COMMONWEALTH OF THE BAHMAS **2015/PUB/JRV/19**

IN THE SUPREME COURT

Common Law & Equity Division

BETWEEN

THE BAHAMAS MEDICAL COUNCIL

Applicant

AND

CHANTA'L ROKEISHA CLEARE-KLEINBUSSINK

Respondent

Before: The Honourable Justice Cheryl Grant-Thompson

Appearances: Mr. Raynard Rigby for the Applicant

Ms. Chernenka Rolle for the Respondent

Hearing Date: 17th April 2017, 14th November 2019

R U L I N G

APPLICATION FOR JUDGE TO RECUSE -

PRINCIPLES OF RECUSAL

GRANT-THOMPSON, J

APPLICATION FOR JUDICIAL REVIEW

This is an application for the court to recuse itself in this matter.

BACKGROUND

1) The substantive matter is that of judicial review proceedings which require, at minimum, a brief articulation before dealing with the request for recusal. There were two applications for Judicial Review which are identical in nature and it is therefore prudent to address them simultaneously in this ruling. Both matters were commenced by an Ex-Parte Summons on Notice filed on the 5th November, 2015 and one supported by the Affidavits of the Respondents herein, Chanta'l Robeisha Cleare-Kleinbussink in PUB/JRV/19 of 2015; and Dellareece Woods-Isaacs in PUB/JRV/20 of 2015. (Collectively "the Respondents in this matter")

2) The Affidavits and the Statements were filed pursuant to the Rules of The Supreme Court (1978), Order 53, Rule 3(2), and detail the Respondents claim and the relief sought by them. Notices of Originating Motion were also filed.

3) The Court granted leave to apply for Judicial Review pursuant to Order 53, Rule 3 of the Rules of the Supreme Court. The Applicants herein entered an Appearance in the substantive matter. The Affidavit of Ms. Merceline Dahl-Regis, the Registrar of The Bahamas Medical Council (the Applicants herein, the Respondent in the substantive matter) laid out the Applicants position. Supplemental Affidavits for the Respondents were subsequently filed on the 17th of February, 2017.

REQUEST FOR RECUSAL

4) By a letter, two years after the commencement of the original action Counsel

for the Applicants respectfully requested an audience to make a written request for recusal. The missive stated-

*"**The ground for the application is that of perceived bias. Your Lady may recall that Mr. Munroe, Q.C. Acted as Counsel in the Judicial Review Case #00025 of 2015 in which you were the Applicant applying for reliefs such as those requested by the above referenced Applicants.(The Respondents herein)***

It is our humble submission that the prior engagement of Mr. Munroe to act on your behalf in a similar fashion would lead a fair and informed observer to conclude that there was a real possibility of bias towards Counsel."

5) The instant application for the Court to recuse itself was opposed by the Counsel for the Respondent herein by a letter delivered to my Chambers on 7th April, 2017 which detailed local and English case law supporting the position to refuse the request for recusal.

6) The Court finds that the current application is without merit and could open a floodgate for future potentially frivolous Judicial Recusal application. The applications are thus dismissed, the reasons for which are set out below.

7) Here, Counsel appearing before me merely worked in the same firm as Counsel who once represented this Judge, years before and prior to appointment in a matter. This is in short not in my view a sufficient nexus to justify recusal.

A judge beneath the auspicious Judicial robes is a human being – with normal functions. He must marry, divorce, buy & sell property, engage in any number of formal legal arrangements which may require him to seek the professional assistance of counsel at the Bar. Similarly, a Judge may belong to a particular social, civil or professional organization or have been a former member of a law firm. These relationships in my view and the performance of these formal functions should not militate against the Judge

sitting in a matter that involves one of the former colleagues with whom he may have been associated at one time or another.

8) Counsel for the Applicant had submitted that as I had been formerly represented in my personal capacity, by a Counsel in the Chambers of the Respondent, there is a possibility of perceived bias and as a result the court should recuse itself. (Counsel for the Respondent, Mr. Wayne Munroe, QC never appeared before me in this matter, a legal representative of his firm did.) Counsel for the Applicant submitted that a Justice of The Supreme Court who was formerly represented by Counsel prior to becoming a Justice should automatically recuse themselves if/when a member of the firm of that Counsel appears before them in a matter. Counsel for the Applicant submitted, therefore then, that this is not an application based on actual bias but one based on a "a real possibility of bias". The Respondent is simply of the view that the Court need not recuse itself in these matters.

THE LAW

9) The test for determining whether there is perceived bias was formulated by Lord Phillips MR in ***Re Medicaments and Related Classes of Goods (No. 2) [2001] 1W.L.R 700*** at paras 85 and 86; restated in ***Porter v Magill [2002] 2 WLR 37*** at 83H-84A; and cited with approval in a number of local cases. In **Porter v Magil**, Lord Hope, at paragraph 103, re-stated the test as follows:

"***The question 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".***

10) In **Conticorp S.A. And others v The Central Bank of Ecuador et al and others [2009] 3 BHS J No. 126**.

The Court of Appeal (**Dame Sawyer, P, Longly, J.A. And Blackman, J.A.)**, noted that:

"the word bias when used in connection with judicial proceedings means that in the tribunal hearing the matter had either actual bias – in the sense that the tribunal had a personal interest in the outcome of the matter – or perceived bias – in the sense that bearing in mind all of the circumstances which have a bearing on the suggestion that the tribunal was biased, an objective and fair-minded and informed observer would conclude that there was a real possibility or a real danger (which means the same thing) that the tribunal was biased".

The Court is thus required firstly to ascertain all of the circumstances which have a bearing on the allegation of apparent or perceived bias and then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the Court was biased. (**Flaherty v National Greyhound Racing Club Ltd. [2005] EWCA Civ 1117** at para 27.)

11) **WHAT CHARACTERISTICS ARE GIVEN TO THIS OBJECTIVE PERSONA?**

Several characteristics have been attributed to the "fair-minded and informed observer". He/she should be:

- "Such an observer will adopt a balanced approached" ***(Lawal v Northern Spirit [2003] UKHL 35, per Lord Steyn at [22])***;
- "A reasonable member of the public is neither complacent nor unduly sensitive or suspicious" (**Johnson v Johnson [2000] 201 CLR 488, 509** at [53] per Kirby, approved by Lord Steyn in Lawal);
- "Gender-neutral" **(Helow v Secretary of State for the Home Department [2008] 1 WLR 2416, per Lord Hope at [1]);**

- "the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument" ***(Helow, per Lord Hope at [2]);***

- *"Her approach must not be confused with that of the person who has brought the complaint …. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make if difficult for them to judge the case before them impartially."* ***(Helow, per Lord Hope at [2]);***

- *"The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction... Our experience over centuries is that this integrity is enhanced, not damaged, by the close relations that exist between the judiciary and the legal profession. Unlike some jurisdictions the judiciary here does not isolate itself from contact with the profession. ... This close relationship has not prejudiced but enhanced the administration of justice. ... The informed observer will therefore be aware that in the ordinary way there is contact between the judiciary and the bar. On the contrary, they promote an atmosphere which is totally inimical to the existence of bias. What is true to social relationships is equally true of normal professional relationships between a judge and the lawyers he may instruct in a private capacity."* ***(Taylor v Lawrence [2002] EWCA Civ 90; [2003] QB 528 at [61] -[63]);***

- He will know that judges are trained to have an open mind *(**El-Farargy v El Farargy and ors [2007] EWCA Civ 1149***, per Ward LJ at [26]);

- The observer will also "be aware of the traditions of judicial integrity and of the judicial oath", and will "give it great weight" ***(Robertson v HM Advocate 2007 HCJAC 63*** per Lord Justice Clerk (Gill) at [63];

- *"...She will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the rest of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."* ***(Helow, per Lord Hope at [3]); and***

- The observer can be expected to be aware of the legal traditions and culture (Lord Woolf CJ in ***Taylor v Lawrence,*** supra at 61), but may not be wholly uncritical of this culture *(Lord Steyn in **Lawal** at [22])* and would adopt a balanced approach *(Lord Steyn supra at [14])*.

12) At paragraph 95 of the judgment of the Caribbean Court of Justice in ***Walsh et al v Ward et al [2015] CCJ 14 (AJ)***, Saunders, JCCJ succinctly summarized the current position on judicial recusal, and I so remind myself as I considered the circumstances of this particular case. At paragraphs 95 of the judgment he states:

"The law on apparent bias is well settled. In determining whether, in instances such as these, a judge is disqualified from hearing a case, the reviewing Court must place itself in the position of an objective and fair-minded lay observer who would not conclude that there was a real possibility of bias. What matters is not so much the reality of bias or prejudice on the part of the judge but its appearance. This test is aimed at preserving confidence in the administration of justice and not at censure of the judge. If an objective bystander thought there was a real (as opposed to a fanciful) possibility a judge might be biased, justice delivery is

compromised. This remains the case even when the judge himself, and his peers, might confidently consider that the judge was a competent and impartial judge. What is at stake is not the integrity of the judicial officer but that of the administration of justice. It is important to stress that for a judge to recuse himself, or be asked to do so, does not reflect negatively on the probity or competence of the judge".

I**NDEPENDENCE OF THE JUDICIARY**

Commonwealth (Latimer House) Principles on the Three Branches of Government

13) Judges are accountable to the Supreme Law, Our Constitution and to the statute and common law which they must apply honestly, independently and with integrity. I am aware and am guided that the principles of judicial accountability and independence underpin public confidence in the judicial system and the importance of the judiciary as one of the three pillars upon which a responsible government relies.

Judicial Oath

14) I took a Judicial Oath I when I was sworn into office which provides as follows:

"I … do swear that I will well and truly serve Her Majesty Queen Elizabeth the Second, Her Heirs and Successors, in the office of Justice of the Supreme Court and will do right to all manner of people after the laws and usages of The Bahamas without fear or favor, affection or ill will. So help me God."[1]

15) (i) The facts here are that in my previous life as Counsel and

[1]First Schedule, Official Oaths Act of The Bahamas

Attorney, one for the members of the firm of Counsel from the Respondent, represented me in a private capacity;

(ii) the matter was one of judicial review

(iii) Counsel currently appearing before me did not appear in respect of that matter;

(iv) the substantive applications for Judicial review were filed November 2015, and in July 2016 the Order was granted by this Honourable Court and yet it was not a year later that the present objection was taken;

(v) I ("Grant-Thompson J") was formerly represented by Mr. Wayne Munroe, QC of Munroe & Associates, Counsel and Attorneys-at-Law in my personal capacity in Judicial Review case 25 of 2015 before then Senior Justice Isaacs; and

(vi) I have had carriage of both PUB/JRV/19 of 2015 and PUB/JRV/20 of 2015 since their filing resulting in the current recusal application.

16) While, as has been previously determined, many cases in which apparent bias is alleged turns on the particular facts of each case. Whether there is in fact apparent or perceived bias or not is a question of law. Therefore, I am of the view that we must be cautious in our approach in matters of this nature to avoid setting dangerous precedents, because, once apparent bias has been found in a particular category of cases then there will generally be limited scope for arguing that there is not apparent or perceived bias in all such cases in that category, regardless of the particular facts.

17) Similarly, in **The United Kingdom's Guide to Judicial Conduct** issued by the Judge's Council, Published in March 2013, amended in July 2026, it

indicates at paragraph 7.2.4 that *"Friendship or past professional association with counsel or solicitor acting for a party is not generally to be regarded as a sufficient reason for disqualification."* In ***Taylor v Lawrence*** (supra) the CA held that it was unthinkable that apparent bias could arise from the fact that the judge had instructed (and was still instructing) a firm of solicitors representing one of the parties in relation to the preparation of his will and codicil.

DECISION

18) Whenever an allegation of bias or a reasonable apprehension of bias is made, the adjudicative integrity not only of the individual judge but of the entire administration of justice is called into question. Therefore, an application for a Justice of The Supreme Court to recuse itself is a matter of public importance and is not a matter that this court takes lightly. However a Judge will have a reason from time to time to require the services of the private bar. We cannot suspect them as a result.

19) Taken to their logical conclusion, Mr. Rigby's submission would preclude a judge from hearing a case in which his former pupil master was acting for one of the parties. Or, from ever hearing a case in which a more senior member of his or her former firm was acting for one of the parties or as in this case where a judge has ever been represented by legal counsel for any matter from hearing a case in which that counsel or their firm is a representative of either side.

20) In my considered opinion having cognizance and due regard for the limited amount of Judges and experienced Counsel and particularly Queens Counsel, in our jurisdiction this would create an untenable situation which would open the flood gates for recusal applications for anything from the

preparation of the conveyance required to purchasing their home to divorcing their spouse.

21) In my judgment, the fair-minded, fully informed observer being fully cognizant and having the relevant facts, and being aware of the judicial oath and the presumption of impartiality, would come to the conclusion that it was unreasonable to suspect bias, real, apparent or perceived, on my part in hearing matters involving the present parties on the basis of my former relationship with Mr. Wayne Munroe, QC of Munroe & Associates. For as the Court of Appeal in ***Taylor v Lawrence*** (supra at Counsel of 75) stated "*To decide that the circumstances in which they rely could give rise to a suspicion of bias would put at risk the way in which the judiciary and the legal profession conduct their relationship; a relationship which has long served the interests of justice in this country.*"

22) For the reasons given above I must therefore refuse the request for recusal in this case.

THE PROCEDURE

23) The Laws of the Commonwealth of The Bahamas recognize the duty placed on Judicial Officers presiding over court proceedings to exercise their functions in an objective and impartial manner. If a Judicial Officer (Judge/Magistrate), cannot be an impartial in the adjudication of a manner before him then that judicial officer has a duty to recuse himself. The issue of impartiality is a matter to which a court should always be alive. As such, a court should not knowingly place itself in a position of being reasonably accused of a lack of impartiality.

24) The doctrine of judicial recusal outlines a process by which a Judge may recuse themselves from proceedings if they find it just to do so. In the

Supreme Court a judge may recuse himself when a party to the action applies to him. This application can be made first by letter as seen in the authority **Neymour v The Attorney General [2006] 3 BHS J. No. 268 at paragraph 3**. Should a Judge refuse to recuse himself based on the initial application by letter an application can follow by Motion?

25) This test was confirmed in the case of **Gillies (AP) v. Secretary of State** for **Works and Pensions 28 (Scotland) [2006] UKHL.2.** In this case Lord Hope of Craighead stated;

"I would say that the issue for determination in this case therefore is whether, on the facts of the case, the test has been satisfied."

26) This test placed more emphasis on the notion of justice being seen to be done rather than the former test of reasonable likelihood. Historically, a Judge was disqualified from presiding over a case only when it could be shown that he possesses a pecuniary interest and then he should find another Judge available to hear the case. The Privy Council in recent times has stressed the importance of looking at the proceedings as a whole. This entails looking at the particular facts, and questioning whether the proceedings would have created at least the impression of bias and unfairness[2]. **(See Stephen Stubbs & The Attorney General.)**

27) As stated above, when a judicial officer is faced with making the decision of whether or not to recuse himself the test to be applied is whether in all of the circumstances his decision would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased. It is imperative that a judicial officer should not allow themselves to be intimidated by a frivolous application for a recusal which is clearly a tactic to delay the courts proceedings. In determining whether to

[2]Lessage v Maiuritius Commercial Bank Ltd. [2012] UKPC 41

continue the adjudication of a claim of apparent bias , a judicial officer should always be seized of their duty to be true to their judicial oath "... to do right to all manner of people after the laws and usages of the Commonwealth of The Bahamas, without fair or favor, affection or ill will."

28) In the Judgment of **Tom Ray McPhee a.k.a. Sean Adderley v The Commissioner of Police**, In the Supreme Court Common Law Side (No. 137, 1992) the question of appearance of bias between Crown Counsel Mr. Bernard Turner (as he then was) in the Office of The Attorney General and S&C Magistrate Ms. Gladys Manuel arose. It was alleged inter alia that there was the appearance of bias in that the prosecutor was seen to enter the court room from a room that leads directly into the S&C Magistrates' chambers moments before the Magistrate entered through the very same door. The thrust of the allegation was that there was the appearance of dialogue between Magistrate Manuel and Crown Counsel. However, both parties signed Affidavits denying any contact between them -selves on the day in question. The Court, accepting the submissions on behalf of the Respondents ruled that the basis of the application was an abuse of the Court's process. The Honourable Justice Burton P.C. Hall (as he then was) found that to grant relief to the applicant would mean that:

"...the common standard of civility and courtesy by which members of the bench would exchange greetings in the streets with members of the Bar (and indeed anyone who has business in the courts) of engage in conversation at public functions or social gatherings would all have to be subordinated to an irrational fear in some parties before the Court that some act of impropriety may appear to have occurred."

His Lordship continued,

"It seems to me that the inhabitants of this country must be taken to proceed from a basic attitude of confidence in, rather than suspicion of,

inter alia, its judicial officers.

29) For the reasons given above I must therefore refuse the request for recusal in the case.

30) The Application for which leave was granted should proceed.

31) I promised to put my reasons in writing this I now do.

Dated the 3 Day of April 2020

The Honourable Madam Justice
Cheryl Grant-Thompson