COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2010/CLE/gen/01137

BETWEEN

(1) RICHARD ANTHONY HAYWARD
(2) SUSAN JANE HEATH
(3) GILES EDWARD HAYWARD
(4) RUPERT CHARLES HAYWARD
(5) FRANCESCA ROSE CHELSOM
(6) EMMA LOUISE CAMERON
(7) ALEXANDER JAMES WROUGHTON HEATH
(8) NICHOLAS CHARLES EDWARDS HEATH

Plaintiffs

AND

(1) STRIKER TRUSTEES LIMITED
(2) PROMETHEUS SERVICES LIMITED
(3) RICHARD W DEVRIES
(4) KEITH GRIFFITHS
(5) SIR JACK ARNOLD HAYWARD (died 13 January 2015)
(6) LADY JEAN MARY HAYWARD (died 12 May 2015)
(7) FREDERICK ARTHUR LEBLANC CAMERON (a minor) by PRESTON RABL his Guardian ad Litem
(8) IAN BARRY
(9) PATRICIA RUTH BLOOM
(10) AMY BLOOM CLOUGH
(11) TREVOR BETHEL
(12) JONATHAN MICHAEL HAYWARD

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Lawrence Cohen QC with him Mr. Ferron Bethell and Ms. Camille Cleare of Harry B. Sands for the Plaintiffs
Mr. John Wilson and Mrs. Erin Hill of McKinney Bancroft & Hughes for the 1st Defendant
Ms. Keri Sherman of Alexiou Knowles for the 7th Defendant
Mr. Samuel Brown holding brief for Mr. Robert Adams of Graham Thompson for the 9th and 10th Defendants
Ms. Meryl Glinton of Maurice O. Glinton for the 11th Defendant
Mr. Christopher Jenkins and Mr. Ra'Monne Gardiner of Lennox Paton for the Judicial Trustee
Mr. Maurice Glinton QC and Mr. Trevor Bethel present

Hearing Date: 11 July 2019

Civil – Breach of trust - Recusal –Appearance of bias – Actual or apparent bias – Bias against party and/or counsel - Whether real possibility or real danger of bias - Whether Judge has a discretion to recuse herself – Whether automatic disqualification – Judge in own case – Duty to disclose – Duty and extent of inquiry of judge – Judicial conduct in active case management – Appropriate test – Right to a fair hearing by impartial tribunal as guaranteed by Article 20(8) of the Constitution of The Bahamas

Advocate and client joint complainants before Bar Ethics Committee against judge – Whether Advocate should withdraw as acting for client - Opportunity to be heard – Omission from findings – Corrected in re-issued Judgment

Trevor Bethel is a beneficiary under a discretionary settlement in which the Plaintiffs were excluded as beneficiaries and have brought these proceedings for breach of trust seeking to set aside the exclusion. Charles J was originally assigned to the action for a period and subsequently transferred to Winder J. who granted a Tomlin Order when a compromise was thought to have been achieved. Two years later Winder J. set aside the Tomlin Order on the application of Trevor Bethel, who did not consent to the compromise, and recused himself, transferring the matter back to the original Judge.

Trevor Bethel seeks an order that the Judge now recuse herself on the grounds that she is a foreign national and Trevor Bethel's counsel has been an avid proponent of an exclusively Bahamian judiciary, which has caused personal tension between them. Further grounds are that the Judge has previously dismissed a recusal application brought by Trevor Bethel's counsel in a separate action for another of his clients and that she has a personal and well-publicized friendship with one of the Plaintiffs' counsel and his wife, a sister Judge, and as such that Counsel has been able to more easily obtain dates for hearings than Trevor Bethel's counsel. Trevor Bethel claims that these facts have led him to a reasonable apprehension of the Judge being bias against him, which has blossomed into actual bias in that (1) the Judge refused to recuse herself of her own motion upon receiving his counsel's private letter requesting that she do so failing which a complaint would be made to the Ethics Committee of the Bar Council and the Chief Justice, (2) the Judge fixed directions hearings without agreement by his counsel on the dates for such hearings and, (3) after the application for recusal was filed has continued to case manage the action.

Trevor Bethel says that the Judge's decision to accede to an application by the Plaintiffs to cross examine him on his Affidavit in support of the recusal application on the basis that the Affidavit did not comply with Order 41.5(2), and her refusal to grant leave to appeal and a stay of that decision is further evidence of bias towards him.

HELD: dismissing the Recusal Application with costs to the Plaintiffs; such costs to be determined at the next hearing. This Court further finds that it is fit and proper for Mr. Glinton QC to withdraw his services as Advocate to his client. He is given a further opportunity to be heard (on the issue of whether he ought to withdraw as Advocate).

1. The Recusal Application should be heard before the Judge sought to be recused. The cases of **In the Matter of the Contempt of Maurice Glinton QC in the face of the Court on 28 September 2015 and In the Matter of the Contempt of Court of Maurice Glinton QC on 9 October 2015** (No. 1 and 2 of 2015) and **Caves Co. v Higgs Estate** [1988] BHS J. No. 122 relied upon.

2. The Order for cross-examination of Trevor Bethel on his affidavit supporting the Recusal Application should not be discharged. Cross examination is not unusual and is preferable to striking out the whole of his affidavit which does not satisfy the requirement to indicate the grounds of his belief or adjourning for a further affidavit.

3. There is no evidence of actual bias and, applying the test from **Porter v Magill** [2002] 2 AC 357 approved by the Court of Appeal in **Re the Contempt of Maurice Glinton QC**, there is nothing to lead an informed observer to conclude that there is any real danger of a lack of impartiality. The Recusal Application will therefore be dismissed.

4. The statement by letter to the Judge that if she did not recuse herself there would be a complaint to the Ethics Committee of the Bar Council was a threat to the Judge which was improper.

5. The evidence of Trevor Bethel consisted of repeating what Mr. Glinton QC had told him so that the evidence being placed before the Court was that of Trevor Bethel's Advocate For this reason, Mr. Glinton QC could not effectively continue to act as his Advocate. Additionally, Mr. Glinton QC has joined with Trevor Bethel as co-complainant in a complaint to the Ethics Committee of the Bar Council in respect of the conduct in this case. Counsel is required to preserve his independence and cannot continue to act where he is either a witness or in the position of a litigant.

6. It is therefore fit and proper that Mr. Glinton QC withdraws his services as Advocate to Trevor Bethel. Given this finding, he is given a further opportunity to be heard (on the issue of whether he ought to withdraw as Advocate).

JUDGMENT (RE-ISSUED[1])

Charles J

Introduction

[1] On 17 June 2019, the purported 11th Defendant, Julius Trevor Bethel ("Trevor Bethel") filed a Summons ("the Recusal Application") supported by the Further Affidavit of Julius Trevor Bethel dated 17 June 2019 seeking the following:

(i) An Order pursuant to the inherent jurisdiction of the Court seeking the recusal of Her Ladyship Madam Justice Indra Charles from further hearing, determining or taking any other step in this action;

(ii) An Order that the Order for directions on case management dated 8 May 2019 and the Case Management Order made on 18 June 2019 and the proceedings in which the Orders were made be set aside on the ground of miscarriage of jurisdiction by the said judge and;

(iii) Stay of all further proceedings.

Relevant background facts

[2] On 3 August 2010, proceedings in this action commenced by Originating Summons. Various judges, including myself dealt with various aspects of this matter. On 2 October 2015, I appointed Judicial Trustees and Receivers. On 12 November 2015, I approved a Consent Order discharging the Receivers.

[3] Subsequently, Winder J continued this matter until 10 April 2019 when he recused himself and transferred the matter back to me. This Order has not been perfected.

[1] This Judgment was re-issued as a result of a Written Ruling delivered on 5 November 2019 to add to paragraph 92: (i) the words "as Advocate" to the last sentence and (ii) the additional sentence to the effect that "Given this finding, the Court shall give Mr. Glinton QC an opportunity to be heard" (on the issue of whether he ought to withdraw as Advocate). In addition, in order to maintain consistency in the Judgment, in paragraph 83, the word "Advocate" is substituted for the word "Counsel" in keeping with the language of The Bahamas Bar (Code of Professional Conduct) Regulations at Rule VIII.

[4] On 17 April 2019, Trevor Bethel appealed the Learned Judge's decision to recuse himself. He also sought a Stay of an Order made by the learned judge on 18 March 2019.

[5] On 25 April 2019, Ms. Camille Cleare, one of the Attorneys for the Plaintiffs ("Ms. Cleare"), emailed Charles J. at 2:29 p.m. seeking a date for Directions Hearing between 6 - 21 May or from 18 June 2019 onwards. In an email sent at 5.56 p.m. on the same day, Charles J tersely wrote: "18 June 2019 at 10.00 a.m."

[6] On 29 April 2019, Mr. Glinton QC wrote Ms. Sharmaine Archer, the Clerk of the Supreme Court Listing Office ("the Listing Office") stating:

> **"…<u>It was misrepresented to Justice Winder</u> at the time of his recusal decision that Madam Indra Charles had an available date for the directions hearing on 3rd May 2019, so the court file in 2010/CLE/gen/No. 1137 was transferred to that Judge's Chambers.**
>
> **It now appears from an email from Harry B. Sands, Lobosky & Company representing the Hayward Plaintiffs in 2010/CLE/gen/No. 1137, that the mention date of 3rd May 2019 [sic] not actually available on her calendar; and that the said Judge will not be accommodating the parties before 18 June 2019.**
>
> **It being only a mention date, there is the legitimate fear of Mr. Bethel that by then the Trust will have vanished and assets misappropriated by the Judicial Trustee colluding with the Hayward Plaintiffs all but complete and a fait accompli….**
>
> **It is Mr. Bethel's belief, based on attorney Ms. Camille Cleare's latest email, regarding the 18th June 2019 mention date before Madam Justice Indra Charles that deceit is being practised on the Court so as to enable the Judicial Trustee and the Hayward Plaintiffs to perfect their initial plan interrupted by the making of the Order of 11th March 2019, which is to eliminate the Trust and misappropriate the property for the Hayward Plaintiffs, all to Mr. Bethel's exclusion as beneficiary.**"
>
> **Mr. Bethel does not cast on [sic] aspersions on Madam Justice Indra Charles or any other Judge by having the Trust action be administratively controlled by Mr. Justice Thompson, he being already seised of 2018/CLE/gen/No. 0252."** [Emphasis added]

[7] On 2 May 2019, Ms. Cleare wrote to the Listing Office explaining that there was no misrepresentation to Winder J concerning the availability of 3 May 2019 as a

hearing date (it was a date given by the Clerk to Charles J without consultation with the Judge who was out of the jurisdiction). Ms. Cleare continued "…Winder J ordered that the above matter be transferred to Madam Justice Charles. *Alteration of this Order (to which we object) is not therefore a matter which can properly be dealt with administratively rather than by judicial determination. We have therefore written directly to the Judge (copy attached) as Her Ladyship has carriage of the matter.*" This letter was also emailed to me.

[8] Having had sight of these letters, I emailed all Counsel at 2.56 p.m. on Thursday, 2 May 2019 stating "*I can hear all parties tomorrow at 10.00 a.m. is [sic] urgency is an issue*."

[9] In an email sent at 4.26 p.m., Ms. Cleare wrote:

> **"You pose the question of whether there is urgency. Our view is that there is nothing which could not wait until the mention date on 18 June when directions will be given as to how the various summonses are to be disposed of. Whereas Mr. Glinton on behalf of his client has asserted that there is urgency in at least some of his applications, he has actually sought from the Court of Appeal in a Notice of Appeal dated 17th April 2019 an interim injunction on those subjects but has not yet pressed for an urgent hearing date….**
>
> **Notwithstanding, what we have said, we do think that it is preferable for there to be a short hearing in which directions can be given so as to ensure the orderly determination of what we think are seven separate summonses. We can attend tomorrow at a convenient time to the Court…."**

[10] About 30 minutes later, Ms. Glinton, appearing for Trevor Bethel, responded:

> **"We regret that the Plaintiffs have elected to write to you as though we have expressed some "preference" for Mr. Justice Thompson. We believe our letter to be self-explanatory. The urgency of the matter is as it was on the filing of the Summons. The Order of Mr. Justice Winder was that he would recuse himself. He indicated that he would be sending the file on. The file was sent to you on the indication given by Mr. Ferron Bethell on behalf of the Plaintiffs that you had an availability on 3rd May 2019, and that you have scheduled us for that date. This was later recanted and it [sic] we were informed by Ms. Cleare that, in fact, we have never been scheduled to appear before**

> **you on 3rd May 2019 and that you had no availability until 18th June 2019.**
>
> **Both Mr. Glinton QC and I are both otherwise engaged tomorrow and consequently will not be available for a hearing before you tomorrow. We find it strange that the Plaintiffs would have such strong opposition to the matter being dealt with by the Listing Office, as is the usual practice when a judge recuses himself. We would suggest allowing the Listing Office to do its job, so as to not be seen as forum shopping or, as the Plaintiffs' counsel has meritoriously accused, showing a "preference." Indeed, this has been subject of many a complaint by the Court of Appeal in cases in which we have acted as counsel. We would not wish to have to explain to them at a later date why the proper procedure was not followed."**

[11] At 8.31 p.m. the Court emailed all Counsel stating "…*Kindly indicate a date next week or soonest when I can case-manage this matter with a view to identifying trial dates and moving forward. I can accommodate you on any day*."

[12] The following day, Friday 3 May 2019 at 9.23 a.m., Ms. Cleare emailed all Counsel stating:

> **"Good morning all, As per Justice Charles' email below, is there a difficulty with us attending on Wednesday, 8 May for a directions hearing? If so, please propose another suitable day next week. I look forward to a speedy response."**

[13] At 11.13 a.m. on the said day, Counsel for the Judicial Trustee, Mr. Jenkins confirmed his availability.

[14] On Monday, 6 May 2019, at 9.51 a.m., Ms. Cleare then wrote to all Counsel stating that "*if there are no conflicts with a directions hearing on Wednesday of this week, I will email the Judge at noon requesting a time to be fixed*."

[15] At 9.58 a.m., Ms. Glinton emailed stating "*we are not available for hearing on 8 May 2019*." She did not indicate any date when she or Mr. Glinton QC might be available, as is normally the practice. At 9.57 a.m. [sic] on 6 May 2019, Ms. Cleare inquired of Ms. Glinton as to her availability. The email reads: "*thank you Meryl, when are you available this week?*"

[16] There was no response to this email by Ms. Glinton. The Court, in keeping with the objective of Order 31A of the Rules of the Supreme Court ("RSC") to actively manage cases in order to reduce unnecessary delays, at 4.58 p.m. on Tuesday, 7 May 2019, emailed a Cause List to all Counsel indicating that Directions Hearing is fixed for 10.00 a.m.

The 8 May 2019 Directions Order

[17] At this hearing, some attorneys representing some of the Defendants were not present. Trevor Bethel was not present nor were his attorneys, Maurice O. Glinton & Co.

[18] The 8 May 2019 Directions Order simply fixed a case management date as well as a trial date. I fully set out below the Order.

> **"IT IS HEREBY ORDERED that:**
>
> 1. **The matter is set down for a case management hearing before Madam Justice Charles on Tuesday 18th June 2019 at 10.00 a.m. for further directions.**
>
> 2. **The parties are to agree a list of all outstanding applications and submit it to the Court electronically by 14th June, 2019.**
>
> 3. **The Trial of this matter is now fixed to be heard for five (5) consecutive days commencing Monday 3rd February 2020 at 10.00 a.m. In the event the Trial date is vacated, there is a secondary Trial date that is fixed for five (5) consecutive days commencing Thursday, 29th April 2021 at 10.00 a.m.**
>
> 4. **The parties have liberty to apply."**

[19] On the same day, Ms. Cleare drafted the Order and circulated it to all Counsel. She invited them to agree or otherwise.

[20] On 9 May 2019, Ms. Glinton emailed Ms. Cleare refusing to agree to the contents of the Order and stating that 18 June 2019 was not an agreed date.

[21] On 10 May 2019, Mr. Glinton QC wrote a letter to me without circulating to other parties, seeking my immediate recusal as Judge in this action as well as in any

other actions and proceedings in which he acts as counsel or is a litigant. To have a flavor of this letter, I highlight some paragraphs:

> **"…You will recall I earlier sought your recusal in several bankruptcy petitions that were then being heard by you. The application for your recusal in that instance was procedural, justified in my respectful view, because you had already heard one of several petitions in my absence from that hearing without the client being present (for whatever reason) and had already pre-determined the issues, albeit *ex parte.***
>
> **In the course of proceedings in the clients' cases from which you refused to recuse yourself, I observed being exhibited the dismissive and patronizing attitude in my presence that had become all too familiar over my many years of practice, from Judges before whom I had not before practised as counsel or as colleagues. However such displays ceased being a phenomenon after a foreign-born Judge (who no longer holds office) explained that my known views on Government's practice of contracting the services of personnel from outside The Bahamas who are not members of the Bar for appointment to High Judicial Office in The Bahamas raised constitutional questions (which obviously would not be of the same moment to such persons who invariably are not members of The Bahamas Bar as it might to a lawyer like myself who is), fostered negative sentiments among some (not all) Judges who automatically reacted to my presence, seeing me as pre-disposed to personally disregarding of them in their official capacities.**
>
> **….However, after reading your decisions in the Bankruptcy actions, in which you ventured beyond the facts of the case and permissible judicial bounds, to condemn me as counsel, as well as the clients, by daring to suggest that my representation of them before you was no more than a delay tactic and a nonsense, I recognized the tension I had to avoid in future in the interest of the client. The decision in those cases including your refusal to recuse yourself had of course to be appealed to the Court of Appeal.**
>
> **I now believe (quite reasonably in my opinion) that the tension between us is a personal one. I suspect it relates to my having previously brought action seeking declarations as to the unconstitutionality of appointment of foreign personnel as High Court judges on several levels some of them so obvious as to be suspect.**
>
> **There are other concerns which have arisen in relation to this action to date….**
>
> **Lastly, your personal social relationship with attorney Ferron J.M. Bethell and his wife (who is also a Judge) is well publicized, and goes beyond just the usual confraternal relationship shared by members of the Bar. <u>However, I cannot ignore the fact that Mr. Bethell (Ferron) was</u>**

> **somehow able to go across the hall on 10 April 2019 and secure a hearing date Justice Winder and counsel present were informed was 3rd May 2018 (sic). He did so without a Summons or any supporting documents and in circumstances where it is well known that getting a date for fixtures in your court (and indeed in almost any court of a Civil Judge, owing to limited number of judges hearing such large number of cases) usually takes some time; and it usually follows a particular procedure, causing a far greater delay….**
>
> **Indeed, even without knowledge of a mutual friendship between yourself and Mr. Bethell, our client wanted to know how it was that he was able to easily get a hearing date advantaging his clients, that I had been unable to get for him over several months. To that end, I am instructed, should you not recuse yourself from further proceedings in the action, to lodge a former (sic) complaint to Bar Council on the client's behalf in light of the conduct of counsel representing the Haywards so far successfully forum shopping in the wake of Justice Winder's recusal…."**[Emphasis added]

[22] It is clear that Mr. Glinton QC has issued a threat to me that if I do not recuse myself for further proceedings in this action, he will lodge a formal complaint against me on his client's behalf with the Ethics Committee of the Bahamas Bar Association which indeed, he subsequently did, not only on Trevor Bethel's behalf but also his. As Learned Queen's Counsel Mr. Cohen properly pointed out, it is the plainest possible impropriety to make any threat to a judge of an adverse consequence if the judge did not do what the litigant asked. Moreover, it is equally improper for that threat to be carried out, more so when, as in this case, the sole purpose in doing so is to attempt to influence the judicial decision still to be made by me.

[23] On 13 May 2019, Mr. Ferron Bethell ("Attorney Bethell") wrote to Mr. Musgrove stating that:

> **"…You, along with Justice Charles' secretary, consulted the Judge's diary and advised me that Justice Charles had availability on Friday, 3rd May 2019 for a directions hearing. Mr. Maurice Glinton QC has recently written a letter to the Listing Officer, Ms. Sharmaine Archer, advising that the undersigned [Ferron JM Bethell] "misrepresented to Justice Winder" that Justice Charles had an available date for a directions hearing on 3rd May, last.**

> **I should be grateful if you could confirm that you informed me that Justice Charles had availability on the 3rd May, last for a directions hearing so as to address this smear on my reputation."**

[24] On the same day, Mr. Musgrove inscribed that *"I spoke with Counsel Mr. Bethell and said that 3rd May as (sic) a suggest date Justice may be available for a brief directions hearing*." Succinctly put, on 10 April 2019 when Mr. Musgrove gave the date of 3 May 2019 to Attorney Bethell, I was on vacation leave and out of the jurisdiction.

[25] On 14 May 2019, Justice of Appeal Mr. Milton Evans adjourned Trevor Bethel's application in the Court of Appeal and indicated that it would be a better use of judicial time for the parties to focus on the application for the removal of the Judicial Trustee. Following that, on 15 May 2019, Lennox Paton wrote to Ms. Glinton requesting her to provide available dates during the months of May and June 2019 for the hearing of her client's application for the removal of the Judicial Trustee. He requested a response by the close of business on Friday 17 May 2019.

[26] On 16 May 2019, Ms. Cleare wrote to Ms. Glinton supporting an urgent hearing of the removal application and suggesting that it be heard alongside other outstanding applications. Ms. Cleare confirmed that the Plaintiffs would be available from 23 May 2019 onwards on two days' notice.

[27] Neither Mr. Glinton QC nor Ms. Glinton responded. On 24 May 2019, Lennox Paton wrote to Mr. Musgrove requesting an urgent date for the removal application.

[28] On 24 May 2019, Ms. Glinton wrote to Lennon Paton and copied to Attorney Bethell and Mr. Robert Adams, who represents two of the Defendants, stating, among other things, that:

> **"Whilst we are agreed as to the urgency of the hearing of the Removal Application, we are at odds as to how and before whom the application ought to proceed. We have applied to the Listing Office to have the applications heard as urgently as possible. We cannot at this time consent to the application being set down before Madam Justice Indra Charles."**

[29] On 29 May 2019, the Court emailed all Counsel informing them of Mr. Glinton QC's letter of 10 May 2019 stating that she has invited him through the Listing Office to make a formal application for her recusal and informing other Counsel that copies of that letter were available for collection. Mrs. Archer re-confirmed as recently as 3 July 2019 that she had spoken to Queen's Counsel Mr. Glinton's secretary on or about 10 May 2019 and shortly thereafter Mr. Glinton QC returned her call. She informed him that she was advised by the Judge that he needed to make a formal Recusal Application (rather than to write to a judge) and for him to circulate his letter of 10 May 2019 to all Counsel.

[30] On 31 May 2019, His Lordship Evans JA adjourned Trevor Bethel's application to 18 July 2019 to be heard together with the substantive appeal by the full panel.

[31] On 17 June 2019, the Judicial Trustee filed a Summons seeking an order pursuant to Order 31A Rule 18 (2) (b) of the Rules of the Supreme Court 1978 and/or the inherent jurisdiction of the Court for an extension of time to 31 August 2019, to deliver to the Court, the results of the audit of the trust accounts of the Settlement under the Order dated 18 March 2019.

[32] On the same date, Trevor Bethel filed the present Recusal Application. The application has no hearing date and before whom it is to be heard. The latter point will become clearer shortly.

[33] Further, on 17 June 2019, Trevor Bethel and Mr. Glinton QC filed a 16-page complaint against Attorney Bethell, Mr. Christopher Jenkins, the Judicial Trustee, Mr. Paul Winder and myself to the Ethics Committee of the Bahamas Bar Council. It commences:

> **"We, the undersigned, write to make a formal complaint of the ethical conduct of the referenced individuals (two of whom are members of the Bar) as a result of events we experienced as a litigant (in the case of Julius Trevor Bethel) and as his attorneys in the course of various proceedings in action 2010/CLE/gen/No. 1137 ("the Action")…."**

The 18 June 2019 Order

[34] On 18 June 2019, Mr. Lawrence Cohen QC along with Attorneys Bethell and Camille Cleare on behalf of the Plaintiffs, Mr. John Wilson along with Mrs. Erin Hill on behalf of the First Defendant, Ms. Kerri Sherman on behalf of the Seventh Defendant, Mrs. Michela Barnett-Ellis holding papers for Mr. Robert Adams on behalf of the Ninth and Tenth Defendants and Mr. Christopher Jenkins and Mr. Ra'monne Gardiner on behalf of the Judicial Trustee, appeared. Mr. Glinton QC and Ms. Glinton were conspicuously absent; they having on 9 May 2019, emailed that 18 June 2019 was not available (and not suggesting any available date or dates). Trevor Bethel was also absent. It is important to emphasize that the 18 June 2019 date was given on 8 May 2019.

[35] In order to continue to actively manage this case, the Court made the following Order which I set out fully:

> "**IT IS ORDERED THAT:**
>
> 1. **The Recusal Application is set down for hearing before Madam Justice Charles on 2nd July 2019 at 10.00 a.m.**
>
> 2. **The Plaintiffs must propose to the other parties an index for a hearing bundle for the Recusal Application by 5.00 p.m. on 25th June 2019.**
>
> 3. **Any party wishing to comment upon the Plaintiffs' proposal index must do so by 5.00 p.m. on 27th June 2019.**
>
> 4. **The Plaintiffs must prepare and file the hearing bundle, which is to include the documents relevant to the Recusal Application.**
>
> 5. **Any party wishing to make submissions in relation to the Recusal Application must lodge written submissions by email and exchange them with the other parties by no later than noon on 1st July 2019.**
>
> 6. **Leave is granted to cross-examine the Eleventh Defendant, Julius Trevor Bethel, on his Affidavit sworn on 17th June 2019.**
>
> 7. **Leave is granted to seal a writ of subpoena *ad testificandum* which is to be personally served on the Eleventh Defendant, Julius Trevor Bethel, no later than 27th June 2019 to compel his attendance at court before Madam Justice Charles on 2nd July 2019 at 10.00 am.**

8. **The application by the Judicial Trustee by summons filed on 17 June 2019 for an extension of time for the submission of trust accounts audited by Mr. Wizman from 30 June 2019 to 31 August 2019 shall be heard at 10.00 am on Monday 24 June 2019.**

9. **The case management hearing of the Action, and all other outstanding applications, are adjourned for hearing at the conclusion of the Recusal Application.**

[36] On 20 June 2019, Ms. Cleare circulated this Order seeking comments. Counsel for Trevor Bethel have not responded. This Order remains unperfected but will be approved by the Court shortly since it comports with my directions.

The Judicial Trustee's Summons for extension of time

[37] On 18 June 2019, the Court fixed Monday 24 June 2019 at 9:30 a.m. for the hearing of the Summons filed by the Judicial Trustee on 17 June 2019 seeking an extension of time from 30 June 2019 to 31 August 2019 for the submission of trust accounts audited by Mr. Igal Wizman of Ernst & Young.

[38] Previously, by Order of Winder J dated 30 March 2019 and filed on 10 April 2019, the Judicial Trustee was given liberty to engage Mr. Wizman to audit the trust accounts of the Settlement dated 16 March 1993 known as the Sir Jack Hayward Discretionary Settlement and to submit the audit by 30 June 2019.

[39] Mr. Wizman believed that because of the extensive documentation and discussions which are ongoing, he will need some more time to 31 August 2019 to submit the audited trust accounts.

[40] Counsel for Trevor Bethel was properly served to attend Court on Monday 24 June 2019 at 9.30 a.m. but did not appear. The Order reads as follows:

> **"AND UPON HEARING** Ramonne D. Gardiner along with McFalloughn Bowleg Jr. of Counsel for the Judicial Trustee.
>
> **AND UPON** Mr. Lawrence Cohen QC along with Mr. Ferron Bethell and Ms. Camille Cleare on behalf of the Plaintiffs, Mr. John Wilson along with Ms. Erin Hill on behalf of the First Defendant and Ms. Keri Sherman on

behalf of the Seventh Defendant not objecting to this Order as indicated to the Court at the hearing on 18 June 2019.

AND UPON Counsel for the 11th Defendant being served with the Notice of Hearing filed on 19 June 2019.

AND UPON the remaining Defendants being neither in attendance nor represented.

IT IS HEREBY ORDERED that the Judicial Trustee is granted an extension until 31 August 2019, to deliver to the Court, the results of the audit of the trust accounts of the Settlement, for the years ending 31 December 2015, 31 December 2016, 31 December 2017, and 31 December 2018 pursuant to Rule 15 of the Judicial Trustee Rules.

[41] On 26 June 2019, Trevor Bethel filed a Summons seeking to set aside the Orders of 8 May and 18 June 2019 respectively and that all further proceedings be stayed until further order. The Summons is not supported by an affidavit but he relies on his affidavit of 17 June 2019.

The law on recusal – in a nutshell

[42] In recusal applications, the Court is guided by some well-established legal principles namely:

1. Where a recusal application is made, it is for the judge sought to be recused to decide the application: see: **In the Matter of the Contempt of Maurice Glinton QC in the face of the Court on 28 September 2015 and In the Matter of the Contempt of Court of Maurice Glinton QC on 9 October 2015** (No. 1 and 2 of 2015) at para [17] quoting with approval Gonsalves - Sabola J. in **Caves Co. v Higgs Estate** [1988] BHS J. No. 122.

2. The first test should be to establish the facts relating to the recusal application. The party who make assertions must prove them applying the civil standard of "on a balance of probabilities."

3. The second step is to apply the test from **Porter v Magill** [2002] 2 AC 357. The question to be asked is "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real*

possibility that the tribunal was biased": See **In the Matter of The Bankruptcy Act, Chapter 69 of the Statute Laws of The Bahamas Re: Bernard E. Evans Ex Parte The Bahamas Communications and Public Officers Union Pension Plan and Trust Fund** [2017/COM/bnk/00007], Judgment delivered on 17 April 2018 [unreported].

4. If there is found to be a real possibility of bias, disqualification of the judge is automatic and not discretionary. There is no balancing exercise to be carried out in which inconvenience, cost or delay are weighed. The relevance of delay, if not, is in judging the genuineness of the complaint: see para [11] of **Re the Contempt of Maurice Glinton QC in the face of the Court** where the Court of Appeal quoted with approval a dictum from **Resolution Chemicals Ltd v H Lundbeck A/S** [2013] EWCA Civ 1515. See also para [13] where the learned President, Dame Anita Allen stated:

> **"As pointed out in *Resolution Chemicals* (supra), an intense focus on the facts of the case is critical. *A fair minded and informed observer who for the purpose of this exercise is not unduly sensitive, suspicious, nor complacent…."***

5. Courts and tribunals do need to have broad backs when unpleasant and even wounding accusations are directed against them, particularly if directed to manipulating the result: **Re Bernard E. Evans** at paras [21] to [22].

Discussion and findings

Preliminary points raised

Judge cannot be judge in her own cause

[43] Learned Counsel Ms. Glinton submits that having already heard and determine applications since the filing of the recusal application, and in light of the particular allegations against me, I ought not to hear the application for my own recusal.

[44] It is well-settled law that where a recusal application is made, it is for the judge sought to be recused to decide the application: see: **Re the Contempt of Maurice**

Glinton QC in the face of the Court [supra]. At para [17], the Court of Appeal quoted with approval a dictum from Gonsalves -Sabola J. in **Caves Co. v Higgs Estate** [1988] BHS J. No. 122 where at para [8], the learned judge said:

> **"8. Where a Court must rise to the protection of its own authority and integrity, it is wholly inappropriate for the judge contemned to abdicate his responsibility by saddling another judge of the Court with the duty of dealing with the contempt committed. The historical development of the common law power of a judge to punish for contempt has proceeded independently of any consideration of the nemo judex rule of natural justice. Conceptually, the judge is not a "party" to a cause nor is the contempt he deals with his cause. It is the highest attestation to the character expected in a judge that the law as developed has never encouraged question of his capacity and inclination to balance with objectivity the multiple roles he play where a contempt is committed within his cognizance."** [Emphasis added]

[45] Further support for this principle is the case of **Belgravia International Bank & Trust Company et al v CIBC Trust Company (Bahamas) Limited** (SCCivApp & CAIS No. 189 of 2011; SCCivApp & CAIS No. 155 of 2012; SCCiv App & CAIS No. 227 of 2012 and SCCivApp & CAIS No. 27 of 2012). This very point was made to the Court of Appeal. Mr. Glinton QC also appeared as Counsel in that case. The Court of Appeal said at paragraph 6:

> **"The Court is of the view that the reasons advanced by Mr. Simms [Counsel for the Appellant) are apposite to the instant matter, and consequently of necessity, it is obliged to hear the recusal application. We are also aware that judges who is asked to recuse themselves, normally hear the application. The Canadian case of *Makowsky v John Doe* [2007] BCSC 1231 to which further reference will be made is a case on point. …"**.

[46] It is passing strange that, despite decisions of the Court of Appeal and the Supreme Court on this very point, Counsel for Trevor Bethel persists with such submission.

Application(s) heard during pendency of recusal application

[47] Learned Counsel Ms. Glinton submits that having already heard and determined applications despite Mr. Bethel's pending application, I have created the

appearance of pre-determination, in that I seem to be saying that there is no merit in the Recusal Application and I have no intention of recusing myself.

[48] It is an elementary principle of law that a judge cannot and should not continue to hear and determine matters in a case while there is a pending application for recusal. This principle was upheld by the Court of Appeal in **Sir Jack Hayward v Lady Henrietta St. George et al** (2007/SCCivApp. No. 51). In a one sentence oral judgment delivered on 9 June 2008, Sawyer P. said:

> **"What we say is that wisdom would dictate that the learned judge thoroughly considered the application for recusal before proceeding with other hearings in this matter."**

[49] The facts of the present case demonstrate that Trevor Bethel filed his Summons for Recusal on 17 June 2019.

[50] On 8 May 2019, the Court set down this matter for case management hearing on 18 June 2019. No Recusal Application had been filed on this date. Then, on 18 June 2019, the Court merely gave directions with respect to the hearing of the Recusal Application which was filed the day before and was brought to my attention: see paras [1] to [8] of the Order. On 18 June 2019, there was also an application by the Judicial Trustee, also filed on 17 June 2019, seeking an extension of time from 30 June 2019 to 31 August 2019 to deliver the results of the audit of the trust accounts of the Settlement. Winder J had previously ordered that the audit be delivered by 30 June 2019. As time was fast approaching and Mr. Wizman was unable to meet the deadline imposed on him by the Court, he saw it prudent to seek an extension of time. Trevor Bethel and his Counsel were served but failed and/or refused to appear.

[51] In a case of this nature, the Judicial Trustee had no recourse but to apply to this Court to extend time. As Learned Queen's Counsel Mr. Cohen properly submitted, the filing of a recusal summons does not cripple the Court from dealing with urgent matters especially of the kind sought by the Judicial Trustee. That said, the Judicial Trustee filed his Summons on 17 June 2019; the same date that Trevor Bethel

filed his Recusal Application. The submission that the Court is actively dealing with matters when a Recusal Application is pending is wholly inaccurate. It must therefore fail.

Disclosure by judge

[52] Ms. Glinton next argues that given the allegations made against me, I am required to make disclosures as to the events and issues raised and to disclose the nature of my relationship with Attorney Bethell as well as all of the details surrounding my receipt of the Confidential Opinion.

[53] In this regard, she relies on the English Court of Appeal case of **IN THE MATTER OF L-B (Children)**, [2011] 1 FLR 889 at para [22] where the Court states:

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

[54] During the course of this hearing, I inquired of Ms. Glinton whether she meant that I ought to formally write to her detailing the issues as both of these matters were addressed during proceedings in this Court when for reasons best known to her, she failed to show up. As she persists with this argument, I take it that her answer must be in the affirmative.

[55] Some guidance on the issue of disclosure by a Judge can be found in the case of **Belgravia** (supra). In that case, the Appellants alleged that both Justices of Appeal, John and Blackman were conflicted. In the case of John JA, it was alleged that his daughter worked for the law firm of Lennox Paton even though she was not employed by that firm in May 2013 when the Court concluded the hearing of the appeal. In the case of Blackman JA, the allegation of bias is that consequent to his being a non-executive Director of CIBC West Indies Holdings Limited, a corporate affiliate of CIBC between 1993/94 and 2001, he should have disclosed

at the outset of the appeal, the family relationships that his son and sister have or had with First Caribbean International Bank.

[56] The Court of Appeal held that Mr. Pushpinder Saini QC and Mr. Maurice Glinton (Counsel for the Appellants in some of the appeals) had not assisted the Court by stating what defining moment or event occurred that would have prompted Justices Blackman and John to disclose a likelihood of bias. Blackman JA at para. 30 of the judgment stated:

> **"While extensive powers are vested in judicial officers, I don't think that the power of divination is one of them."**

[57] The allegations raised in the present case calling for disclosure is even weaker. There is not a scintilla of evidence to demonstrate the unfounded and baseless allegations that I have any personal social relationship with Attorney Bethell and/or his wife who is a Supreme Court Judge. In his letter of 10 May 2019, Mr. Glinton QC averred that this fact is well-publicized and goes beyond the usual confraternal relationship shared by members of the Bar. Yet, he has not produced a single well-publicized document to substantiate his bare assertion.

[58] With respect to the Confidential Opinion which apparently was emailed and/or transmitted to me sometime in 2016, I do not recall receiving and/or reading any Confidential Opinion. I am the only person who would know that and I categorically state that, to the best of my knowledge and ability, I have not read the Confidential Opinion. As I stated during the hearing of this application, this is an exceedingly busy Court with sittings almost every day except on one or two Fridays in the month so documents might have been emailed and/or transmitted to me which I normally read when required so to do, for example, when hearing a matter and reference is made to it and/or writing a judgment/ruling.

[59] Consequently, there is nothing for me to disclose to any party.

[60] Further, I am impelled to reverberate what I said in **Re Bernard E. Evans** [supra] quoting from a paper entitled "*Recusing yourself from hearing a case*" written by Mr. Justice Hayton of the Caribbean Court of Justice. The learned judge wrote:

> **"Becoming a judge starts with a memorable swearing-in ceremony. A judge will swear (or solemnly affirm) that he will faithfully exercise his office without fear or favour, affection or ill-will - and perhaps in accordance with the relevant Code of Judicial Conduct or Ethics if there is one. The judge will also be well aware of a citizen's fundamental constitutional rights to a fair and public hearing by an independent and impartial tribunal, judicial independence in itself being a means of ensuring impartiality, the two concepts being closely linked.**
>
> **By virtue of their professional background leading up to their appointment, judges are assumed to be persons of "conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." "It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions". The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views." Judges should be selected as independent-minded persons of intellect and integrity. Thus there is a "presumption of impartiality" which "carries considerable weight."** [Emphasis added].

[61] An experienced judge does not need a lawyer to make an application to seek his/her recusal. That judge knows when he or she is conflicted and ought to do so on his/her own initiative. Although there is no written Code of Judicial Conduct in this jurisdiction, all judges swear/affirm that he/she will faithfully exercise his office without fear or favour, affection or ill-will. Put another way, all judges swear or affirm to perform the duties of the office of a judge with impartiality and integrity. A judge must disqualify himself/herself in a proceeding in which his/her impartiality might **reasonably** be questioned.

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

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

> **"22. We also find great persuasive force in three extracts from Australian authority. In *Re JRL, ex p CJL* (1986) 161 CLR 342 at 352 Mason J, sitting in the High Court of Australia, said:**
>
> > **'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.' [Emphasis added]**
>
> **24. In the *Clenae* case [1999] VSCA 35 Callaway JA observed (para 89(e)):**
>
> > **'As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.'"** [Emphasis added]

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

> **"Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation.** [Emphasis added]

[63] To end this unfortunate discourse, the allegation of my personal social relationship with Attorney Bethell is not only speculative but without any proper and concrete foundation and even if it were true, I am a professional and experienced judge. With respect to the Confidential Opinion, I reiterate that I am the only person who could say whether or not, I read it. I emphatically state that I have not and any suggestion to the contrary is equally speculative and without substance.

[64] In the context of the unsubstantiated allegations against me, it cannot be said that an informed, reasonable and right minded person, viewing the matter realistically and practically could conclude that bias or its apprehension was probable.

The affidavit does not satisfy the requirement of Order 41 Rule 5(2)

[65] Learned Queen's Counsel for the Plaintiffs, Mr. Cohen also raised a preliminary point namely that the only evidence supporting the recusal application is the affidavit of Trevor Bethel filed on 17 June 2019 and that the affidavit does not satisfy the requirement of O. 41 r 5(2) thus the necessity to cross-examine him.

[66] O. 41 r. 5(2) provides that: "*An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof*."

[67] Mr. Cohen QC submits that there is very little in the affidavit which appears to be within Trevor Bethel's own knowledge and therefore cross-examination will establish that. According to him, serious allegations are advanced which obviously requires proof with the deponent accepting responsibility for what he alleges. The overwhelming probability is that the source is Mr. Glinton QC who could not be a witness and continue as Counsel.

[68] Mr. Cohen QC argues that whatever the source, Mr. Glinton QC cannot be continuing as counsel for a further reason – in joining with Trevor Bethel as co-complainant to the Bar Council - he is personally asserting the facts on which the complaint is based as well as his own personal opinions. According to learned

Queen's Counsel Mr. Cohen, it is inconceivable that Mr. Glinton QC can therefore have the independence essential to act as counsel/advocate.

[69] Ms. Glinton strenuously objects to the cross-examination of Trevor Bethel. She submits that the proper course is either to apply to strike out the relevant paragraphs or to have the affidavit amended and re-sworn.

[70] I agree with Mr. Cohen QC that the affidavit does not purport to verify the assertions in the documents exhibited namely:

1) Paragraph 3 refers to Exhibit JTB1 "*the contents of which were shown to me."* This does not even purport to be a verification of the factual assertions made in Mr. Glinton QC's letter on 10 May 2019 to Charles J. I agree that it is unsurprising because it is difficult to see how Trevor Bethel could sensibly verify what is said in that letter.

2) Paragraph 5 refers to Exhibit JTB2 which merely states that Trevor Bethel has lodged a formal complaint jointly with his Counsel against Charles J and others. As in the case of Exhibit JTB1, there is not even an attempt to verify the truth of what is asserted in the complaint.

3) Paragraph 6 makes clear that Trevor Bethel relies on the contents of the documents exhibited.

[71] I also agree with Mr. Cohen QC that these are not trivial defects to be amended given the seriousness of the allegations made against a judge and the fact that evidence ought to be available from Mr. Glinton QC. I agree that striking out of paragraphs of the affidavit effectively leaves nothing of substance.

[72] The Recusal Application needs to be determined on concrete evidence. Trevor Bethel, having sworn to the contents of his affidavit, ought to be cross-examined if Counsel on the other side requires such cross-examination. There is nothing novel

in this principle that a deponent to an affidavit must attend court for cross-examination, if such cross-examination is requested. That is the law.

[73] In addition, Trevor Bethel was only subpoenaed because he with his Counsel never showed up in this Court and they have offered no alternative date(s) when they would be available. To simply state that I am not available is not the practice of lawyers.

Cross-examination of Trevor Bethel

[74] Trevor Bethel took the witness stand and was cross-examined. Under cross-examination, he admitted that he has never appeared before me as a witness or a litigant. He also stated that he has no connection or personal experience with me. He was cross-examined as to his averment in paragraph 6 of his affidavit that he verify believes that he cannot receive a fair trial and an impartial hearing within a reasonable time or at all before me. Before he could even understand and answer this question, there was interruption by Ms. Glinton. With respect to whether he knows anything about several bankruptcy petitions where Mr. Glinton QC sought my recusal, Trevor Bethel was not aware of this. Trevor Bethel was extensively cross-examined on his affidavit, the letter written to me by Mr. Glinton QC on 10 May 2019 and the letter of complaint to the Ethics Committee of the Bar Council dated 17 June 2019. The Court observes that it is written on the very same day that the Recusal Application was filed.

[75] It was very plain that Trevor Bethel objects to my hearing of this case based on what Mr. Glinton QC told him. As he said during his cross-examination: see page 61 of the transcript of proceedings of 2 July 2019: *"I'm relying on his opinion*." This was the common thread running through most if not all of the questions put to him.

[76] Trevor Bethel was further cross-examined on the contents of a letter dated 29 April 2019 written to the Listing Office in which Mr. Glinton QC writes to Mrs. Archer:

> **"Mr. Bethel does not cast on [sic] aspersions on Madam Justice Indra Charles or any other judge by having the trust action be**

administratively controlled by Mr. Justice Thompson, he already being seized of the other action."

[77] He was asked whether that was true when it was said. His reply is that "*I'm going on what my counsel is advising me*." He was asked what has changed and his reply was "*I'm going on the advice and the guidance of my Counsel."*

[78] From his cross-examination, one thing stands out: he relies entirely on what Mr. Glinton QC told him about the judge.

[79] Now, given that Trevor Bethel and Mr. Glinton QC are joint complainants before the Bar Council, there can be no excuse for Mr. Glinton QC to abstain from giving evidence as he plainly cannot continue as counsel whilst joining with a party as a litigant in relation to the same subject matter.

[80] Learned Queen's Counsel Mr. Cohen refers to The Bahamas Bar (Code of Professional Conduct) Regulations at Rule VIII - The Attorney as an Advocate. Commentary 1(c) is especially significant. It states:

"The attorney must not, for example,

(c) endeavour or allow anyone else to endeavour, directly or indirectly, to influence the decision or action of a tribunal or any of its officials in any case or matter, whether by bribery, personal approach or any means other than open persuasion as an advocate."

[81] The letter of 10 May 2019 threatens the judge.

[82] Commentary 3 is equally important. It states that:

"3. The attorney should not express his personal opinions or beliefs, or assert as fact anything that is properly subject to legal proof, cross-examination or challenge. <u>He must not make himself in effect an unsworn witness or put his own credibility in issue. If the attorney is a necessary witness he should testify and the conduct of the case should be entrusted to another attorney. The attorney who was a witness in the proceedings should not appear as advocate in any appeal from the decision in those proceedings.</u> There are no restrictions upon the advocate's right to cross-examine a fellow attorney and the attorney who does appear as a witness should not

expect to receive special treatment by reason of his professional status." [Emphasis added]

[83] Based on the fore-going, I find as a fact that the evidence of Trevor Bethel consisted repeating what Mr. Glinton QC had told him so that the evidence being placed before the Court was that of Mr. Glinton QC. Mr. Glinton QC could not therefore continue to act as "Counsel"[2] for this reason as well as the fact that he had joined with Trevor Bethel as co-complainant in a complaint to the Ethics Committee of the Bar Council in respect of the conduct in this case. Counsel is required to preserve his independence and cannot continue to act where he is either a witness or in the position of a litigant.

Whether the judge should recuse herself?

[84] Ms. Glinton correctly submits that in determining whether to recuse myself, I must not be concerned with just actual bias but also with apparent bias. She identifies four (4) circumstances which according to her, would lead to the eluctable conclusion that there is a real possibility that I was biased, some of which have already been dealt with namely:

1. That I am in receipt of Confidential Opinion via email on 8 March 2016 and, at that time believing I was the judge who would hear the application, there is a real probability that I was privy to the contents of this Confidential Opinion. This issue was already discussed and determined: see paras [58] and [63].

2. That given Mr. Glinton QC's quite vocal and ongoing legal battle to disqualify foreign citizens from being appointed as judges, and given that I am a non-Bahamian judicial appointment, there is a real possibility of bias against him. Shortly put, there is not a shred of evidence to substantiate this bald allegation.

[2] To be replaced by the word "Advocate" in keeping with the language used in Rule VIII of The Bahamas Bar (Code of Professional Conduct) Regulations: see Ruling dated 5 November 2019.

3. That I am incapable of impartiality where my friend, Attorney Bethell is acting as Counsel. This issue has already been addressed so there is no need for regurgitation.

4. That Trevor Bethel has made a formal complaint against me to the Ethics Committee of the Bar Council which is pending. Accurately it should state that Mr. Glinton QC and Trevor Bethel have made a formal complaint against me, among others.

Analysis and Findings

The test for apparent bias and predetermination

[85] In **Re Bernard E. Evans,** I comprehensively set out the test for apparent bias and predetermination at paras [15] to [19]. The law has not changed since so I will merely adopt what I said in that case.

> **[15] The question to be asked is "*whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased"*: per Lord Hope in *Porter v Magill* [2001] UKHL 67 at para. 103. See also *The Rt. Hon. Perry G. Christie, Prime Minister of the Commonwealth of The Bahamas et al v The Queen and The Coalition to Protect Clifton Bay et al* (SCCivApp No. 63 of 2017).**
>
> **16] In *Otkritie International Investment Management v Mr. George Urumov* [2014] EWCA Civ. 1315, the Court of Appeal regarded this as a fundamental principle of English law and went on to state:**
>
> > **"It is an even more fundamental principle that a judge should not try a case if he is actually biased against one of the parties. The concept of bias …extends …to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have "pre-judged" the case."**
>
> **[17] The learned authors of *Blackstone's Criminal Practice 2009* note that the right to an impartial tribunal is protected by the rule that provides for the judge's disqualification or the setting aside of a decision if on examination of all the relevant circumstances there was a real danger or possibility of bias. It is the judge's duty to consider and exercise judgment on any objection raised which could be said to give rise to a real danger of bias. Disqualification for apparent bias is not discretionary; either there is a real possibility of bias, in which case the**

judge is disqualified, or there is not: *AWG Group Ltd. V Morrison* [2006] 1 WLR 1163. However, it is generally undesirable that hearings be aborted unless the reality or appearance of justice requires such a step: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 45.

[18] In *Helow v Secretary of State for The Home Department and Another (Scotland)* [2008] UKHL 62, the appellant, a Palestinian by birth, averred that her family were supporters of the Palestinian Liberation Organisation ("the PLO"). More particularly, she was actively involved in the preparation of a lawsuit brought in Belgium, alleging that the then Prime Minister was personally responsible for the massacre in the Sabra and Shatila camps in Lebanon in September 1982. She alleged that she was at risk of harm not only from Israeli agents, but also from Lebanese agents and because of her links with the PLO; from Syrian agents. On that basis, she claimed asylum in Scotland but her application was refused by the Home Secretary and, on appeal, by the Adjudicator. The appellant was refused leave to appeal by the Immigration Appeal Tribunal. She then lodged a petition in the Court of Session seeking a review of that refusal. The petition was considered by Lady Cosgrove. The appellant did not criticize Lady Cosgrove's reasons for dismissing her petition. Instead, she launched an attack on the ground that it was vitiated for "apparent bias and want of objective impartiality". She did not suggest that the judge could not be impartial merely because she is Jewish. Rather, the contention was that, by virtue of her membership of the International Association of Jewish Lawyers and Jurists, the judge gave the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of a petition for review concerning a claim for asylum based on the appellant's support for the PLO and involvement in the legal proceedings against the then Prime Minister. The Court noted that:

> **"The basic legal test applicable is not in issue. <u>The question is whether a fair-minded and informed observer, having considered the relevant facts, would conclude that there existed a real possibility that the judge was biased,</u> by reason in this case of her membership of the Association: *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357. The question is one of law, to be answered in the light of the relevant facts, which may include a statement from the judge as to what he or she knew at the time, although the court is not necessarily bound to accept any such statement at face value, there can be no question of cross-examining the judge on it, and no attention will be paid to any statement by the judge as to the impact of any knowledge on his or her mind: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, para. 19 per Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott V-C. The fair minded and informed observer is "neither complacent nor unduly sensitive or suspicious", to adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488, para 53, which was approved by my**

> **noble and learned friends Lord Hope of Craighead and Baroness Hale of Richmond in *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2; 2006 SC (HL) 71, paras 17 and 39…."**
>
> **[19]The House of Lords found that the fair-minded and informed observer would not impute to the judge the published views of other members because she was a member of the Association. The appellant also contended that the observer would think that by reading the journal which the Association publishes, the judge might well have absorbed the most extreme views expressed in its pages by a process of osmosis so that there is a real possibility that, as a result, she would be biased in dealing with the appellant's petition. In dismissing the appeal, Lord Rodger of Earlsferry had this to say [at para. 23]:**
>
> > **"So, the hypothetical observer would have to consider whether there was a real risk that these articles, read at perhaps quarterly intervals, over a period of years would have so affected Lady Cosgrove as to make it impossible for her to judge the petition impartially. In assessing the position, the observer would take into account the fact that Lady Cosgrove was a professional judge. Even lay people acting as jurors are able to put aside any prejudices they may have. Judges have the advantage of years of relevant training and experience. Like jurors, they swear an oath to decide impartially. While these factors do not, of course, guarantee impartiality, they are undoubtedly relevant when considering whether there is a real possibility that the decision of a professional judge is biased. Taking all these matters into account, I am satisfied that the fair-minded observer would not consider that there had been any real possibility of bias in Lady Cosgrove's case."** [Emphasis added].

[86] As earlier stated, courts and tribunals must have broad backs. As learned Queen's Counsel Mr. Cohen submits, the need for courts to have broad backs is even stronger when unpleasant and wounding accusations are directed at them, especially if directed to manipulating the result. Mr. Cohen QC next submits that in the present case, the manipulation attempted is to alter the judge (apparent since 4 April 2019 when Mr. Glinton QC stated to Winder J "*I won't be seen in that Court."* Subsequent conduct of deliberate absence at hearings confirmed this statement.

[87] Having examined Ms. Glinton's submissions regarding apparent bias and predetermination on my part, the question is one of law, to be answered in light of

the relevant facts. It is a well-established principle of law that when an application of this type is made, an asserted risk to the fairness of the trial which is unconvincing or fanciful will not suffice. However, the converse proposition applies with equal force. The court is required to make an evaluative judgment based on all the information available. In doing so, the court will apply good sense and practical wisdom.

[88] A decision-maker must not be influenced by partiality or prejudice in reaching his or her decision. Similarly, a decision-maker must not act in a way, or have characteristics, that would lead **a notional fair-minded and informed observer to conclude that there was a real possibility that he or she is biased**. The former rule is important because it helps to achieve a high quality of decision-making unaffected by irrelevant matters. The latter rule is important because it helps to maintain public confidence in decision-making processes: see **Auburn, Moffet, Sharland: Judicial Review Principles and Procedure**, para. 8.41, p.212**.**

[89] As I said in **Re Bernard E. Evans**, at paragraphs [25] to [27]:

> **"[25] The importance of an impartial tribunal is a longstanding feature of the common law and finds itself in the Bahamian Constitution: see Article 20(8) which provides that where an individual's civil rights or obligations are determined, or a criminal charge against him or her is determined, he or she is entitled to an adjudication before an "*impartial and independent tribunal*."**
>
> **[26] It is undoubtedly a wise and jealous rule of law to guard the purity of justice that it should be above all suspicion. Kirby J in *Johnson v Johnson* (2000) 201 CLR 488, 509, para. 53., stated that "the fair-minded observer is not unduly sensitive or suspicious."**
>
> **[27] Thus perceptions are all important: the terms of the immutable rule that justice should not only be done but should manifestly and undoubtedly be seen to be done are familiar to all practitioners: see Lord Hewart CJ in *R v Sussex Justices, ex parte McCarthy* [1923] All E Rep 233 at page 234.**

[90] In the present case, the allegation that I was/will be biased for the reasons stated by Trevor Bethel is unfounded and baseless. There is not a shred of evidence to support any of those allegations.

[91] For all of these reasons, I hold that the application seeking my recusal is without merit. I would therefore dismiss the Recusal Application with costs to the Plaintiffs and to the Defendants who were present and made submissions. Such costs are to be taxed if not agreed.

[92] In addition, I will also order that since Mr. Glinton QC is a joint complainant with Trevor Bethel before the Ethics Committee of The Bahamas Bar Council, he cannot effectively be a litigant and lawyer at the same time. Therefore, it is only fit and proper that he withdraws his services as Advocate [3] to Trevor Bethel. Given this finding, the Court shall give Mr. Glinton QC a further opportunity to be heard (on the issue of whether he ought to withdraw as Advocate).[4]

[93] In her concluding paragraph, learned Counsel Ms. Glinton submits that if the Court does not find in her favour, she will seek leave to appeal and a stay of the decision as well as any Orders which I made while the application is pending and any further proceedings in this action pending the determination of the appeal by Trevor Bethel.

[94] In this regard, Ms. Glinton will have to file a formal Summons for Leave to Appeal and a Stay of my decision. I shall hear Counsel on Monday, 29 July 2019 at 10.00 a.m. for 3 hours. Submissions must be emailed to me by Friday, 25 July 2019 by 4:30 p.m. I shall also hear the parties on costs.

Postscript

[95] I am compelled to add this. There are a number of defendants in this case and only Trevor Bethel, who has never appeared before me as a witness or litigant, and does not have any relationship with me, sees it fit to seek my recusal. I believe that the answer is obvious. He relies on Mr. Glinton's opinion. Simply put, it is Mr. Glinton QC who is seeking my recusal and not Trevor Bethel.

[3] "As Advocate" is added to lend clarity to the Judgment.
[4] Sentence added in conformity with Ruling delivered on 5 November 2019.

[96] That said, it is probably worth stating that no other defendant has made a similar application. In fact, learned Counsel Mr. Wilson who appears for the First Defendant, Striker Trustees Limited ("Striker") opposes the application. He has gratefully provided written as well as oral submission in this matter. He emphatically declared:

> **"In the First Defendant's view, Charles J. is the judge best suited to deal with this action and she ought not to be disqualified <u>on the basis of tenuous suggestions of bias being alleged by Bethel (Trevor)</u>. Given that Winder J has already recused himself and two of the other experienced commercial judges would not be able to adjudicate this matter the option of another experienced commercial judge hearing this matter should Charles J be recused is limited. Striker submits that the recusal application should be dismissed."** [Emphasis added]

[97] If however this was a case in which the test of actual or apparent bias was made out, the inconvenience of the recusal is not something which would influence me.

[98] Also, the Judicial Trustee does not support the Recusal Application. Learned Counsel Mr. Jenkins appearing for the Judicial Trustee opines that there is no evidence of bias or apparent bias.

[99] Learned Counsel Mr. Brown holding papers for Mr. Robert Adams who represents the 9th and 10th Defendants states that he has not received any instructions from his clients in so far as it relates to supporting or opposing the application for recusal which is why no submissions have been laid over. However, insofar as the main contentious preliminary issue is concerned, whether or not I should hear this application, Counsel for the 9th and 10th defendants have taken the position that the application could be properly heard before me.

[100] Ms. Sherman who appears for the 7th Defendant remained a neutral party in these proceedings.

[101] Last but not least, I thank all Counsel for their industry.

Dated 11th day of July, A.D. 2019

(Re-issued on 5 November 2019)

Indra H. Charles

Justice