COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/COM/bnk/00007

BETWEEN

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

(By AVERIL CLARKE, ANDREA CULMER and STEVE HEPBURN in their capacity as Trustees)
(A Judgment Creditor)

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Maurice Glinton QC and Ms. Meryl Glinton for the Judgment Debtor
Mr. Kahlil D. Parker and Ms. Roberta Quant for the Judgment Creditor

Hearing Date: 17 April 2018

Bankruptcy Proceedings – Recusal - Apparent bias and/or predetermination – Whether apparent bias and/or predetermination made out – Whether Judge should have recused herself – Right to fair hearing by impartial tribunal, as guaranteed by Article 20(8) of the Constitution of The Bahamas

The Judgment Creditor (JC) filed a Petition seeking an order for the Judgment Debtor (JD) to be deemed a bankrupt in accordance with the provisions of the Bankruptcy Act, Ch. 69. The Petition has its genesis in a Final Judgment which was entered on 15 October 2014 in Supreme Court Action - 2012 CLE/gen/00573. The said Final Judgment was entered pursuant to a Consent Order made before Barnett CJ on 7 October 2014. There has been no appeal of the Final Judgment. However, nineteen months later, the JD applied to strike out/set aside the Final Judgment. The said application cannot be located and it appears that there is no serious attempt to prosecute it. The judgment debt of in excess of $1.3 million has not been paid. In the interim, the JC filed this application for the JD to be adjudicated a bankrupt.

Before the hearing of the Petition even got off the ground, the JD made an oral application for me to recuse myself alleging bias and/or predetermination on my part. The JD relies on two

grounds to found his application namely (i) matters prima facie evident from the record of proceedings relating to case 2017/COM/bnk/0004 – **Re Colin Wright** and (ii) views of the judge stated orally on 28 March 2018 in two other related matters namely that "*Judgment be entered for the JC if the two other JD's fail to file and serve their affidavits by 9 April 2018*". In other words, the judge is likely to be biased and/or she has predetermined the case since she made unless orders in related cases.

The JC opposes the application and alleges that it is a delaying tactic.

HELD: dismissing the application for recusal with costs to the Judgment Creditor

1. The test for apparent bias and predetermination is well-settled. The question to be asked is "whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." A real danger of bias might well be thought to arise if on any question at issue in the proceedings before her, the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on her ability to try the issue with an objective judicial mind: **Porter v Magill** [2001] UKHL 67 and **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) applied.

2. There may be nothing wrong in a judge giving some indication of her current thinking during the hearing of a case. A judge may alert counsel to the difficulties a litigant may face with respect to a matter or point in issue. The overarching principle is that a closed mind should not be shown. In the present case, this court has written a judgment in **COLIN WRIGHT** which, if Counsel is aggrieved, may appeal to the Court of Appeal and, in two related cases namely: **SHAWN BOWE and RAY NAIRN**, the Court made unless orders which it routinely does so that parties comply with Orders in a timely fashion. In the present case, the Court has not even embarked on the hearing. On these facts, a fair-minded and informed informer would be hard-pressed to conclude that there is a real possibility of bias or that I have predetermined the matter: **Arab Monetary Fund v Hashim** (1994) 6 Admin. LR 348 and **Harada Limited v Turner** [2001] EWCA Civ 599 applied.

3. The right to a fair trial by an impartial tribunal is the pillar of a democratic society. It is embedded in the Constitution of The Bahamas. It is pivotal for public confidence in the administration of justice. Lack of impartiality erodes the entire judicial process.

4. The present application for recusal is nothing more but a delaying tactic to stymie the hearing of the Petition.

JUDGMENT

Charles J:

[1] By Petition filed on 24 April 2017, The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees) ("Judgment Creditor") seeks an order for

the Judgment Debtor, Bernard Evans ("Mr. Evans") to be adjudged a bankrupt in accordance with the Bankruptcy Act, Ch. 69 ("the Act").

[2] The Petition has its genesis in a Final Judgment which was entered on 15 October 2014 in Supreme Court Action - 2012 CLE/gen/00573. The said Final Judgment was entered pursuant to a Consent Order made before Barnett CJ (as he then was) on 7 October 2014 in the presence of Counsel for the parties. There has been no appeal of the Final Judgment to the Court of Appeal. However, nineteen months later, Mr. Evans and three other judgment debtors applied to strike out/set aside the Final Judgment. The said application cannot be located. It appears to me that no serious attempt has been made to prosecute it. This Court was willing to reconstruct the file and hear that extant Summons but learned Queen's Counsel prefers another judge to hear it.

[3] The Final Judgment has not been stayed and/or set aside by the Court of Appeal or, for that matter, any Court. The time limited for appealing the Final Judgment has long since expired in 2014. The judgment debt of in excess of $1.3 million has not been paid. In the interim, the Judgment Creditor filed the Bankruptcy Petition for an Order that Mr. Evans be adjudicated a bankrupt.

[4] Before the Petition even got off the ground, learned Queen's Counsel Mr. Glinton who represents Mr. Evans made an oral application for me to assign the Petition to another judge. As I understand him, he is seeking an order for my recusal but it took him a bit of time to acknowledge that.

[5] The basis of the recusal application is contained in paragraphs 1:02 to 1:08 of Mr. Evans' written submissions. Stripped to its bare essentials, the recusal application is premised on two grounds namely:

(i) Matters *prima facie* evident from the record of proceedings relating to case 2017/COM/bnk/0004 - IN THE MATTER of the Bankruptcy Act, Chapter 69 Statute Laws of The Bahamas: Re: **COLIN WRIGHT v Ex Parte The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees ("Judgment Creditor")** that

concluded in an Order of Adjudication being made against Mr. Wright; and;

(ii) The Judgment Debtor fear and reasonably apprehend bias as a result of views Madam Justice Charles stated orally on 28 March 2018 in their presence and recorded in the Judge's notes on the files of Orders she made, "*that Judgment be entered for the Judgment Creditor if they failed to file and serve their affidavits by 9 April 2018*" in two other matters namely (1) 2017/COM/bnk/0005 - **Re: SHAWN BOWE v Ex Parte The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees ("Judgment Creditor")** and (2) 2017/COM/bnk/0006 – **Re: RAY NAIRN v Ex Parte The Bahamas Communications and Public Officers Union Plan & Trust Fund (By Averil Clarke, Andrea Culmer and Steve Hepburn in their capacity as Trustees ("Judgment Creditor")**.

[6] Shortly put, the recusal application is based on issues of apparent bias and/or predetermination.

[7] In the main, learned Counsel Mr. Parker submitted that this is a feverish attempt by Mr. Evans to stall and stymie these proceedings and it is nothing more but delaying tactic.

The Facts

Bankruptcy Order involving Colin Wright

[8] On 15 January 2018, a Petition filed on 24 April 2017 to declare one, Colin Wright, a bankrupt, pursuant to the Act, came before me for hearing. Mr. Wright was personally served with all of the requisite documents to attend Court but he did not appear personally or with his Counsel. The Court proceeded to hear the Petition in Mr. Wright's absence. The Court, being satisfied that a judgment debt of in excess of $1.3 million remained unsatisfied, made an Order declaring Mr. Wright a bankrupt.

[9] On 12 February 2018, by an *Ex Parte* Summons filed on the same date, Mr. Wright, through his Counsel Mr. Glinton QC approached the Court seeking an interlocutory injunction to restrain the Judgment Creditor from advertising, in the Gazette, the Bankruptcy Order of 15 January 2018.

[10] The matter was heard *Inter Partes* on the same day. On 30 April 2018, this Court delivered a written judgment. The Court refused to grant the interlocutory injunction sought in the *Ex Parte* Summons on the grounds that there was no issue to be tried, moreover, a serious one and, in any event, even if there was a serious issue to be tried, damages would be an adequate remedy and there was no evidence that the Judgment Creditor was not in a financial position to pay: see paragraphs 53 to 57 of the judgment.

[11] If Mr. Wright is unhappy with the judgment, there is nothing precluding him from appealing it to the Court of Appeal. That, however, does not amount to bias.

Two related matters - Re Shawn Bowe and Re: Ray Nairn

[12] No Court Reporter was present on 28 March 2018 when these matters came for hearing. In any event, an adjournment was sought to facilitate the presence of lead Counsel Mr. Glinton QC. The handwritten notes of the Court read:

> **"Mr. Parker states that Ms. Glinton is seeking an adjournment because lead Counsel for the Judgment Debtor is not present and Ms. Glinton herself is set to travel over the holiday weekend. Counsel requests that these two matters be heard consecutively as they raise the same subject matter and issue. Court gives some directions on a way forward.**
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> **ORDER:**
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> **IT IS HEREBY ORDERED AS FOLLOWS:**
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> **(1) That the Respondent/Judgment Debtor is to file and serve any affidavit evidence by 9 April 2018 failing which Judgment will be entered for the Petitioner/Judgment Creditor;**
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> **(2) Written submissions are to be emailed in Microsoft word to the Court by 16 April 2018;**
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> **(3) Hearing is to take place on Wednesday, 18 April 2018 at 10:00 a.m."**

[13] Ms. Glinton submitted that there were other exchanges between the Bench and Counsel. Perhaps, there was but there is no such notation on the Court's file. In any event, the Petition seeking an order for Mr. Evans to be adjudicated a

bankrupt was not before the Court on 28 March 2018. It came before this Court for the first time on 17 April 2018.

The law

Becoming a judge with presumed impartiality

[14] In a paper entitled "*Recusing yourself from hearing a case*", Mr. Justice Hayton of the Caribbean Court of Justice, 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.**
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> **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." "<u>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</u>." 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].
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> See also: **Andre Penn v The Director of Public Prosecutions** [BVIHCV2009/0031] (unreported) delivered on 22 February 2011.

Apparent bias and predetermination

[15] The test for apparent bias is well-settled. 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].

[20] I gratefully adopt these judicious words of Lord Rodger of Earlsferry.

[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:**
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> > **'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]
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> **24. In the *Clenae* case [1999] VSCA 35 Callaway JA observed (para 89(e)):**
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> > **'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]

[23] With that background, I will examine Mr. Glinton's QC's submission 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.

[24] 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**.**

[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.

[28] Learned Queen's Counsel Mr. Glinton submitted that because I made a Bankruptcy Order in **Colin Wright** and because I made Unless Orders and some comments (which, for present purposes, are bare allegations) in the yet to be heard Petitions of **Shawn Bowe** and **Ray Nairn**, that there was a real possibility that I was biased.

[29] It is important to point out that there may be nothing wrong in a judge giving some indication of his/her current thinking during the hearing of a matter. A judge may inform counsel of the difficulties a litigant may face with respect to a matter or point in issue. The overarching principle is that a closed mind should not be shown. In **Arab Monetary Fund v Hashim**, Bingham M.R. said at page 356:

> **"But on the whole the English tradition sanctions and even encourages a measure of disclosure by the Judge of his current thinking, it does not**

> **sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind."**

[30] In **Harada Limited v Turner** [2001] EWCA Civ 599, Pill LJ had this to say (at para. 31):

> **"[Counsel] for Harada accepts that judges may make remarks at the beginning or in the course of hearings which indicate the difficulties a party faces upon one or more of the points at issue. Provided a closed mind is not shown, a judge may put to counsel that, in the view of the judge, the counsel will have difficulty in making good a certain point. Indeed, such comments from the Bench are at the very heart of the adversarial procedure by way of oral hearing which is so important to the jurisprudence of England and Wales. It enables the party to focus on the point and to make such submissions as he properly can."**

[31] Furthermore, a judge can be assumed, by virtue of the office for which he/she has been selected, to be intelligent and well able to form his/her own views: **Helos v Secretary of State for the Home Department** [supra]. A judge must also not predetermine or appear to predetermine a decision but he or she must consider it on the merits with an open mind.

[32] The issue in this case is whether the fair-minded and informed observer, having considered the relevant facts, would conclude that there exists a real possibility that I was biased? The test for apparent bias requires consideration of a "possibility", applying the information known to and attributes of the hypothetical observer. It is well-established that the hypothetical observer is properly informed of all facts, is of balanced and fair mind, is not overly sensitive and is of a sensible and realistic disposition. Such an observer would, in my opinion, readily conclude that a judge will presumptively, decide every case coldly and dispassionately and only in accordance with the evidence. This principle is deeply rooted with the policy of the common law and our constitution.

[33] In the present case, the allegation that I was biased and have predetermined the case is unfounded and unsubstantiated. There is not an iota of evidence to support it. The fact that I ruled against Mr. Wright does not mean that I was biased. He has a right to appeal my decision. In the present matter, I have not

even heard learned Queen's Counsel. This is the first time that Mr. Evans' Petition is coming before me for hearing.

[34] For all of these reasons, I hold that the application seeking my recusal is without merit. As Mr. Parker correctly submitted, this application is nothing more than a delaying tactic and cynical maneuverings of a delinquent Judgment Debtor, as Mr. Evans is, who has failed to substantively address or legitimately challenge a Final Judgment entered almost four years ago.

[35] I would therefore dismiss the recusal application with costs to the Judgment Creditor to be taxed if not agreed.

[36] I will proceed to hear the Petition. .

Dated this 24th day of May, A.D. 2018

Indra H. Charles
Justice