation would be that she should file within (say) three or four months, she would have made the effort to do so (Day 2/88). Sometime in February she had a bout of flu. In addition , there was a problem in that the Commission's documents were not deposited in the Archives until what would appear to be shortly before 9 June 2022, despite the fact that in the letter from the Commissioners to the Premier dated 31 July 2021 [Moulder 2 page 20] it was said that all documentation had been sent to the Government Department of Archives in accordance with the Archives Protocol. These matters, Ms Junos submitted, were circumstances which made a six-month period before filing acceptable. She also suggested that the rule requiring promptness should mean that promptness was only required in specific circumstances that required you to be prompt e.g. if the judicial review related to a building of historical interest which was about to be demolished, or, as in *Perinchief*, when the judicial review concerned the job of Solicitor General being given to a non-Bermudian when the appellant claimed that he should have been recommended. I disagree. The obligation to be prompt applies in every case.

67. If the only question was whether Southey AJ's decision that Ms Junos was out of time was one which was open to him, on the material that he had, I would accept that it was. But that was not the only question. It was necessary to consider whether to extend time. That would involve considering whether there was good reason for extending the period within which the Application could be made. Mr Hawthorne submits that, in relation to the question of an extension of time the position is no different to that which it is in relation to delay. The decision of Southey AJ was one to which he was entitled to come; no good reason for an extension was provided to him by Ms Junos; the Court of Appeal is not considering whether it should extend time but whether Southey AJ erred in not doing so; the issue of promptness and extension of time is not in Ms Junos ground of appeal (in fact it is at paragraph 3.10); and, even if we were to ignore that, there is no basis for us to decide that an extension should have been granted. Lastly Ms Junos (having filed no evidence)

cannot now rely on further reasons for delay that could have been but were not put to Southey AJ.

68. In relation to any extension Southey AJ relied on (a) the absence of any attempt to explain why the application was not brought earlier; (b) the lack of particulars in the grounds (he said that he "*struggled to clarify the grounds by reference to evidence filed'*" and that "*fairness to the Respondents requires a properly particularised application");* (c) Ms Junos had only limited standing; and (d) the merits were far from sufficient to justify an extension of time.

69. It seems to me, with respect, that this analysis failed to take account of a number of relevant matters (of the type identified at [38] of *Maharaj v National Energy Corporation of Trinidad and Tobago* [2019] 1 WLR 983).

70. First, there was an explanation as to why the application was not brought earlier, namely that Ms Junos thought (wrongly) that the time limit was simply six months and there was no separate requirement of promptitude. It had also to be borne in mind that consideration of the over 500 page report dated 31 July 2021 (which itself had only been made public on 11 December 2021 shortly before Christmas, over four months after it was presented) would have been an arduous exercise as would the drafting not only of the application for leave but also of the first affidavit. (Ms Junos also told us that she had influenza in either February or March, which does not appear to have been before the judge). Further it is difficult to see what prejudice anyone has suffered because the Notice of Application was filed later than "promptly", as might have been the position if some future action by the Commission could be said to depend on the outcome of the judicial review.

71. On 31 July 2021 the report was signed and sent to the Premier and the Commission disbanded. The Report was not published until December 2021. Mr Hawthorne submitted that there was severe prejudice to the Commission in that its former members, now private individuals, would have to deal with Ms Junos' judicial review (if allowed to proceed) and, also that of Mr Moulder, a long time after the relevant events. I see the force of that submission but the need for former Commissioners to address the subject matter of any judicial review would have arisen if Ms Junos had issued her proceedings in January 2022; and it does not seem to me that the delay between whatever date would fall to be regarded as "prompt" and the actual date of filing materially increased any prejudice. As it was the Commissioners had to address the Davis/Piper requests for judicial review in the first half of 2022.

72. Secondly, the reference to an alleged lack of particularity in the grounds appears to ignore the substantial first affidavit of Ms Junos which explained, in some

considerable detail, her case on section 6. I accept that passages in that affidavit are not wholly clear but that is remediable.

73. Thirdly, in relation to standing, Ms Junos was and is a member of the Civil Justice Advocacy Group ("CJAG"), one of those groups which had called for the Commission to be established in the first place, and who, herself, was a former investigator for the Commission. The CJAG was recognised by the Premier as having a particular interest in the Commission in his ministerial statement on 7 June 2019: see the skeleton argument for the leave hearing dated 14 July 2022. She described herself in her affidavit of 13 June 2022 as "*well-positioned to give insight to matters that the average claimant or member of the public would not have knowledge of.*" At paragraph 66 of our 22 February 2024 ruling we determined that she had standing as an appropriate public interest litigator to bring a judicial review on the points which appeared to us to merit her having leave to appeal.

74. As Lord Diplock said in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All E.R 93.

> *"It would in my view be a grave lacuna in our system of public law if a pressure group or even a single spirited taxpayer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped."*

I recognize, of course, that Ms Junos lacks standing to appeal the Davis/Piper cases to which she was not a party. But, as it seems to me, she has standing, as a public interest litigator, to advance the contention that the Commission acted – systematically – in a way which was ultra vires section 6 of the Act. For that purpose, it would, in my judgment, prima facie be legitimate for her to advance points by reference to sample cases.

75. Fourthly, it seems to me that, subject to what I say below, her grounds of challenge merited consideration.

76. Fifthly, it seems to me necessary to take account of the public interest in determining whether the Commission has fulfilled its obligations: a consideration which does not feature in Southey AJ's reasoning. Ms Junos' case is designed to highlight a series of systemic errors in the approach of the Commission.

77. For these reasons it seems to me that Southey AJ erred in approaching the question of an extension of time and that, if he had taken these matters into account he would, or at any rate, should have extended time. I recognize that this may be a generous approach to an appellate review of a decision at first instance.

78. In her first affidavit Ms Junos gave several examples of what she said was the failure of the Commission to fulfil its role. Ms Junos failed to provide submissions to us for her substantive appeal but, during the hearing she set out in a list what she described as "*Categories of Systemic Issues in the COI which would contravene section 6*". That list, as revised, is attached to this judgment and has been referred to as the "Updated Categories Document". Reference is made in it to 12 cases which are said to be illustrative of these systemic failures, which, Ms Junos says, have each been referred to in her first affidavit. It is true that, with the exception of Case 027 all of the cases in the list of examples are referred to in Ms Junos' affidavit. It is, however, not always clear from the affidavit how they reflect the category into which they have been put.

79. In the email to which the revised list was attached Ms Junos stressed that the Court "*will NOT be required to troll through the detailed evidence of each case, but I will be relying on general letter correspondence between the claimant and the COI, and the COI Report itself. In some instances, minutes of the COI will be referred to as relevant*".

80. When first considering this case, it seemed to me that, *prima facie* Ms Junos might be entitled to be given leave to apply for judicial review of the Report insofar as she seeks leave to rely on at least some of the categories of systemic issues to which she refers Further, contrary to Southey AJ's view it seems to me that a systemic challenge can be established by linking together a number of cases where there has been the same failing.

81. I use the expressions "*prima facie*" and "*might"* for a number of reasons. First, we did not have the written submissions of Ms Junos which were called for in relation to this issue, nor, obviously, any submissions in response. Secondly, it was not apparent to me exactly what material was relied on by Ms Junos in relation to each of the categories mentioned. Third, although Ms Junos says that the Court will not be required to troll through detailed evidence, that may well turn out not to be the case, not least because the Respondents may seek to rely on a raft of possible evidence. Mr Hawthorne told us, not surprisingly, that as and when an example was put forward, the Commission and the Court would have to look into what had occurred; and that the documents in each case would have to be before the Court, which could be a heavy burden.

82. In those circumstances it seems to me that we should address our minds to the categories on which Ms Junos now seeks to rely, having regard to the submissions that we have now received from Mr Howstead and the submissions of Ms Junos in reply. If Ms Junos and Mr Moulder had complied with the orders of the Court to provide submissions for the November hearing we would, no doubt, have had more material before us (from both sides); but it does not seem to me that Ms Junos (or Mr Moulder), who have failed to comply with the orders of the Court, can pray that

in aid. We must deal with what we have, and the case as Ms Junos currently seeks to present it.

83. In submissions dated 5 December 2024 (to which Ms Junos responded on 16 December 2024) Mr Hawthorne addresses the various categories of cases to which Ms Junos referred and submitted that, on close inspection, the Updated Categories Document does not highlight systemic issues but simply takes issues with individual cases. And the question for the Court at this stage is whether there is enough before it to demonstrate an arguable case with a real prospect of success that the Commission acted beyond its powers. These submissions mirror what he had submitted to us orally at the November hearing. I set out below the submissions he made on that issue and Ms Junos' response.

Category 1

84. Ms Junos described this category as follows:

> ***1. Cases which were specifically rejected because they did not meet the "systemic" requirement – 027*** *[fn1: 'the evidence for Case 027 is three letters between the claimant and the COI, which letters only became publicly available in the Archives. The Claimant was told in the first letter that her case was outside the jurisdiction of the COI. When she wrote saying that she did not understand, the COI wrote back saying that she must show that her case was "systemic". This case is therefore included in the second category, as well.']*"

85. As to that Mr Hawthorne submits that there is a single case in this category (027), which cannot amount to a systemic failing of the Commission. There is nothing whatsoever to suggest that this was anything other than the same misdirection in the Davis/Piper claims. Further the fact that the Commission may have gone wrong in a particular case does not make it (or the Commission Report) *ultra vires:* see the *Amah* case (referred to below). There is no evidence (or even a suggestion in evidence) that the Commission knew 027 was within the Terms of Reference and decided not to investigate. 027 cannot therefore be a case within the category for which Ms. Junos has leave to appeal.

86. In *Armah v Government of Ghana* [1968] AC 192, Lord Reid stated at 233-234:

> "Although the tests which the magistrate must apply under the Extradition Act, 1870, and the Fugitive Offenders Act, 1881, may not be the same, the same principle must govern the power of the court to review or interfere with his decision. I think that most of the difficulties which have arisen are, due to attempts to derive the power of the court from lack of jurisdiction in the magistrate. In my view jurisdiction has nothing to do with this matter. If a

> magistrate or any other tribunal has jurisdiction to enter on the inquiry and to decide a particular issue, and there is no irregularity in the procedure, he does not destroy his jurisdiction by reaching a wrong decision. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction. Whether or not there is evidence to support a particular decision is always a question of law but it is not a question of jurisdiction…" (Emphasis added)

87. Similarly in the Court of Appeal judgment in the Davis/Piper case the Court said:

> "*64. If the establishment of the Commission under its TOR was intra vires the Act, the Commission would have the task given to it by the Premier and the power to carry it out. And, if the Commissioners (who, themselves, have to interpret their Terms of Reference: see Jason Beers QC, Public Inquiries (2011) at 2.009-2.113 and the cases there cited) misinterpreted the Terms, it would not mean that the Commission was ultra vires the Act or the Premier or had no powers at all; but it would be ultra vires the Act for the Commissioners to purport to change that remit.*

88. In addition, Mr Hawthorne submits, the exercise of considering the documents in fact submitted should be avoided because (a) Ms. Junos does not have standing to bring that claim; (b) Ms Junos does not have leave to appeal on that basis; and (c) the claimant in 027 had to act promptly to challenge the decision not to grant standing when the letter was sent. The letters do not appear to have been exhibited by Ms Junos, but it can be said with absolute certainty that those letters would have to have been prior to 31 July 2021 when the report was published (and almost certainly considerably before that).

89. In her response Ms Junos said that the Report of the Commission was inaccurate in that it said that 027 was given standing and that the claim was closed by the Commission because of a lack of communication from the client when in fact she was not given standing and her claim was rejected as being outside the Terms of Reference because her case had to be "systemic". The Report was flawed and covered up the systemic error of requiring the Claimant to show that her case was "systemic".

Category 2

90. Ms Junos described this category as follows:

> ***2. Cases which were rejected as being outside the Terms of Reference of the Commission (i.e. the COI not having jurisdiction) – 020, 021, 023, 027, 040, 052*** *[fn2: 'All of these cases, with the exception of 027 (see previous footnote), involve banks and lending practices – cases that as a group were excluded. All can be confirmed by looking at the correspondence between the claimants and the COI. The Court does NOT have to go into the details of the cases.']*"

91. As to that Mr Hawthorne submits that Cases 020 and 021 are Mr Davis' claims that were dealt with by the Court in the Davis/Piper judgment. The Court held that the Commission did not expressly or impliedly exercise a power not to investigate the Davis cases even though they did fall within the Terms of Reference; i.e. the Court has already determined the issue against the position now advanced by Ms Junos. Clarke P stated at paragraph 80:

> "*80. Lastly, the Commissioners' decision was that the claims did not fall within the scope of their inquiry. They did not purport to exercise a power not to investigate the present cases even though they did fall within scope - an exercise which would have involved some consideration as to the nature of the claims and whatever reasons were put forward as to why, even though they fell within scope, they should not be investigated, and which would call for some explanation of the reason for rejecting an in-scope claim. And I do not think that they can be taken impliedly to have exercised any such power, if it existed*."

92. Case 052 is Mr. Piper's claim. This has already been determined by Southey AJ who, having considered the evidence, found as follows at [126]:

> "*126. It appears to me that [the] mis-directions are immaterial in the case of Mr Piper. The Commission was willing to consider his case. The dispute that followed was about procedure. It was not about the terms of reference."*

The Court did not grant Mr. Piper leave to appeal that conclusion. Therefore, the Court can conclude as follows: (a) the Commission was prepared to look into lending practices; (b) the Commission found that Mr. Piper's claim was in the Terms of Reference; and therefore (c) Mr. Piper's claim cannot evidence a systemic failing or even an error of law.

93. Case 023 is Mr. Dilton Robinson's claim, which was ultimately withdrawn by Mr. Robinson. On 11 May 2020, the Commission determined that Mr. Robinson's claim was outside its terms of reference but made it clear it was investigating dealings with the banks: "*Although the Commission is not prepared to grant you standing, it is prepared to hear your evidence setting out your dealings with the Banks*." [ROA/9/122-123]

94. On 1 October 2020, the Commission reiterated that Mr. Robinson's claim is not within the remit as it is "*a non-historical commercial dispute*". The Commission then goes on to say: *"However, as a result of several cases filed with it, the Commission has decided to investigate historical lending practices in Bermuda that may have led to loss of land. Your allegations appear to raise issues that may be relevant to this matter. Thus the Commission is prepared to hear the evidence you have to offer relating to this matter as part of the background information relating to banking practices on the Island, but in its final report it will not comment or make recommendations regarding your specific case*" (ROA//129) Mr. Robinson decided not to assist that investigation on 15 October 2020 as follows: "*I will not participate in what I deem to be a matter that doe[s] the people of Bermuda a disservice and should have Walton turning in his grave*" [ROA/132]

95. Mr Hawthorne submits that a) the Commission was clearly investigating lending practices and banks despite the decision it took on standing in Mr. Robinson's case; (b) Mr. Robinson did not seek judicial review of that decision taken (at the latest) on 1 October 2020; (c) Ms. Junos does not have standing or leave to challenge the individual case and cannot demonstrate Mr. Robinson's case evidences a systemic failure to investigate lending practices because, on the evidence she has provided, it is clear that the Commission was in fact investigating lending practices.

96. There is no information provided for Case 040. Ms. Junos has therefore failed to demonstrate an arguable case with a real prospect of success that, on the information and evidence filed, Case 040 identifies a systemic failing by the Commission.

97. Ms Junos' response is that the Davis, Robinson and Piper cases, which represented property loss through foreclosure on a mortgage, were rejected as being outside the Terms of Reference. She submits that, as appears from the First Affidavit of Wayne Perinchief, filed in the Davis/Piper cases the COI "*took the view" that lending practices were not within the Terms of Reference"* (May & June 2020). The COI then briefly "*decided to consider lending practices*" (October 2020) but never did any real investigations. Ultimately it "*formed the view that they would halt their investigation into lending practices*" (November/December 2020). In the end they took the view that "*a lawful mortgage repossession of land in the context of commercial transactions that involved the enforcement of a security over land when a borrower is in default did not fall within the ToR*" (December 2020), "*The Commissioners therefore decided the investigation into lending practices should not proceed*"(January 2021).

98. Ms Junos submits that the Report was inaccurate when it claimed that Messrs Robinson, Darrell and Piper were granted standing. She then says that in relation to the other categories she would make her full argument with all the relevant evidence in the proper judicial review hearing if the Court sees fit to grant leave.

Category 3

99. Ms Junos describes this category as follows:

> *3.* ***Cases where adverse notices were not sent out in accordance with section 12 of the Act, therefore affecting the duties of the COI under Section 6 of the Act*** *– 016, 017, 024 [fn3: 'The COI's own Report confirms the lack of adverse notices sent out. Ms. Junos also received complaints from at least two families.']"*

Clause 12 does not in fact provide for adverse notices but provides that counsel may appear for anyone *"whose conduct is the subject of inquiry under this Act, or who is in any way implicated or concerned in the matter under inquiry".* I take Ms Junos' point to be that a failure to serve adverse notices impaired the ability of the Commission to make a full inquiry rather than any contention that prejudice was suffered by anyone because of a finding that there had been no adverse notice (to which some of Mr Hawthorne's submissions relate).

100. As to that Mr Hawthorne submits that it is not clear how the alleged failure to send out adverse notices impacts the vires of the Commission. This complaint goes to Ms. Junos' criticism of how individual complaints were investigated. There is no information provided as to the information that would have been available had the adverse notices been sent out. Nor is there a reference to a finding in relation to a person directly who is prejudiced by not having received an adverse notice (which would in any event be a claim for that person to bring).

101. The substance of the complaint is in paragraphs 24 to 27 of Ms Junos First Affidavit (ROA/2/7-8). In relation to Cases 017 and 024, the complaint appears to be that adverse notices were not sent out to the descendants of the "Dallas" and "Chiappa" families. The fact of names being mentioned in the Commission Report does not of itself warrant adverse notices being sent out to descendants. For example, in relation to "Dallas" the criticism is that descendants should have been served adverse notices because the name appears 15 times in the Commission Report. However, this is in the context of the Commission reciting what occurred in court reports. The Commission is not alleged to have made adverse findings, nor is it asserted that there was relevant information that the "Dallas" descendants possessed. In relation to Case 016, it is for the Audobon Society to bring a claim if it felt there was an issue with a finding in the Commission Report. The remedy, if such a claim were made out, would not be to declare the Commission ultra vires but to remove any adverse finding from the Commission Report. However, on any view, Ms Junos does not have standing or leave to bring that claim.

Category 4

102. Ms Junos describes this category as follows:

> ***Cases which the COI claims were withdrawn (for personal reasons) – 002, 023*** *[fn4: 'correspondence in these two cases illustrate that unaddressed written complaints were made to the COI.']"*

103. As to that Mr Hawthorne observed that Mr Robinson's claim (Case 023) has been dealt with above and that the Commission cannot be ultra vires as a result of claimants withdrawing for personal reasons. In any event, Ms Junos does not have standing or leave to bring these claims, which are also well out of time.

Category 5

104. Ms Junos describes this category as:

> **Cases which were given partial/unfair treatment as opposed to other cases – 015 & 035 (comparative)**
>
> No further detail is given.

Category 6

105. Ms Junos describes this category as follows:

> 6. **Cases where COI members with conflicts, failed to recuse themselves – selected cases above** [fn5: 'This important category has been added to the list – utilizing some of the same case numbers already listed.']"

106. As to that Mr Hawthorne observes that there are no specific cases identified in the Updated Category Document in relation to this category. The only allegation of conflict is in paragraphs 13-14 of Ms. Junos' First Affidavit [ROA/2/6], which in in relation to Case 015. The basis of the allegation is in paragraph 13 that Mr. Perinchief, "as a former Minister of the PLP government and comrade of the late Walton Brown, would have had a conflict and an appearance of bias to preside over claim 15, which was Mr Brown's family matter". Paragraph 14 then makes a bare allegation of actual bias in relation to the same matter.

107. Mr Hawthorne submits that a) this is not sufficient to satisfy the test of actual bias; no actual party has made a complaint about apparent or actual bias; (b) this allegation does not amount to a systemic failing by the Commission; and (c) Ms

Junos does not have permission to appeal in relation to this category since it is not a challenge that could, taken at its highest, result in a finding of ultra vires.

Category 7

108. Ms Junos describes this category as follows:

> 7. "**A lack of impartiality when it came to which expropriation cases were looked at – comparison of Tucker's Town expropriations & War Department expropriations**".

109. As to that Mr Hawthorne submits as follows. The Davis/Piper judgment sets out the relevance of Tucker's Town and St. David's Island expropriations as follows:

> "8. According to the Commission of Inquiry's report as well as its terms of reference, the impetus for its appointment was a motion of the Honourable House of Assembly ('the HOA') on 4 July 2014 regarding land expropriation and the need to investigate it. On that date the late C. Walton D. Brown, JP, MP, a member of the Progressive Labour Party, which was then the Official Opposition, introduced the motion. The ensuing parliamentary debate revealed that there were particular concerns regarding 2 well-known expropriations in Bermuda, Tucker's Town and St. David's Island…
>
> 26. Later the report states:
>
> One of the primary challenges faced by the COI was to determine its own scope of inquiry, given the breadth of the Terms of Reference. Because the first Term of Reference does not make specific reference to the expropriations at Tucker's Town and St. David's Island, the two expropriations with which Bermudians are most familiar, the COI determined that these events should be included generically along with any other matters that fall within the ambit of historic losses of property…"
>
> 29. The Commission of Inquiry's report noted that: Before the COI could devise a comprehensive approach to its mandate and Terms of Reference, careful consideration had to be given to the context in which the COI was established. Its instrument of appointment authorized it to deal with alleged expropriations in Tucker's Town and St. David's Island, together with alleged injustices which might *have occurred in relation to other land matters throughout the Island…*"

110. There is, Mr Hawthorne submits, absolutely no evidence provided by Ms Junos that the decision to investigate the two expropriations above (which were mainly of land

belonging to coloured persons) was motivated by racial bias. There is no evidence of a decision having been made to exclude the British War Department expropriations (relating to losses of land by white persons in the mid-1800s) for any reason, still less for a reason based on race. The basis of the decision in relation to Tucker's Town and St. David's Island was set out clearly in the Commission Report as recorded as findings by Southey AJ in the Davis/Piper judgment.

111. In summary Mr Hawthorne submits that, even at this late stage it is unclear on what basis Ms Junos seeks to apply for judicial review. If it is to argue errors in individual cases, she has neither leave nor standing to do so. If it is to identify systemic failure that amounts to the Commission being ultra vires the burden is on her to set out exactly what those failings are. The Updated Categories Document sets out individual cases but does not set out an arguable case with real prospect of success that the Commission was ultra vires. That would be a high burden and requires evidence that the Commission had systemic failure that took it outside its jurisdiction. There is no evidence before the Court either in the Record of Appeal or in the Updated Categories Document that begins to reach that threshold.

Category 8

112. Ms Junos describes this category as follows:

> ***8. "The general failure of the Commission to fulfil its remit (i) – (v) in the published Terms of Reference".***
>
> Mr Hawthorne submits that this general statement with no particularity adds nothing to the other categories and should be disregarded. Ms Junos in response cites a number of respects in which she says that the Commission failed to fulfil its duty under section 6.

113. As I have already indicated, whilst Ms Junos has no right to appeal the cases of other claimants (e.g. Davis and Piper) it seems to me, as we held at [66] of our decision in February 2024, that she should be regarded as having standing to contend that she should have leave to seek judicial review on the basis that the Commission acted ultra vires section 6. These were the relevant terms of the leave to appeal (which makes no reference to systemic, although whether it was appropriate to grant leave might depend on the extent that the Commission acted in that way).

114. But I accept Mr Hawthorne's submission that the categories relied on, and the material presented to us in support of them, do not present (with the necessary degree of particularity to be expected by those who would have to respond) an arguable case with a real prospect of success that the Commission acted *ultra vires*

section 6 in its proper sense. That might be the case if the Commissioners had purported to exercise a supposed power to exclude a case from consideration for some reason even if they believed that it fell or might fall within the remit; but it would not cover the Commission erroneously concluding that a case did not fall within the remit or otherwise failing to fulfil the duties under section 6. Further, in categories 1 2, and 4 an application in June 2021 would be way out of time.

115. For those reasons I would decline to grant Ms Junos leave to apply for judicial review.

Mr Moulder

116. The refusal of leave to review the judgment of February 22 2024 applies to Mr Moulder as well as Ms Junos. The effect of that is that what remains for consideration is whether Mr Moulder should have leave to seek judicial review on the two grounds for which we gave leave, namely that the Commission's reasons for making no recommendation in his case were flawed because there was no basis for refusing to consider (i) matters that followed the order of this Court returning Mr Moulder's land; and (ii) criminality. Ms Junos explained to us that the alleged criminality included criminality in the creation of a conveyance and criminality by realtors.

117. The history of Mr Moulder's case is complicated. His Notice of Application for leave to apply for judicial review was dated 13 June 2022 the same date as that of Ms Junos.

118. Mr Moulder had made a claim to the Commission on 8 June 2020 seeking standing to be heard on the circumstances in which a false claim to adverse possession had been made in respect of land owned by him. He contended that the claim to adverse possession had been falsely made by the use of untrue affidavits which the persons claiming to have a title by adverse possession knew to be untrue. He in fact recovered his land by successfully defending proceedings that were brought against him in the Supreme Court and the Court of Appeal. He appears never to have received any compensation. When the Report came out there were no recommendations made.

119. On **5 August 2022** Southey AJ gave a judgment, following a hearing on 15 July 2022, in which he said that there appeared to him from the Form 86A and Mr Moulder's affidavits to be essentially three grounds of challenge:

    (i) the Commission erred by failing to hold Mr Moulder's case in public and failing to disclose the Commission's records regarding his case;

(ii) the Commission's reasons for making no recommendation in his case were flawed in that there was no basis for refusing to consider matters that followed the order of the Court of Appeal returning Mr Moulder's land and in refusing to consider whether there had been criminality;

(iii) the work of the Commission was undermined by bias.

It is apparent from [18] of Southey AJ's judgment of 31 May 2023 that grounds (i) and (ii) were not particularised in the form 86A in the manner that they were in the judgment ordering a rolled up hearing, but were the grounds which, having read the Form 86A and the two affidavits of Mr Moulder, and having heard Mr Moulder's oral submissions, he had identified as arguable.

120. In his judgment of 5 August 2022 Southey AJ concluded that grounds (i) and (ii) were arguable but ordered a rolled-up hearing in relation to both grounds, which were specified in an appendix to the judgment, in order to consider whether relief should be denied on the grounds of delay or the existence of an alternative remedy. His order of 5 August 2022 [ROA Vol 1/11] granted Mr Moulder leave for a rolled-up hearing in relation to ground (i) and (ii); and r**efused leave on any grounds other than those**; and made orders for the production of evidence and skeleton arguments with a view to the matter being determined at a 2-day trial on 17 October 2022.

121. In the event the rolled-up hearing did not take place according to plan. The hearing for 17-18 October 2022 was vacated at a case management hearing on 7 October 2022 [Vol1/13], at which Mr Moulder indicated that he intended to apply for a stay (he filed an affidavit almost immediately before the hearing) , following Mr Moulder's failure to comply with the directions given by the judge. 18 October 2022 was fixed as a date for determining an application made by Mr Moulder on 10 October 2022 [Vol1/15] for a stay of the matter until the appeal in linked matters had been determined, and for disclosure of various items.

122. In his judgment dated 21 October 2022 following the hearing on 18 October 2022, at which he gave two oral judgments on (i) discovery and (ii) the stay, Southey AJ set out the respects in which Mr Moulder had failed to comply with his directions. He, also, recorded [25] – [29] how he had on 18 October 2022 dismissed (a) Mr Moulder's application of 10 October 2022 for a stay of the proceedings until the appeals in linked matters had been determined and (b) what remained of his application of the same date for disclosure of certain emails, videos, transcripts, and minutes of meetings. In relation to the application for a stay he determined that there was an insufficient overlap between the matters raised in appeals against his

earlier judgments regarding the Commission's decisions and Mr Moulder's claims to justify the lengthy delay that might result from a stay (paragraph 29). As to costs, he ordered Mr Moulder to pay the costs of the applications for a stay, and for disclosure, and the costs incurred by the Commission as a result of the adjournment of the October hearing (on an indemnity basis), which, the judge found, had been necessary because of a number of failures by Mr Moulder to carry out the orders of the Court.

123. Ms Junos submitted to us that the order for costs of the adjournment was unfair because the Commission had issued, but not served, a summons and an affidavit to prevent Ms Chambers (Mr Moulder's former wife) and Ms Junos from assisting Mr Moulder, because of their previous position with the Commission, which, if successful would have necessitated an adjournment in any event. Service took place only after the October hearing.

124. The order made following the judgment provided (a) for the service of evidence, skeletons and a trial bundle on a series of dates; and (b) that in the event that a party failed to comply with any provision in the Order that party may be disbarred from filing any further pleadings in the action or participating in the substantive hearing. It also provided for a 2-day hearing on 28 – 29 March 2023.

125. On 13 February 2023 Southey AJ, having heard from Mr Moulder and Counsel for the Commission, ordered that Mr Moulder be prohibited from filing any further pleadings in relation to the substantive hearing fixed for 28-29 March 2023 on account of his failure to file and serve his skeleton argument on or before 13 December 2022 as required by the order of 21 October 2022. (Ms Junos told us that Ms Chambers was completely stressed and got ill just before Christmas). By 13 February 2023 Mr Moulder had not only failed to file a skeleton argument but had also failed to file a trial bundle which the order of 21 October 2022 had required to be filed by 7 February 2023. A judgment was delivered orally, and full written reasons were given on 8 March 2023.

126. In his judgment of 31 May 2023, following the hearing on 28 & 29 March 2023, at which Mr Moulder did not appear, Southey AJ held that the claim underground (i) insofar as it related to the decision taken on 26 January 2021 to hold a hearing in camera was far out of time [42] and insofar as it concerned a failure to consider disclosure thereafter was either in time or that time should be extended [45]. In relation to ground (ii) he held that the application was out of time [51]; and he declined to extend time [52]. In relation to ground (i) he declared that the Commission erred in its approach to the continuing confidentiality of their records of the hearings at which the Appellant gave evidence. That declaration is set out in an order of 1 August 2023 which provided that there should be no order as to costs in relation to the judgment of 31 May 2023.

127. In his 31 May 2023 judgment Southey AJ held that the application for judicial review, made on 13 June 2022 in relation to the Commission Report published on 11 December 2021 was not made promptly [51]. In his judgment he proceeded on the basis that the date when time started to run was 10 December 2021, the date of the publication of the report or, if the date was earlier, there was good reason to extend time. I shall proceed on that basis. The judge took into account the fact, relied on by Mr Moulder (in his skeleton, described as for the hearing on 14 July 2022: [1/9. Paras [7]-[8]6]) that it was only in March 2022, after the website had been updated, that he became aware of the paucity of information about his claim that featured on the website (two short paragraphs) and the fact that there was no evidence or transcripts uploaded to it, and only on 9 June 2022 that Bermuda Archives, to which the documents were sent indicated that public access to the records, would be closed for 50 years. In an email to Ms Chambers of 9 June 2022 she was told that Archives had received the Commission file from the Commission administrative team (it is not clear exactly when they had done so but it would appear to be on or shortly before 9 June 2022) and that the records relating to a land grab that his family filed were among a series of files that would remain closed for 50 years. Ms Chambers on behalf of Mr Moulder had made a number of requests to the Commission since March 2022 for access to the records at Archives; but was told that no records had been transferred to the Archives by the Commission: see pages 2-7 of the exhibit to Mr Moulder's Second affidavit of July 2022.

128. The judge did not regard these matters as explaining why it took 6 months to commence a challenge to the Commission's decision not to make a recommendation, which was apparent from the Report of 10 December 2021[51]. He declined to grant any extension of time [52-3].

129. He identified four matters that were relevant to the question whether to extend time. These were as follows:

    (i) The issues raised by ground (ii) were not particularly important.

    (ii) The delay was not limited to delay before the application was lodged. The failure to comply with the directions of the Court after the application was lodged, which caused one substantive hearing date to be lost and risked another was a matter that weighed against extending time.

    (iii) The public interest in any uncertainty about the legality of decisions of public authorities being resolved promptly suggested that the Court should be reluctant to deliver a judgment on delay that suggested that time should be readily extended.

(iv) The strongest factor weighing against items (i) – (iii) was the fact that the judge found ground (ii) to be arguable.

130. On 19 July 2023 Mr Moulder filed with the Court of Appeal a Notice of Appeal which sought the following relief (i) that he should be granted full leave to apply for judicial review; (ii) that any orders penalising him with indemnity or general costs should be vacated; and (iii) that this Court should consider a waiver of any fees and/or security for costs for the forwarding of the appeal and make a no costs order for potential costs against the appellant.

131. In my judgment Southey AJ did not err in reaching the conclusions that he did about delay and whether there was good reason to extend time; nor did he fail to take into account some material matter. He was entitled to find that the continued absence of material on the Commission website was not a good reason for failing to file any application until June 2022. Mr Moulder's Form No 86A was two pages long and his affidavit was six pages and was obviously filed without the documentation which was in the Bermuda Archives. Thus, in accordance with the principles set out in *C-Care* we should not overrule his decision on delay, namely that the Notice of Application of 13 June 2022 was not brought promptly and that there should be no extension of time.

132. I realise, of course, that that is a different conclusion to the one that I have reached in relation to Ms Junos. That is because the circumstances are different. Mr Junos had a heavier task; her case of ultra vires section 1 and 6 was significantly more important; and her initial delay was not compounded by the sort of behaviour that caused Southey AJ to make the costs orders and the orders forbidding participation which he made.

133. In respect of the orders as to costs, as we indicated in our February 22 2024 judgment any appeal filed on 19 July 2023 against those costs orders is way out of time. The relevant order was made in October 2022 and by reason of section 12 (2) (b) of the Court of Appeal Act 1964 required leave from either the Supreme Court or the Court of Appeal, which has not been granted.

134. It is also the case that the order refusing leave to apply for judicial review on any grounds other than grounds (i) and (ii) was made on 5 August 2022, such that the Notice of Appeal of 19 July 2023 was (a) brought without leave (none ever having been sought) and (b) even if leave had not been required, was way out of time. These are additional considerations which justify our declining to interfere with the orders for costs or the refusal of leave in relation to any grounds other than grounds (i) and (ii).

135. I do not accept that applying rules as to leave or timing of appeals is an interference with Mr Moulder's constitutional rights. Or that Mr Moulder can derive any assistance from Order 2, rule 24.

136. Accordingly I would not grant Mr Moulder leave to apply for judicial review

137. Reliance is placed by Ms Junos and Mr Moulder on the fact that, when deciding whether or not the Junos/Moulder applications for leave to apply for judicial review should be determined before the Davis/Piper application so that the Court could, thereafter, have all the judicial review applications considered together (and consolidated) as suggested by the Commission and Messrs Davis, Piper, Juno, Junos and Moulder, the judge rejected that proposal, following a hearing on 5 July 2022, for reasons which he set out at [59] of his judgment in Davis/Piper. He gave a number of reasons one of which was:

> "*Listing the new leave applications [i.e. the Moulder and Junos leave applications] to follow this substantive application [i.e. the Davis/Piper application] might result in there being a single hearing [i.e. of the Davis/Piper application] if leave was refused. That would be the only circumstances in which a single hearing could take place and my intention was to facilitate that. The course proposed by the parties would inevitably cause 2 hearings*[2]*. Further, if leave was to be granted in the new matters, there was likely to be little time saved by linking the new matters and the existing matters because of the limited overlap between the issues."*

138. Ms Junos and Mr Moulder submit that this was an indicator of a predisposition to refuse the Junos/Moulder applications and to continue only with the Davis/Piper matters.

139. In my judgment that reads too much into what was only one (the third) of four reasons given by the judge; and that the fact that the course which he took could have the result that only one substantive hearing took place should be regarded as a matter of case management (preserving the possibility of only one substantive hearing) and not some form of prejudgment or predisposition to reach a particular decision on the leave applications. In the events which happened all the matters were dealt with in the week beginning 11 July 2022.

Summary

[2] It is not clear to me why this should be so. If the Junos/Moulder's applications for leave were refused there would only be one substantive hearing.

140. Dealing with matters in order, first is the renewed application made by Ms Junos and Mr Moulder that Bell JA and I should recuse ourselves. For my part I gave reasons for declining the invitation to recuse myself at paragraphs 46 and 47 above. Bell JA gives his reasons for declining the invitation to recuse himself at paragraph 146 below.

141. In relation to the application made by Ms Junos and Mr Moulder that we should review our judgment of 22 February 2024, I indicated at paragraph 53 that it did not seem to me that the facts of this case were exceptional or that it was necessary to reopen the appeals in order to avoid real injustice. I therefore refused the application.

142. Next is the application made by Ms Junos for leave to apply for judicial review. In our 22 February 2024 judgment we had given leave, but only in respect of the application made by Ms Junos that the appointment of the Commission was ultra vires section 1, or that the Commission had acted ultra vires section 6 of the Act. I dealt with the issues of delay, extension of time, and the categories of cases which Ms Junos submitted demonstrated evidence of systemic failures on the part of the Commission. For the reasons appearing between paragraphs 55 and 115, I declined to grant Ms Junos leave to apply for judicial review.

143. In relation to Mr Moulder, I set out between paragraphs 117 and 132 my reasons for concluding that Southey AJ had not erred in his finding that the application had not been brought promptly, and that there should be no extension of time. I therefore declined to grant Mr Moulder leave to apply for judicial review.

144. In relation to costs, I would propose that any such application should be made within 21 days of this judgment and be dealt with on the papers.

BELL JA

145. I agree with the judgment of my Lord, and have only the following few comments to make. In relation to recusal, I see nothing exceptional in the underlying facts. As I indicated at paragraphs 95 and 96 of the Court's judgment of 22 February 2024, it makes no sense to me that a complaint based on the possibility of bias should be made on the basis of my having acted for a particular client some thirty years or so previously, when the client in question is not even a party to the proceedings before this Court. To do so demonstrates a fundamental misunderstanding of the role of an attorney. Neither do I regard myself as conflicted because Ms Junos had filed a complaint against me, based, so far as I can tell, on the fact that I was carrying out my judicial function.

146. In relation to the application for review of the judgment of 22 February 2024, I can confirm, as the President indicated, that I did not receive a copy of the Notice of Motion dated 15 May 2024 until shortly before the start of the November session. Neither was I aware of any of the activities of Acting Justice Wheatley. Nor would I expect to be. And I would reject the application for leave to review the judgment of 22 February 2024. No good reasons for doing so have been advanced.

GLOSTER JA

147. I also, agree.

ANNEX I

Civil Appeal No. 13 of 2023 Junos v The Governor
Transcripts of 6 March 2024 Hearing

IN THE COURT OF APPEAL OF BERMUDA

CIVIL APPEAL NO: 2023/013

B E T W E E N:

LEYONI JUNOS

- v -

THE GOVERNOR OF BERMUDA

The President, Sir Christopher Clarke
Justice Geoff Bell
Justice Ian Kawaley
on the 6th day of March 2024

APPEARANCES:
The Appellant appeared In Person
MS LAUREN SADLER-BEST for the **Respondent**

PROCEEDINGS

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At 10.34

THE CLERK OF THE COURT: Good morning. This morning, Civil Appeal No.2023/013, *Leyoni Junos v The Governor of Bermuda*. We have Leyoni Junos as self-litigant for the Appellant and Lauren Sadler-Best for the Respondent.

MS. SADLER-BEST: Good morning, my Lord.

SIR CHRISTOPHER CLARKE: Good morning.

MS. SADLER-BEST: My Lord, it is Ms. Junos' appeal, so I will just let her ----

SIR CHRISTOPHER CLARKE: Just a moment, we want to determine how we want to proceed. What has happened is that Ms. Junos has filed a petition for leave to appeal to the Privy Council but the Respondent has not filed anything in response.

MS. SADLER-BEST: My Lord, as I understood from the email that we were to file something as soon as possible.

SIR CHRISTOPHER CLARKE: Yes.

MS. SADLER-BEST: I was aiming to do this Friday and then I saw the email to come today.

SIR CHRISTOPHER CLARKE: Oh, I see.

MS. SADLER-BEST: So I was not sure if there was going to be something additional in the directions.

SIR CHRISTOPHER CLARKE: Oh, I see. Well, what we contemplate is that we should determine the application for leave to appeal to the Privy Council on the papers. We have got Ms. Junos' petition. We hope to receive your response and, in the light of that, and possibly any response to it, we think it would be perfectly possible for us to determine whether leave should be given upon the paper material that we have had.

MS. SADLER-BEST: If I may just add, my Lord, because I am not sure if the assumption was that we had been served with it. We had not. The first time I received the petition or the application was from the court on Friday.

SIR CHRISTOPHER CLARKE: Oh, I see.

MS. JUNOS: I did send an email to Ms. Sadler-Best on the 22nd attaching it, on 22nd February.

SIR CHRISTOPHER CLARKE: Right.

MS. JUNOS: She didn't acknowledge receipt but ----

MS. SADLER-BEST: Which is very unusual, I am sure Ms. Junos would say. I have not received that email.

MS. JUNOS: Yes. I do have a ----

SIR CHRISTOPHER CLARKE: Right. Well, we are where we are.

MS. SADLER-BEST: Yes.

MS. JUNOS: ---- record of it.

SIR CHRISTOPHER CLARKE: Okay.

MS. JUNOS: In that email, I did raise some concerns with Ms. Sadler-Best about the judgment. I don't know if the court read the footnotes of my application but the judgment was sent to both of us on 1st February and I assumed I would have 21 days from that date – I thought had just come out – to file the application but on the eve of 14th February, I relooked at the emails and I discovered that the date of the judgment was actually 24th January and that was on the night of the 13th and when I counted the 21 days, I saw that the 21 days was up the next day, on the 14th. So I had to scramble to meet the deadline and when I looked at the emails from the court, I saw that the court had sent two different judgments on the day and I expressed all that to you in an email but you didn't get it.

MS. SADLER-BEST: I am sorry, my Lord. I have seen the footnotes to Ms. Junos' application and so I know the concern now having received the petition on Friday but I did not receive that email.

MS. JUNOS: Yes. So what happened was, on the 14th, I received two emails several hours apart but they were identical. The texts of the emails were identical from Ms. Kenlyn Swan.

JUSTICE BELL(?): Received from whom?

SIR CHRISTOPHER CLARKE: Ms. Kenlyn.

MS. JUNOS: Ms. Kenlyn Swan and she just said, "Here's the judgment attached" to Ms. Sadler-Best and myself. When the second one came through a few hours later, the text of the email was exactly the same, so I just assumed that she had just sent a duplicate but, you know, but when I sat down on the evening of the 13th to look at the judgments, I saw that they were named differently and they were different. The introductory paragraphs were different; the numbering of the paragraphs was different; some of the wording throughout the judgment was different. So that made it even more difficult for me to properly respond at such short time, having been cut short of seven days.

SIR CHRISTOPHER CLARKE: Yes.

MS. JUNOS: So I wasn't …. and I also wasn't sure whether I would be dealing with the specially constituted court that actually heard the matter as opposed to this court.

SIR CHRISTOPHER CLARKE: That is another question that we have to determine. As you know, the court that determined the appeal, none of us were parties to it. I think it is perfectly possible for us to deal with the application for permission to appeal but an alternative view is that we should invite the members of the court who delivered the judgment to deal with the application for permission to appeal, which, if it is to be dealt with on paper, can fairly readily be done. I do not know whether either of you have any submissions as to that.

MS. JUNOS: My Lord, I noticed the first case that was before you today, that there were some issues of corrections and I had raised some issues as well of corrections that needed to be made to the judgment but I haven't had the opportunity to discuss with Ms. Sadler-Best.

JUSTICE BELL(?): These are corrections …. when you said there were two different versions, I had rather assumed that the second made corrections to the first but you are talking about yet further corrections which need to be made?

MS. JUNOS: Yes because, actually, I'm not sure which version is the approved version because both of them say "Approved judgment" and there was no explanation when the second one was sent ----

JUSTICE BELL: For why there are two versions.

MS. JUNOS: Right, so there was no explanation saying, "Ignore that first one. This is the new one" or the final one but, for instance, the actual numbering of the appeal was incorrect. It said it was No.19 of 2023 but it's actually 13 but there were some other factual errors in the judgment that I thought I would be able to address to the court, the court that actually issued the judgment. I don't know how that's supposed to work.

SIR CHRISTOPHER CLARKE: Well, the judgment has been handed down now and it is on the web.

MS. JUNOS: Yes. I don't know which one is on the web and I was sent two judgments. I don't know which one is considered the final one but I don't …. I don't know how to deal with the issue of corrections. I don't …. I expressed the fact that because I was

cut short of 7 days of the 21 days, I had to hastily put this together and I wondered if I had a right to, once these other issues were resolved, whether I would have a right to better craft my grounds of appeal because I did them in less than …. in less than …. because I did them within less than eight hours. I had to throw it together and get it filed because I distinctly remember Justice Bell mainly, when I was before the court last November, saying that the calculation of the days that you have for appealing, whether it's the six weeks or whether it's the 21 days, commenced from the date of the judgment, not the date that you receive it or the date that it is corrected or finalised.

JUSTICE BELL: The date that the judgment is handed down, absolutely.

MS. JUNOS: Yes, so …. and, in the past, I have heard from Mr (Inaudible) that this court has no …. if you are late filing your application for leave, the court has no jurisdiction to extend time.

JUSTICE BELL: Correct.

MS. JUNOS: So I was in a bit of a bind.

JUSTICE BELL: Yes. No, understood.

MS. JUNOS: Yes. So I don't know how to deal with any of those issues.

JUSTICE BELL: But in the normal course, the judgment that is handed down, I understand there are possibly two in this case but there is only one on the website, but in the normal course, there is no question of making amendments to a judgment once it has been handed down.

MS. JUNOS: I'm sorry, you're saying there's no opportunity to make amendments, you're saying?

JUSTICE BELL: Not after it has been handed down. Sometimes, the court distributes a judgment in draft but, more often than not, it simply delivers the judgment. If there is a fault in the judgment or a typographical error, it stays there.

MS. JUNOS: I mean I've had experience where the court has posted it and corrected it and reposted it, so I don't know what the actual allowances are.

SIR CHRISTOPHER CLARKE: Well, we obviously need submissions from both of you as to whether or not leave should be given to appeal to the Privy Council.

MS. JUNOS: Yes. I have looked at the 1911 Act and this particular issue revolves almost exclusively around the constitution. It is a constitutional issue but, also, the court that

heard it did agree that it was of public importance as well. So, on both of those grounds, it would seem that leave should be granted but, of course, that is for the court to decide but it is a constitutional matter and it is of public importance. I know the public importance is at your discretion. A constitutional matter would be an appeal as of right, I believe.

JUSTICE KAWALEY(?): Yes. I mean my understanding is that the appeal as of right on a constitutional matter is only if the matter relates to fundamental rights and freedoms under Chapter 1 of the Constitution.

MS. JUNOS: Yes, under s.15, yes.

JUSTICE KAWALEY: Which I do not believe this present appeal is.

MS. JUNOS: I take your point.

SIR CHRISTOPHER CLARKE: Right. The question is, what is the most efficient way of going about things? Are you saying, Ms. Junos, that you want to file supplemental submissions in addition to your existing application as to whether there should be leave?

MS. JUNOS: Yes, my Lord.

SIR CHRISTOPHER CLARKE: I cannot hear.

MS. JUNOS: Yes.

SIR CHRISTOPHER CLARKE: Yes. Well, one course that we could take is that you should file supplemental submissions within x days and then the Crown could respond and we would then decide who should decide whether or not there should be leave to go to the Privy Council.

MS. SADLER-BEST: That is acceptable to us, my Lord.

SIR CHRISTOPHER CLARKE: It is?

MS. SADLER-BEST: Because we would need the additional time if Ms. Junos was going to file anything additional as far as submissions go and just bearing in mind, my Lord, that we had not been notified until ----

SIR CHRISTOPHER CLARKE: No.

MS. SADLER-BEST: ---- the court ----

SIR CHRISTOPHER CLARKE: I know. I know. Well, how much time do you need for further submissions, Ms. Junos?

MS. JUNOS: I was cut short of a week, so I guess seven days. I would like a little more than that if the court was so inclined.

SIR CHRISTOPHER CLARKE: Yes. That is why I am asking you how much time you are seeking.

MS. JUNOS: Fourteen days if possible.

SIR CHRISTOPHER CLARKE: Fourteen days. That is enough? Okay. Please file supplemental submissions within 14 days and how long would you need to respond?

MS. SADLER-BEST: I would ask for 14 days as well.

SIR CHRISTOPHER CLARKE: Right. Well, we will so order and when we have received those, we will address the question as to who should decide the issue and how it should be decided but in relation to the latter, the likelihood is that it will be decided on paper, hence our giving both of you the opportunity to say what you want on paper.

MS. JUNOS: My Lord, is there a possibility to have a defining decision as to which version of the judgments we were both sent, actually …. did you know that they were different?

SIR CHRISTOPHER CLARKE: Were you sent two versions?

MS. SADLER-BEST: I was sent two emails, my Lord, but I did not check the first one because I did assume the latter was the correct one.

SIR CHRISTOPHER CLARKE: Well ----

MS. JUNOS: Did you know they're different?

MS. SADLER-BEST: No.

MS. JUNOS: Okay.

JUSTICE BELL: So you have not conducted the exercise which Ms. Junos conducted of comparing the two versions?

MS. SADLER-BEST: Of comparing the two, no, my Lord.

JUSTICE BELL: Ms. Junos tells us that they are in fact different in ----

MS. JUNOS: Yes, they are.

JUSTICE BELL: Yes.

MS. SADLER-BEST: What I have not done as well, my Lord, because the copy I have, I took from the website but I did not check it against the email.

SIR CHRISTOPHER CLARKE: Well, I think we will have to investigate as to what has happened. I do not know what the answer is.

MS. JUNOS: Yes. I mean I do have for the court the two emails with the two different attachments that show they are actually named differently as well and I've checked the paragraphs and they are different. The very first paragraph is completely new. It's not the same as the other one. So I don't know whether that would be helpful in your looking into it.

JUSTICE BELL: We ought to be able to see that when ----

SIR CHRISTOPHER CLARKE: We ought to be able to find it, yes. Who sent the emails?

MS. JUNOS: Ms. Kenlyn Swan but they were also copied in to the Court of Appeal address as well.

SIR CHRISTOPHER CLARKE: Yes.

MS. JUNOS: So the Court of Appeal would have the two emails. They were both sent on 1st February, one at 11.49 a.m. and the other one at 2.05 p.m.

SIR CHRISTOPHER CLARKE: On 1st February?

MS. JUNOS: On 1st February, yes.

SIR CHRISTOPHER CLARKE: Okay.

MS. JUNOS: I didn't realise, at that point, that the judgment had actually been issued seven days before. The face of the judgment says that it was issued on 24th January.

SIR CHRISTOPHER CLARKE: Oh, I see. You say there are differences but are there any differences of substance?

MS. JUNOS: The end result is the same, my denied appeals. Words have been changed throughout the judgment. The wording has been changed in some ways things have been expressed but ----

SIR CHRISTOPHER CLARKE: But is there any change to the substance of what is decided?

MS. JUNOS: And, for some reason, an issue was made and it was incorrect. It said that I was .... I was before the court as a McKenzie Friend for the Civil Justice Advocacy Group, which is an unincorporated body, and I don't know where that came from because that was never asserted, that I was a McKenzie Friend for the Group. I'm a member of the group; I'm a founding member of the group and because the group is unincorporated, I filed it in my name because I'm a person ----

JUSTICE BELL: So the reference to McKenzie Friend was in one version but not the other?
MS. JUNOS: It's in the footnotes of both but the opening paragraph highlights it as well.
SIR CHRISTOPHER CLARKE: Dawn, have you got the document that has just been handed up?
MS. JUNOS: Yes, so one document, the first one is titled …. the PDF is titled "Junos v Governor KCC" and the second one, which was sent in the afternoon, is "Leyoni Junos v The Governor" and they are different.
SIR CHRISTOPHER CLARKE: **(Confers with clerk)** We will have to look into this, Ms. Junos. I think what might have happened is that the first email in time was recalled. Whether you got the message of recall, I know not but that would certainly seem quite likely if a subsequent email was sent.
MS. JUNOS: You'll appreciate that the text in the second email is exactly the same as the first. So it doesn't say, "Ignore the first one". So I assumed, at the time that I saw it come to my phone, that she had just sent a duplicate email, the same.
SIR CHRISTOPHER CLARKE: I understand that.
MS. JUNOS: Yes.
SIR CHRISTOPHER CLARKE: Okay. We will have to look into that. I am afraid we do not know what the answer is at the moment but, meanwhile, can you serve your submissions within that time limit, 14 days and 14 days?
MS. SADLER-BEST: Yes, my Lord.
SIR CHRISTOPHER CLARKE: Thank you. Is there anything more we can usefully do at the moment?
MS. SADLER-BEST: Thank you, my Lord.
MS. JUNOS: Thank you.
SIR CHRISTOPHER CLARKE: Ms. Junos, before you leave, you have another petition to the Privy Council in relation to the Commission of Inquiry case.
MS. JUNOS: Yes, with Mr. Piper. We never heard anything back from that.
SIR CHRISTOPHER CLARKE: No, you have not heard anything back from that. There is a reason for that. The Commission of Inquiry case, as I think you know, is going to be heard in June. Justice Kawaley does not normally sit in June and he is not …. I am so sorry, Justice Bell does not normally sit in June and he is not sitting in this June, so the court would be a court of which he is not a member. In those circumstances, the

matters raised in the petition to the Privy Council are, in effect, moot and I would hope that, in those circumstances, it is not necessary for you to seek leave.

MS. JUNOS: Would that be communicated to myself and Mr. Piper in writing?

JUSTICE BELL: Speak up.

SIR CHRISTOPHER CLARKE: I cannot hear.

MS. JUNOS: Would that issue be communicated to myself and Mr. Piper in writing?

SIR CHRISTOPHER CLARKE: Yes, we can send you an email explaining what the position is.

MS. JUNOS: Yes.

SIR CHRISTOPHER CLARKE: Yes.

MS. JUNOS: I cannot speak for it at the moment.

SIR CHRISTOPHER CLARKE: No, I follow that but I thought it would be polite to let you know now what the position is.

MS. JUNOS: Yes.

SIR CHRISTOPHER CLARKE: Okay. We will communicate to you and you can take a view. I should indicate that if the position is, as it is moot, the idea that the Privy Council should entertain it, it borders on the ridiculous and I do not think they would welcome having sent to them a case which had no practical consequence. We will send you an email explaining that.

MS. JUNOS: Thank you.

SIR CHRISTOPHER CLARKE: Thank you very much.

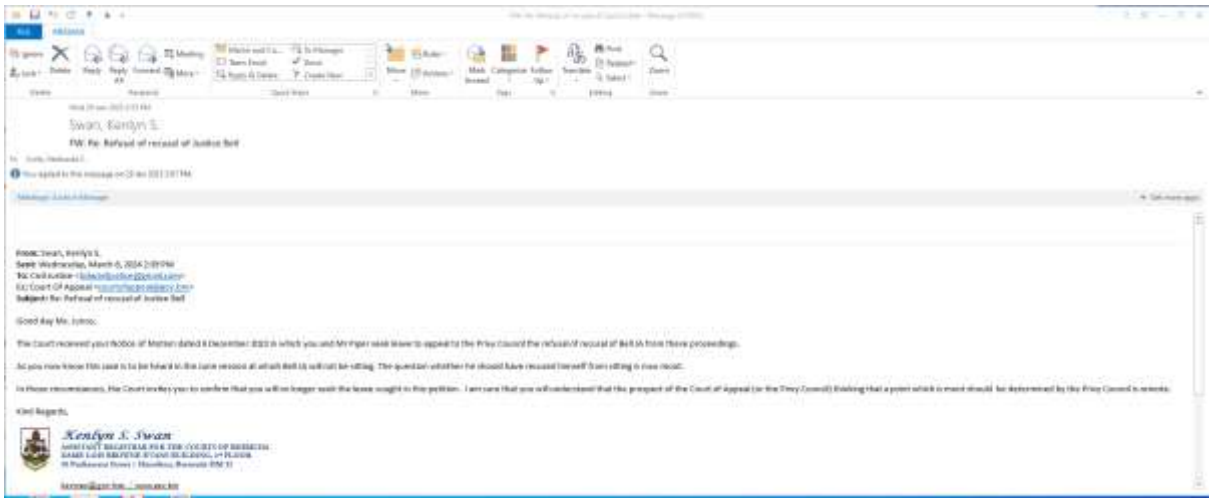
MS. SADLER-BEST: Thank you, my Lord. May I be excused?

SIR CHRISTOPHER CLARKE: Thank you.

Court adjourned at 10.56

ANNEX II

Civil Appeal No. 13 of 2023 Junos v The Governor
Email sent from Assistant Registrar to Ms. Junos dated 6 March 2024



Swan, Kerilyn S.

FW: Re: Refusal of recusal of Justice Bell

Good day Ms. Junos,

The Court received your Notice of Motion dated 6 December 2023 in which you and Mr Piper seek leave to appeal to the Privy Council the refusal of recusal of Bell JA from these proceedings.

As you now know this case is to be heard in the June session at which Bell JA will not be sitting. The question whether he should have recused himself from sitting is now moot.

In these circumstances, the Court invites you to confirm that you will no longer seek the leave sought in this petition. I am sure that you will understand that the prospect of the Court of Appeal (or the Privy Council) finding that a point which is moot should be determined by the Privy Council is remote.

Kind Regards,

Kerilyn S. Swan