COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/00765

BETWEEN

(1) ALAN R. CRAWFORD
(2) SHARON M. CRAWFORD

Plaintiffs

AND

(1) CHRISTOPHER STUBBS

(2) SHANNA'S COVE ESTATE COMPANY LIMITED

(3) DONNA DORSETT MAJOR

(Trading as Dorsett Major & Co., a firm)

Defendants

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Glen Curry of Glinton Sweeting O'Brien for the Plaintiffs
Mr. Rouschard Martin of Martin & Martin for the First and Second Defendants
Mr. Larell Hanchell for the Third Defendant did not participate in the Recusal Application but was present with his Client

Hearing Date: Heard on written submissions (submitted on 26 June 2020)

Civil - Recusal –Appearance of bias – Actual or apparent bias – Whether real possibility or real danger of bias - Whether Judge has a discretion to recuse herself – Whether automatic disqualification – Duty to disclose – Duty and extent of inquiry of judge –Allegations by Third Defendant – Unfounded and bald allegations - Right to a fair hearing by impartial tribunal as guaranteed by Article 20(8) of the Constitution of The Bahamas – Contempt of Court by Third Defendant and Attorney who drafted affidavit

After the Court conducted a full-blown trial into this action and gave a comprehensive written judgment in favour of the Plaintiffs, the Defendants now seek an order that the Judge recuses herself with respect to the pending consequential issues which arose from the Judgment namely (i) an assessment of damages and (ii) costs. The grounds on which the recusal application is premised are that (a) the Defendants' right to a fair hearing as guaranteed by Article 20 of the Constitution has been or is being infringed upon or violated, or threatened to be infringed or violated; and (b) there is or has been the presence of bias or the appearance of bias on the part

of the Judge against the Defendants. The Defendants alleged that the Judge should have disclosed her relationship with the Plaintiffs who are American citizens residing between Texas and Cat Island and/or her affiliation with the law firm that represents the Plaintiffs.

The Plaintiffs opposed the recusal application on the basis that it is a delaying tactic, it had no merit and it ought to be refused.

HELD: Finding that the recusal application is a delaying tactic and lacks substance, it is dismissed with costs to the Plaintiffs; such costs to be assessed at the hearing fixed for 24 August 2020.

1. Citizens of a democratic society are entitled to the right to a fair trial by an independent and impartial tribunal. This right is enshrined in Article 20(8) of The Constitution of The Bahamas.

2. As a starting point, a presumption exists that judges are impartial, of high intellectual acumen and imbued with the ability to disabuse themselves of any biases that may exist amongst the majority of the population. The case of **Bernard E. Evans v. 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) -** [2018] 1 BHS J. No. 68 recently affirmed by the Court of Appeal in consolidated appeals SCCiv App. No. 111 of 2018; SCCiv App No. 128 of 2018; SCCiv App No. 157 of 2018 and SCCIv App. No. 158 of 2018) applied.

3. The duty of judicial officers is to hear and determine cases allocated to him or her and not to accede to any unfounded and unsubstantiated recusal application. See: **The Queen v Gary Jones** [2010] NICC 39 **Locabail (UK) Ltd v Bayfield Properties Ltd** [2000] QB 45 and **Bennett v London Borough of Southwark** [2002] IRLR 407.

4. The allegations made by the Third Defendant in support of the recusal application of the First and Second Defendants that the Judge did not travel with an aide, was not met by the Police, rode in the same car driven by the First Plaintiff with her then clerk and then Counsel for the Plaintiffs, now deceased, and other wounding allegations are fabrications and had the Defendants and/or Counsel who drafted the affidavit of the Third Defendant (in particular) conducted a proper inquiry, they would have found that the allegations are unfounded and unsubstantiated by any evidence.

5. The Defendants have made bald allegations that the Judge has a relationship/association with the Plaintiffs and/or the law firm which represents the Plaintiffs. There is not a scintilla of evidence to support any of the allegations, intended to bring the Court into disrepute.

6. 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 **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) there is nothing to lead an informed observer to conclude that there is any real danger of a lack of impartiality. The Recusal Application is therefore dismissed.

7. The fair minded and informed observer is neither complacent nor unduly sensitive or suspicious. Where he reaches the conclusion of bias or apparent bias, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-

suspicious or apt to envisage the worst possible outcome: see dissenting judgment of Lord Sumption in **Almazeedi v Penner and Another (Cayman Islands)** [2018] UKPC 3 at paragraph 36.

8. The affidavit of the Third Defendant, Donna Dorsett-Major consists of untruths and fabrications. The documentary evidence provided by the Court showed that the judge was at all material times, accompanied by an aide and a posse of police officers from the Cat Island Police Station including very senior officers. The allegation that "we were invited to lunch" was intended to demean the Judge. Even if what the Third Defendant alleged were true (which is denied), all parties appeared before the Court to continue the trial after the site visit. Why was this issue not raised while the trial was ongoing? Why wait after the delivery of the Judgment to raise such an important issue? As I see it, it is only a delaying tactic with no merit.

9. The time is ripe for the Court to discipline attorneys who swear affidavits and Counsel who draft those affidavits when they are fully aware that the contents of those affidavits are loaded with untruths against judges, as in the present case. I will therefore cite the Third Defendant, an Attorney at law and the law firm of Martin & Martin (who drafted the Affidavit of the Third Defendant) for Contempt of Court: **Re the Contempt of Maurice Glinton QC** (supra) considered.

RULING

Charles J:

Introduction

[1] The trial of this action began before me on 16 January 2019 and continued for three consecutive days. The Court then visited the *locus in quo* in Cat Island on 22 February 2019. The matter was finally concluded on 1 May 2019 when all parties appeared before me and made closing submissions. On 1 May 2020, I delivered a comprehensive written judgment in favour of the Plaintiffs ("the Crawfords"). The Court found, among other things, that the First and Second Defendants have unlawfully done some acts and as such, they are to pay to the Crawfords damages to be assessed and costs to be taxed if not agreed. The Court also found the Third Defendant guilty of professional negligence. The assessment of damages and taxation of costs were adjourned to 17 June 2020 at 11.00 a.m.

[2] In the intervening period, the First and Second Defendants filed a Notice of Motion seeking my recusal from the further hearing of those outstanding matters ("the recusal application"). The application was supported by the affidavit of the First

Defendant ("Mr. Stubbs") sworn to on 26 May 2020 and the affidavit of Mrs. Major sworn to on 3 June 2020. The grounds of the recusal application are two-fold namely:

a) The Defendants' right to a fair hearing as guaranteed by Article 20 of the Constitution has been or is being infringed upon or violated, or threatened to be infringed or violated; and

b) There is or has been the presence of bias or the appearance of bias on the part of Her Ladyship against the Defendants.

[3] The Crawfords strenuously opposed the Recusal Application on the basis that it is a delaying tactic, it had no merit and ought to be refused.

The law

[4] Citizens of a democratic society are entitled to the right to fair trial by an independent and impartial tribunal. This right is enshrined in Article 20(8) of The Constitution of The Bahamas ("the Constitution") which provides as follows:

> **"Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."**

[5] As a starting point, a presumption exists that judges are impartial, of high intellectual acumen and imbued with the ability to disabuse themselves of any biases that may exist amongst the majority of the population. In the case of **Bernard E. Evans v. 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) -** [2018] 1 BHS J. No. 68 (recently affirmed by the Court of Appeal in consolidated appeals SCCiv App. No. 111 of 2018; SCCiv App No. 128 of 2018;

SCCiv App No. 157 of 2018 and SCCIv App. No. 158 of 2018), this very Court was presented with a recusal application on the basis of apparent bias. The Court referred to a paper written by Mr. Justice Hayton of the Caribbean Court of Justice which provides some guidance in a recusal application. 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.**
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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." "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].

[6] Indeed, there is a presumption of impartiality which ought not to be easily rebutted on little or no evidence of apparent bias.

[7] 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 any unfounded and unsubstantiated recusal application. At paras [21] to [22] of the judgment, I quoted from **The Queen v Gary Jones** [2010] NICC 39; **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:**
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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]
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> **[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):**
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> > **"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]

[8] That said, in appropriate cases, such as where there is apparent bias, a judge may accede to an application for recusal. To determine whether apparent bias exists, the Court ought to examine all of the circumstances of the case and ought to recuse itself where the Court determines there was a real danger or possibility of

bias. Further, either there is a real possibility of bias or not. If there is, the judge should recuse himself/herself.

[9] When considering all of the circumstances, it must be noted that the fair minded and informed observer is neither complacent nor unduly sensitive or suspicious. In his dissenting judgment in **Almazeedi v Penner and Another (Cayman Islands)** [2018] UKPC 3, Lord Sumption beautifully puts it this way (at paragraph 36):

> **"… The notional fair-minded and informed observer whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. <u>But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious or apt to envisage the worst possible outcome</u>. The many decisions in this field are generally characterised by robust common sense."** [Emphasis added]

The recusal application

[10] In support of their recusal application, the First and Second Defendants filed an Affidavit of Christopher Stubbs on 26 May 2020 ("the Stubbs Affidavit"). They also relied on an Affidavit by Mrs. Major sworn to on 3 June 2020 ("the Major Affidavit"). Mr. Stubbs deposed:

a. At para. 3: "That I was informed for the first time by Mrs. Donna Dorsett-Major, the above 3rd Defendant in this action, on or about the <u>11th day of May 2020</u>, that the said Honourable Justice Charles (Justice Charles) asked her to find out from me whether I would sell my property which is the subject-matter of this action to the Plaintiffs, Alan and Sharon Crawford (the Crawfords) at the price of One hundred thousand dollars ($100,000.00). To my recollection, there was no mention in the least of such offer by Justice Charles or anyone or at all during the trial" and

b. At para. 4: "That the attack on me in paragraph [56] of Justice Charles' Judgment as having develop (sic) personal animosity towards the Crawfords (inter alia) is not in the least supported by the evidence, shows

bias and brings into play the question of objectivity in the Court's assessment of the evidence."

[11] Learned Counsel for the Crawfords, Mr. Curry correctly submits that paragraph 3 of the Stubbs' Affidavit ought to be struck out as it is hearsay and inadmissible. Mrs. Major is a party to the action and has filed an affidavit which the Court will come to momentarily. I also observed from what Mr. Stubbs deposed that such conversation with the Court took place on 11 May 2020, that is, eleven days after the written Judgment was delivered. It escapes me why a Court would be asking Mrs. Major whether Mr. Stubbs would be interested to sell his property to the Crawfords after the Judgment was rendered. In any event, no such discussion took place with Mrs. Major on 11 May 2020 or at all.

[12] Furthermore, even if such question was asked (which is denied), the question does not rise to the level of bias. At best, as Mr. Curry pointed out, it is an enquiry into the mindset of Mr. Stubbs.

[13] In addition and contrary to Mr. Stubbs' statement that he was not aware of such offer to purchase his property, during the trial there was discussion of an offer being put to Mr. Stubbs; however, it was dismissed.

1) At page 14 line 23 – page 15 line 3 of the Transcript dated 17 January 2019, Mr. Newbold (the attorney for all three Defendants at the time) asked Mr. Crawford if he would buy Mr. Stubbs' property to preserve the value of his property. Mr. Crawford confirmed that he would buy the property for that reason.

2) Then there was further discussion of the purchase of Mr. Stubbs' property: see page 17 line 11 – lines 25 of the Transcript dated 17 January 2019, where the following exchange took place:

The Court: "You asked and you got an answer. Sorry, may I ask, you asked a question, and I was just thinking if there was a simple way of dealing with

this matter, if Mr. Stubbs makes an offer, whether she (Mrs. Crawford) will be willing to buy it and she said yes. Are you considering that option?

Mr. Sweeting: My Lady.

The Court: At the right price.

Mr. Sweeting: It has been discussed between - well first of all, between Mr. Stubbs himself and through counsel and between myself and Mr. Newbold yesterday, but it hasn't really led anywhere.

The Court: Is he willing to sell it? No, okay."

Further in the Transcript dated 17 January 2019, at page 18 lines 15- 27:

The Court: "Well, that's the case for the plaintiff. I haven't heard the defendant's case. We will have him in the box. I was only trying to simplify this matter. If he's willing to sell it, we have an end to this long trial. Mrs. Dorsett might be the one who could do that.

Mrs. Major: My Lady, I tried. **Too much bad blood, I tried**."[Emphasis added]

[14] With respect to paragraph 4 of the Stubbs Affidavit, Mr. Curry correctly submits the following:

a) The Court heard and accepted the evidence of the Crawfords, which it was entitled to do. According to Counsel, there was clear evidence of an antagonistic relationship between the parties. He referred to the following passages:

i. Witness statement of Sharon Crawford:

1. Para 14: “Mr. Stubbs started coming by the site ranting and raving about one thing or another to our contractors and his crew.”

2. Para 16: “He refused to listen to the authorities and told my husband that the court could not stop him from doing anything he wanted to do on his property.”

3. Para 17: “Mr. Stubbs built a septic tank on the beach in front of our house that was not approved by any sort of permit and not even on a lot he owns.”

ii. Witness statement of Alan Crawford:

1. Para 18: “Immediately after construction started, Mr. Stubbs started complaining to Mr. Webb that I had not provided him with the plans for him to “Ok” to build…He continued to harass my crew on a weekly basis.”

2. Para 23: “On 4 April 2014, Mr. Stubbs came by and in front of my house guests, Bob Mills and family, he verbally threatened my life, threatened harm to my wife and dog and to bring a bulldozer down and bulldoze my house down. I immediately filed a complaint with the Cat Island Police department, Case Number 1-14-047491.”

3. Para 25: …”Mr. Stubbs also came outside the house and used abusive/vulgar language on multiple occasions.” This was confirmed in Mr. Crawford’s oral testimony at Transcript dated 16 January 2019 page 37 line 32- page 38 Lines 1-7

b) The Court visited the locus in quo and, at paragraph 55 of the Judgment, referred to the scene which unfolded before her evidencing Mr. Stubbs’ blatant and indignant actions of going onto the Crawfords’ property and

uprooted a tree without any regard to the Crawfords who were standing right there: see also page 49 lines 23- 27 of the Transcript of 16 January 2019. During the cross-examination of Mr. Crawford, he stated:

> **"When [he] whacks all my plants that my wife has planted with his cutlass and thing of that nature when he pulls up coconut trees thinking it is his, yes I call that trespassing. Which again you were present for one of them."**

[15] In deciding who is telling the truth and who is not, the Court assessed the demeanour of the witnesses and how they withstood the rigours of cross-examination. The Court then made factual findings which it is entitled to do. When a party is aggrieved with the findings made by a trial judge, the proper avenue is to appeal the judge's decision; not to seek the disqualification of the judge.

[16] In my judgment, the allegations made by Mr. Stubbs do not have any merit. With respect to encouraging parties to settle their matters, it is a normal practice of this Court to try to persuade litigants to settle their claims amicably rather than resorting to litigation which is expensive, protracted and generally acrimonious as this present case demonstrates.

[17] As already mentioned, besides the affidavit of Mr. Stubbs, Mrs. Major also swore an affidavit supporting the recusal application. When stripped to its bare essentials, Mrs. Major makes the following allegations namely:

a. On 22 February 2019, the Judge travelled with her then clerk, Mr. Gardiner, attorneys Anthony Newbold, the late Mr. Roy Sweeting and Mrs. Major to Cat Island. She (the Judge) was not accompanied by an aide.

b. Upon our arrival at the Airport in Cat Island, it became apparent to her (Mrs. Major) that the Crawfords were there waiting for the Judge since there were no police officers at the airport in Cat Island to greet the Judge. She also alleged that the Judge and her clerk were driven by Mr. Crawford in Mr.

Crawford's vehicle. The late Mr. Sweeting also rode with the Judge and her clerk.

c. During the site visit, the Judge said that she did not see any access road.

d. At the locus the Judge's clerk suffered a seizure and had to be taken to the clinic **via police vehicle**. Shortly after the locus visit, the Judge walked with her and the Crawfords followed behind. She said that the Judge asked her if she could convince Mr. Stubbs to sell his property to the Crawfords for a reduced price of $100,000 in exchange for them discontinuing the matter against her and Mr. Stubbs.

e. **We were invited** to lunch at Shanna's Cove.

f. During lunch, the Judge asked "Mrs. Major, where is your property" and before she could give an answer, Mr. Crawford pointed out her property.

g. After lunch, and on her (Mrs. Major) urging, Attorney Anthony Newbold, the Judge, Mr. Sweeting and the Crawfords rode in the same vehicle and the Crawfords took them to the airport.

h. The following day, she telephoned Mr. Anthony Newbold and told him the conversation that the Judge had with her.

Disclosure

[18] Learned Counsel Mr. Martin submits that the Judge should have:

a. Disclosed at the outset of her involvement with these proceedings her relationship with the Crawfords and/or their attorneys; and

b. Considered that these proceedings or related or connected proceedings came before her previously and that she at such hearings and that subsequently she made remarks or statements or conducted herself in a manner which brought into question her fitness to discharge her duty to

afford the First and Second Defendants a fair and independent hearing in public as required by Article 20(8) of the Constitution and the general law.

[19] Mr. Martin submits that it is well known in legal quarters in this country that Mr. Justice Hartman Longley always recused himself from hearing any matter connected with the firm of Evans & Co. because of his relationship or former relationship with this firm. This submission is ludicrous as I have no reason to recuse myself as I am not connected to any law firms or related to any person in The Bahamas. The second allegation of "considered that these proceedings or related or connected proceedings came before her previously" is just as ludicrous. There is not a shred of evidence that I have heard any proceedings between these parties. I am reminded of the ancient adage of "he who alleges must prove".

[20] Learned Counsel Mr. Martin further submits that having been involved with the other side as complained by the First and Second Defendants, I should have recused myself and I should have made such disclosure. Counsel quoted elaborately from the Privy Council case of **Almazeedi v Penner and another (Cayman Islands)** [2018] UKPC 3. In a majority Judgment, the Board found that Cresswell J. would have been regarded by a fair-minded observer as '*unsuitable to hear the proceedings*' in a case in the Grand Court of the Cayman Islands. The seven-year dispute was between Cayman-registered BTU Power Company and its predominantly Qatari shareholders. Mr. Almazeedi, BTU's director, had been accused by shareholders of mismanaging company funds. In 2011, the shareholders filed a petition in the Cayman Islands where Cresswell J, who has since retired as a Judge of the Qatar International Court and Dispute Resolution Centre, was sitting at the time. Cresswell J. appointed liquidators in January 2012. At a further hearing in 2014, he ordered Mr. Almazeedi to pay costs. Mr. Almazeedi appealed against the liquidation order at the Court of Appeal of the Cayman Islands where he argued that another judge should have heard the case.

[21] The Board found that the Court of Appeal was right to regard it as inappropriate for Cresswell J. to sit without disclosing his Qatar links. At paragraph 34 of the Judgment, the Board stated:

> **"…The judge not only ought to have disclosed his involvement with Qatar before determining the winding-up petition. In the Board's view, and at least in the absence of any such disclosure, a fair-minded and informed observer would regard him as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency which dispels concern, and may mean that no objection is even raised. An alternative to disclosure might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would, so far as appears, have been no obstacle.** [Emphasis added].

[22] The Board underscored the right which a person has under the constitution to an independent and impartial tribunal. Lord Mance in delivering the Judgment of the Board, quoted at paragraph 27, Lord Hope in **Millar v Dickson** [2001] UKPC D 4 and stated:

> **"In the same case, Lord Hope said at (paras 52 and 63:**
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> > **"52. The right which a person has under article 6(1) of the Convention to a hearing by an independent and impartial tribunal is fundamental to his right to a fair trial. Just as the right to a fair trial is incapable of being modified or restricted in the public interest, so too the right to an independent and impartial tribunal is an absolute right. The independence and impartiality of the tribunal is an essential element if the trial is to satisfy the overriding requirement of fairness. The remedy of appeal to a higher court is an imperfect safeguard. Many aspects of a decision taken at first instance, such as decisions on the credibility of witnesses or the exercise of judgment in matters which are at the discretion of the presiding judge, are incapable of being reviewed effectively on appeal. As Lord Steyn said in *Brown v Stott* [2001] 2 WLR 817, 840A, it is a basic premise of the Convention system that only an entirely neutral, impartial and independent judiciary can carry out the primary task of securing and enforcing Convention rights."**
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> > **"63. … [T]he question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings."**

[23] The challenge in **Almazeedi** was made solely on the ground of an alleged lack of independence due to "*apparent bias*", that is, on the basis that the "*fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased*": **Porter v Magill** [2001] UKHL 67; [2002] 2 AC 357, para 103, quoted and applied recently in **Yiacoub v The Queen** [2014] UKPC 22; [2014] 1 WLR 2996, para 11. There was no suggestion of actual bias; but, as the Court of Appeal pointed out in **Almazeedi** (para 61), if a judge of the utmost integrity lacks independence, "*then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence*". The right of a litigant to an independent and impartial tribunal is "fundamental to his right to a fair trial".

[24] At paragraph 20 of the Judgment, the Board continued:

> **"The Board was also referred to and is mindful of the elucidation of the characteristics of the fair-minded and informed observer by Lord Hope in *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416. She or he is a person who reserves judgment until both sides of any argument are apparent, who is not unduly sensitive or suspicious, and who is not to be confused with the person raising the complaint of apparent bias. The last is an important point in a case like the present where the appellant has made some allegations which on any view appear extreme and improbable. She or he is not, on the other hand complacent, knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weaknesses - an observation with perhaps particular relevance in relation to unconscious predisposition. She or he "will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially": see generally para 2. She or he will also take the trouble to inform themselves on all matters that are relevant, and see it in "its overall social, political and geographical context: para 3".**

[25] Applying the legal principles enunciated above to the facts of the present case, I find that the First and Second Defendants do not have a scintilla of evidence to prove any of the allegations which were raised. The allegation of a relationship with the Crawfords and/or their Counsel is unfounded, baseless and unsubstantiated. Based on their own evidence, since 22 February 2019, the

Defendants would have been aware that the Judge had a relationship with the Crawfords and/or their Counsel. Why did they not make that challenge on 1 May 2019 when the trial was still part-heard? As for any association with the law firm of Glinton, Sweeting O'Brien, the allegation is unfounded and unsubstantiated. The issue of disclosure is therefore untenable and must fail since there is nothing to disclose.

The test for apparent bias

[26] In **Re Bernard E. Evans,** I comprehensively set out the test for apparent bias at paras [15] to [19]. For present purposes, I will repeat 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).**
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> **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:**
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> > **"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."**
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> **[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]:**
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> > **"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].

[27] I am reminded that courts and tribunals must have broad backs. The need to have broad backs is even stronger when unpleasant and wounding accusations are directed at them, especially if the objective is to manipulate the result, for example, as in this case, to delay the assessment of damages and taxation of costs.

[28] In the present case, the affidavits particularly that of Mrs. Major are loaded with untruths and fabrications. The only truth in Mrs. Major's affidavit is that my then clerk suffered a seizure during the site visit, had to be taken to the nearby clinic and everyone had lunch at a nearby restaurant (the only restaurant in the neighbourhood).

[29] The untruths and fabrications told by Mrs. Major are, in my opinion, intentional. She must have envisioned that she would have gotten away with them because the clerk is no longer employed by the Court and Mr. Sweeting has sadly passed

away. However, the Deputy Registrar/Court Administrator, Mrs. Constance Delancy was able to retrieve invoices from the Travel Agency (which was provided to all Counsel) to demonstrate that Sergeant Reuben Stuart was my aide who travelled with me to Cat Island. On our arrival, we were greeted by a posse of police officers including the Officer in Charge of the Cat Island Police Station and Sergeant Theresa Stuart. A vehicle rented by the Court was there at the airport. Sergeant Reuben Stuart drove that vehicle with the clerk seated in the front passenger seat and I was seated in the back seat of the vehicle. At least two police vehicles were part of the convoy which escorted the Court to the locus in quo. This is normal perquisite that all judges enjoy when they are on official duty in the Family Islands.

[30] As I said earlier, if what Mrs. Major alleged was true (which is denied), she and Mr. Stubbs appeared with their Counsel, Mr. Newbold before me on 1 May 2019 to continue with the trial. Why did the Defendants not raise their concerns in Mr. Sweeting and Mr. Newbold's presence? In that way, Mr. Newbold would have been able to confirm or refute the allegation of whether he rode with me and Mr. Sweeting in Mr. Crawford's vehicle. What is clear is that since the Judgment was rendered, Mr. Newbold has been replaced by new Counsel, Martin & Martin representing the First and Second Defendants and the Third Defendant, Mrs. Major by Mr. Hanchell who, though present, did not participate in the recusal application.

[31] Now, the question of bias or apparent bias 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.

[32] 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 equally 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**.**

[33] In **Re Bernard E. Evans**, at paragraphs [25] to [27], I stated:

> **"[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*."**
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> **[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."**
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> **[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.**

[34] In the present case, the Court must consider whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Every recusal application must have a proper, concrete foundation and should, therefore, be scrutinised with appropriate care. In my judgment, any fair minded and informed observer, having considered all the facts of the present case would conclude that there was no real possibility that the Court was biased. In my opinion, the fair minded and informed observer would be troubled that certain attorneys would descent to the level of fabricating

allegations against judges. The time is therefore ripe for the Court to discipline these lawyers.

[35] Looking at my judgment, in my opinion, I considered the submissions of all parties, analyzed and applied the law based on the circumstances of the case. I also heard the evidence of all witnesses for all parties and visited the locus in quo to ascertain the true nature of the issue and to better grasp the gravity of the issues related to the action. In my opinion, the Judgment is a sound one.

[36] Lastly, I agree with the submissions of Mr. Curry that this application is nothing more than a delaying tactic to stall the smooth progress of this case.

Conclusion

[37] For all of the reasons stated above, I hold that the recusal application is unfounded and without merit and is aimed at bringing the Court into disrepute. I would therefore dismiss the recusal application with costs to the Plaintiffs. If costs are not agreed, I will summarily assess on Monday 24 August 2020 at 10:30 a.m.

[38] Having found that Mrs. Major has fabricated the contents of her Affidavit, I will cite her for Contempt of Court. The appropriate charge is being prepared and will be formally read to her on 23 July 2020 at 12.00 noon in Open Court. Mrs. Major will have an opportunity to be heard and be represented by Counsel.

[39] In addition, the law firm of Martin & Martin drafted the Major Affidavit. Had that law firm carry out a proper investigation into this matter, they would have discovered that the allegations in Mrs. Major's affidavit consists of untruths and fabrications. I will also cite the law firm of Martin & Martin for Contempt of Court. The appropriate charge will be formally read on 23 July 2020 at 12:00 noon in Open Court. The firm will also have an opportunity to be heard and be represented by Counsel.

Dated this 6th day of July, A.D., 2020

Indra H. Charles
Justice