COMMONWEALTH OF THE BAHAMAS **2013/PUB/jrv/00012**

IN THE SUPREME COURT

PUBLIC LAW DIVISION

IN THE MATTER of application for Judicial Review

THE QUEEN

AND

THE HON. PERRY G. CHRISTIE,

PRIME MINISTER of the Bahamas

(In his capacity as the Minister Responsible for Crown Land)

1st Respondent

THE HON. PHILIP E. BRAVE DAVIS,

DEPUTY PRIME MINISTER

(In his capacity as the Minister of Works and Urban Development

And the Minister Responsible for Building Regulations)

2nd Respondent

THE HON GLENYS HANNA-MARTIN

MINISTER OF TRANSPORT AND AVIATION

(In her capacity as the Minister Responsible for Ports and Harbours)

3rd Respondent

THE TOWN PLANNINGCOMMITTEE

4Th Respondent

PETER NYGARD

5th Respondent

KEOD SMITH

6th Respondent

EX-PARTE

COALITION TO PROTECT

CLIFTON AND 2 OTHERS

Applicants

Before: The Honourable Mr. Justice Keith H. Thompson

Appearances: **Mr. Carlton Martin for 6th Respondent**
Mr. Keod Smith for 6th Respondent
Mr. Dawson Malone and Skira Martin – Coalition

Hearing Dates: **April 29th & 30th, 2019**

RULING

[1] This application was made by Notice of Motion filed May 01st, 2019. The Notice of Motion provides:

> **"TAKE NOTICE that the Court will be moved on the ------- day of -------- - A.D., 2019, at ..... o'clock in the ..... noon or as soon thereafter as counsel can be heard, by counsel for the above named 6th, Respondent, Koed Smith, that His Lordship the Honourable Mr.**

Justice Keith Thompson do recuse himself from the hearing or any hearing of or in this action i) principally on the ground that the 6th Respondent's constitutional right to a fair hearing as guaranteed by or under ARTICLE 20 (8) of the CONSTITUTION has been, and is being, infringed or violated or threatened to be infringed or violated; and particularly ii) that there is or has been the presence of bias or the appearance or is the likelihood on the part of His Lordship against the 6th Respondent which bias would affect or likely affect the obtaining by the 6th Respondent of a fair hearing or of fair hearings in this action."

[2] The Notice of Motion is supported by an affidavit of Whanslaw Turnquest filed also on May 01st, 2019. (The Turnquest Affidavit). Mr. Koed Smith, filed a supplemental affidavit on May 09th, 2019 which was supplemental to the Turnquest Affidavit.

[3] The Applicant, "the Coalition" in response relies on;

a) Affidavit of Raven Rolle filed 14th May, 2019;

b) Skeleton Arguments of the Applicants in opposition to the recusal application filed on 1st May, 2019 and 14th May, 2019;

c) Coalition's bundle of authorities [KS's Recusal Application for Recusal of Justice Keith Thompson] not dated but served with SA.;

d) Coalition's Recusal Rulings;

e) Supplemental Skeleton arguments [in opposition to recusal application filed on 1st May dated 24th May, 2019;

[4] There is some history in this matter I deem important to bring to the forefront. The application of the 6th Respondent filed on 1st May, 2019 for me to recuse myself was scheduled to be heard on Friday the 27th, September, 2019. However, counsel for the 6th Respondent did not appear and sought to fix his non-appearance by seeking an adjournment by writing a letter on the day of the hearing to explain that he had left his file in Exuma and requested that the matter be set down sometime in December or later. He did apologize in the letter for any inconvenience. However, as senior counsel he ought to be fully aware that if he could not appear he ought to have arranged for a colleague to appear on his behalf.

[5] The matter was rescheduled to be heard on December 9th, 2019. The Coalition was ordered to draft the notice of adjourned hearing and serve the perfected order on the firm of counsel for the 6th Respondent, the 6th Respondent and the chambers of the 6th Respondent Koed Smith, Commercial Law Advocates.

[6] An attempt was made to comply with the order being served on October 1st, 2019. In the first instance the order was served on the office of Martin & Martin in the Heritage Building at 8th Terrace East, in Centerville. The orders were accepted by Mr. Whanslaw Turnquest on behalf of Martin & Martin.

[7] However, four (4) attempts were made to serve the 6th Respondent and his chambers with no success. In light of this failure, on October 10th, 2019 the Coalition applied for and was granted a variation of the previous order to effect substituted service on the 6th Respondent Koed Smith by e-mailing the order the notice and other documents to Keod Smith@yahoo.com and in addition to that taping the order, the Notice and other documents on the doors of Commercial Law Advocates previous chamber Suite #1 Trinity Place, Mosko Building and Commercial Law Advocates Chambers No. 81 Yellow Elder. Eventually, one Ms.

Adrianne Cartwright accepted the documents on behalf of Commercial Law Advocates on 11th October, 2019.

[8] Mr. Martin in presenting his application advised that he was relying on:

a) The Turnquest Affidavit filed May 01st, 2019;

b) Supplemental Affidavit of Koed Smith filed May 09th, 2019;

c) Second Supplemental Affidavit filed May 13th, 2019 and

d) Submissions dated May 09th, 2019.

[9] Mr. Martin further advised that he was not going to go through the affidavits and would leave it to the Court to decide for,

"REASONS WHICH I NEED NOT DISCLOSE TO ANYONE."

[10] Mr. Malone, interjected and advised that if that was the process Mr. Martin was taking, then he wanted it on the record that he would not object, but that it would have to be subject to him being able to respond to all of the evidence presented. With that, Mr. Malone began his presentation.

[11] However, before I deal with Mr. Malone's presentation it is important to note that the submissions of the 6th Respondent in the instant matter are virtually identical to those of the 1st Respondent Peter Nygard in Action No. 299/PUB/jrv/00005.

[12] Article 20 (8) of the Constitution of the Commonwealth of The Bahamas provides:

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

[13] I must state right away that the 6th Respondent has been the mover and shaker behind any delay in the hearing of this matter. The evidence is patently clear that despite what he has set out in any affidavit or any other affidavit sworn on his behalf he has been like a moving ghost in an all-out effort of avoiding being served with critical documents which were intended to bring his application for recusal on for hearing within a reasonable time.

[14] The Affidavit of Compliance by Monique Brice makes it very clear along with its exhibits and is res ipsa loquita. The affidavit certainly has a place in this ruling.

AFFIDAVIT OF COMPLIANCE

[Service of Order of Thompson J made and filed 27th September, 2019 and varied on 10th October, 2019]

COMMONWEALTH OF THE BAHAMAS 2013/PUB/jrv/00012

IN THE SUPREME COURT

Public Law Division

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

THE QUEEN

And

THE RT. HON. PERRY G. CHRISTIE, Prime Minister of The Commonwealth of The Bahamas (in his capacity as the Minister Responsible for Crown Lands)

1st Respondent

THE HON PHILIP E. BRAVE DAVIS, Deputy Prime Minister of The Commonwealth of The Bahamas
(in his capacity as the Minister of Works and Urban Development and the Minister Responsible for Building Regulation)

2nd Respondent

THE HON GLENYS HANNA-MARTIN, Minister of Transport and Aviation of The Commonwealth of The Bahamas
(in her capacity as the Minister Responsible for Ports and Harbours)

3th Respondent

THE TOWN PLANNING COMMITTEE

4th Respondent

PETER NYGARD

5th Respondent

KEOD SMITH

6th Respondent

Ex Parte

COALITION TO PROTECT CLIFTON BAY & 2 others
Applicants

AND In the Matter of the Application by the Applicant for an Order of Committal Against the 6th Respondent

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AFFIDAVIT OF COMPLIANCE

[Service of Order of Thompson J made and filed 27th September, 2019 and varied on 10th October, 2019]

I, **MONIQUE BRICE,** of the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas hereby make Oath and say as follows, that:

1. I am a Messenger in the law firm of Messrs. Callenders & Co. ("**Callenders**"), the Attorneys of record for the Coalition to Protect Clifton Bay ("**the Coalition**"). In my capacity as aforesaid, I am duly authorized by the Coalition to swear this Affidavit on its behalf.

2. Unless otherwise deposed to herein, the facts and information are within my knowledge and are true and insofar as they are in accordance with information furnished to me or derived from statements or documents I have read as hereinafter appears, they are they are true to the best of my knowledge, information and

belief.

3. There is now produced and shown to me a paginated bundle of documents marked "Exhibit "MB-1" to which I shall refer herein. References to page numbers herein, are to the pages in that Exhibit.

4. The 6th Respondent's, Mr. Keod Smith **("Mr. Keod Smith")** application seeking to recuse Justice Keith Thompson **("Justice Thompson")** filed on 1st May, 2019, was scheduled to be heard on Friday, 27th September, 2019. Mr. Keod Smith and his Counsel did not appear at the scheduled hearing, as his Counsel sought an adjournment by letter of even date due to leaving the file in Exuma. A copy of the letter is exhibited at page 1.

5. As a result, the said application was adjourned to Monday, 9th December, 2019 **(the "Adjourned Date")** and the Coalition was ordered to:

   5.1. Draft the Order of Justice Thompson made on even date **(the "Order")** and serve the Order on the Firm of Counsel for the 6th Respondent, Mr. Keod Smith, Martin, Martin & Co. and the Chambers of Mr. Keod Smith, Commercial Law Advocates; and

   5.2. Draft the Notice of Adjourned Hearing with the Adjourned

Date inserted (the "Notice") and serve the Notice on Commercial Law Advocates.

A copy of the Order and Notice are exhibited at pages 2 to 4 and 5 to 10 respectively.

6. Pursuant to the Court's order, I was instructed by Ms. Akeira D. Martin, an Associate of Callenders ("Ms. Martin"), to serve the Order and the Notice on Martin, Martin & Co. and Commercial Law Advocates.

7. On Tuesday, 1st October 2019, I attended the office of Martin, Martin & Co. located in the Heritage Building, 8th Terrace East, Centreville, situate on the island of Nassau, N.P., The Bahamas to serve the Order and the Notice.

8. Mr. Whanslaw Turnquest, an employee of Martin, Martin & Co., accepted the documents on behalf of Martin, Martin & Co. by taking them and signing the service receipt accompanying the Order and the Notice. A copy of the service receipt proving service on Martin, Martin & Co. is found at page 11.

9. Thereafter, I made 4 separate unsuccessful attempts to serve the Order and Notice on Commercial Law Advocates. A copy of my Affidavit filed 10th October, 2019, detailing my attempts is exhibited at pages 12 to 34. As a result, the Coalition, on Thursday, 10th

October, 2019, applied for and was granted a variation of the Order to effect substituted service on Mr. Keod Smith by:

9.1. emailing the Order, the Notice and other documents to Mr. Keod Smith's email address keod_smith@yahoo.com;

9.2. Taping the Order, the Notice and other documents on the doors of Commercial Law Advocates' previous chambers Suite #1, Trinity Place, Mosko Building and Commercial Law Advocates' chambers, No. 81, Yellow Elder.

(the "Varied Order")

A copy of the Varied Order is exhibited at pages 35 to 38.

10. I am advised by Ms. Martin and I verily believe that pursuant to the Varied Order she:

10.1. emailed the Order and Notice to keod_smith@yahoo.com on Thursday, 10th October, 2019 along with the Varied Order, the Ex-Parte Summons seeking variation and the Affidavit in support both filed on 10th October, 2019. A copy of the email is exhibited at page 39; and

10.2. on Friday, 11th October, 2019, she attended both Commercial Law Advocates' at Suite #1, Trinity Place, Mosko Building and at No. 81, Yellow Elder and taped the Order and Notice along with the Varied Order, the Ex-Parte Summons seeking

variation and the Affidavit in support both filed on 10th October, 2019. A picture of the aforesaid documents taped to Suite #1, Trinity Place is exhibited at page 40 and a picture of the aforesaid documents taped to No. 81 Yellow Elder doors are exhibited at page 41.

11. I am further advised by Ms. Martin and I verily believe that when she attended Commercial Law Advocates at No. 81, Yellow Elder on the 11th October, 2019, Ms. Arianne Cartwright an employee of Commercial Law Advocates, accepted the document on behalf of Commercial Law Advocates.

12. In view of the foregoing, I verily believe that the Coalition complied with both the Order and Varied Order and successfully effected service of the Order and the Notice on Martin, Martin & Co. and Commercial Law Advocates.

AFFIRMED ~~SWORN~~ TO at Nassau, New Providence)
on this 5th day of December, 2019) Monique Bowe

BEFORE ME,

DESIGNATED CLERK OF THE SUPREME COURT COMMISSIONER FOR OATHS

NOTARY PUBLIC

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[15] The Notice of Motion filed May 01st, 2019 sets out what it refers to as:

> i) principally on the ground that the 6th Respondent's constitutional right to a fair hearing as guaranteed by or under Article 20(8) of the Constitution has been, and is being, infringed or violated or threatened to be infringed or violated; and particularly;
>
> ii) that there is or has been the presence of bias or the appearance or is the likelihood of bias on the part of His Lordship against the 6th Respondent, which bias would affect or likely affect the obtaining by the 6th Respondent of a fair hearing or of fair hearings in this action.

[16] Paragraph 3 of the Turnquest Affidavit filed May 01st, 2019 provides:

> **"3. The 6th Respondent adopts his supporting Affidavit filed in Action No. 2019/PUB/con/00005 on May 28th, 2019 as though they was herein set out and repeated verbatim, a copy of which affidavit is now produced and shown to me marked "EXH. KS 1"**

[17] However, this is not the only affidavit relied upon by the 6th Respondent. Mr. Martin also advised that he relies on the affidavits filed May 01st, 2019 (the Turnquest Affidavit), the Supplemental Affidavit of the Respondent filed May 09th, 2019 and the Second Supplemental Affidavit filed May 13th, 2019.

[18] It has become very clear to this court that the conduct of this and other matters involving the same players are not a by chance process. The 6th Respondent has sought to muddy the entire process by the piece meal process it has taken.

[19] In adopting affidavits and swearing brief affidavits with one or two allegations and then making references to other affidavits is not in my humble opinion an above board process where a litigant is seeking justice and fairness from the court within a reasonable period of time.

[20] On May 02nd, 2019 Mr. Frederick Smith, along with Mr. Dawson Malone and Ms. Candice Maycock appeared before me. Mr. Carlton Martin along with Mr. Rouchard Martin appeared for the 6th Respondent and Mr. Keod Smith who was also present. In this regard it is necessary to lay out here portions of the transcript for that hearing.

(Page 2, lines 12 – 32, pages 3 – 13:

"12. Now, my Lord, I'm ready to proceed with the
13. application, but I am told by Mr. Martin, that on behalf
14. of Mr. Keod Smith, he has filed but has not served me,
15. with a motion for your honor's recusal. I have asked
16. him for a copy of it. I have not been provided with it.
17. The first of it I heard was moments ago. I would like
18. to proceed with the hearing of this very long delayed
19. motion.
20. So, perhaps Mr. Martin can indicate whether a
21. recusal motion does, in fact, exist or not.
22. THE COURT: Yes.
23. MR. MARTIN: My Lord, I really would need an

adjournment. I sent a letter out pursuant to appearing before your Lordship yesterday, and my learned friend might not have gotten a copy. But I see a copy came to your Lordship. The substance of it is this, my Lord - -

THE COURT: Sorry, Mr. Martin, you said you filed - -

MR. MARTIN: I filed a recusal application.

THE COURT: So, why can't we have it?

MR. MARTIN: My Lord, I was before

Page 3 – 13:

Your Lordship yesterday . . .

THE COURT: Yes.

MR. MARTIN: And then I informed you that I was in the process of doing that and that I would sent you copies of the documents even though they would be filed in the Supreme Court. There would be copies filed in the Supreme Court.

Between yesterday and now, it would have been rushy for me to have done that. That's probably in the process of being dealt with right now. That was only yesterday. But I wrote a letter on my account, when I appeared before your Lordship yesterday, I indicated that we would be in the Court of Appeal this morning, on

THE COURT: Which was yesterday?

MR. MARTIN: Yes. So there might have been a misunderstanding. I represent - -

THE COURT: Well, I have sent for the transcript after - -

MR. MARTIN: Yes. Well, that would have been a misunderstanding.

THE COURT: - - After receiving this present letter. But back to what you say has been filed, if it has been filed, then I'm prepared to stand the matter down for 10, 15 minutes, to allow you to bring us the filed copies

MR. MARTIN: For me to get those files, I mean if they have not been served as yet; unless they are on the way.

THE COURT: Well, what I'm saying is Mr. Smith is here.

MR. MARTIN: But, My Lord, yesterday when I appeared before you, your Lordship said "Well if you are before the Court tomorrow ..."

THE COURT: No. No. I understand that, Mr. Martin.

MR. MARTIN: I can't comply with that - -

THE COURT: Let me explain to you what I'm saying. I'm hard pressed - -

MR. MARTIN: Very well.

THE COURT: - - to not proceed without having in front of me, a filed application by you on behalf of Mr. Keod Smith. I don't have it.

MR. MARTIN: But I'm counsel, senior counsel, telling your Lordship that they were filed. I told you that yesterday.

THE COURT: But what I'm saying, Mr. Martin, please try and understand.

MR. MARTIN: How can I go ahead without having taken full instructions from my client, who just instructed me about two to three days ago, to prepare for the application, even taking into consideration the fact that if that recusal application were not filed, I still would need time to prepare for this. This is a serious matter. And I was instructed about two to three days ago. And I said to the Court . . . and in my letter I said - -

THE COURT: Excuse me.

Ms. Smith, can you call the stenographer please and ask her if she can get me right away, because

it ought not to be long that, a copy of the transcript.

MR. MARTIN: Of what significance is the transcript going to be?

THE COURT: Well, I need to be certain that there is, in fact, a misunderstanding as to what was said yesterday.

MR. MARTIN: Well, I need to be certain that what your Lordship said about Rouschard Martin representing Keod Smith in this matter, there was a misunderstanding. I appeared holding brief for Rouschard Martin in the constitutional action No 5.

THE COURT: When did we set the date for today's fixture, how long ago did we set that?

MR. MARTIN: Well, I would not know that, My Lord. I have not even had a chance to look at - -

MR. SMITH Q.C.: That was set on February 21st of this year. And Mr. Keod Smith was served on March 7th of this year. So it is no excuse for Mr. Martin to say he has only been instructed two or 3 days ago.

Mr. Keod Smith has been at the epicenter of this matter for years.

MR. MARTIN: If I may speak on that, my Lord,

Mr. Smith says he got it last week Friday. And I will tell you why I believe that's true, because I met with Mr. . . .

MR. SMITH Q.C.: I have an affidavit of service.

MR. MARTIN: No, last week Friday it came to him. The date might have been set.

MR. SMITH Q.C. No. No. Let's be clear, My Lord, what I'm saying. The date was obtained from your Lordship and a notice of hearing was filed on February 21. And subsequently, pursuant to the instructions, we filed an - - sorry, to the service requirements, we filed an affidavit of compliance on April 29. But, my Lord . . .

MR. MARTIN: So, Mr. Smith is actually saying that there was an order for substituted service and the bundle of documents were dropped off at his office last week Friday. So between last week Friday and probably three, four days later, three days ago, he instructed me in these matter.

THE COURT: Mr. Smith.

MR. SMITH Q.C.: Yes.

THE COURT: You said you have an affidavit of service?

MR. SMITH Q.C.: Yes. It's the affidavit of Compliance dated April 29, 2019. It is an affidavit by Doreen Deal. And if we go to Exhibit DD - - well, it's April 29, 2019. But, my Lord, if I may, rather than take your Lordship through all of this, the fact is that Mr. Keod Smith is here. Whether he found this out a month, two months, three months ago or last week. Secondly, my Lord, I resist and oppose the application for the adjournment. Keod Smith has a practice along with another defendant in this same case, of filing a recusal motion in respect of every judge.

MR. MARTIN: My Lord, I object to that. my Lord.

MR. SMITH QC.: Excuse me, let me finish.

MR. MARTIN: My Lord.

MR. SMITH QC.: I would like to finish.

MR. MARTIN: My Lord. My Lord.

My Lord, with the very greatest respect to my learned friend, these matters are intertwined. There is another application in constitutional action number five, which is identical to dealing with the same facts. The same matters. These are over-lapping. These are of

one concern. And my learned friend is directly involved in that as a party in one case.

My Lord, if I may say, applications for - -

MR. SMITH QC: MY Lord, I was on my feet and I was half way through speaking, so my friend should really yield to me.

THE COURT: Sorry, Mr. Martin, Mr. Smith is still on his feet.

MR. MARTIN: Very well.

THE COURT: I will give you an opportunity to respond.

MR. MARTIN: Very well, my Lord.

MR. SMITH QC.: I waited for him to sit down, then I stood up.

so, my Lord, Mr. Keod Smith, inevitably files a recusal application against every judge involved in any process against him in this matter. And the reason is to prevent the orderly disposition of applications made against him. I would like to put this case in context.

It is a motion to commit, as a result of Mr. Keod Smith's failure to answer questions under oath as directed by the Court, on an examination of him as a

judgment debtor, in respect of a costs order made against him by Justice Bain. This is not a complicated case. And so, when my friend asks for an adjournment, I resisted, not to be awkward - -

I believe someone is there looking at you, My Lord.

THE COURT: It's okay.

MR. SMITH QC: - - not to be awkward to my friend, my Lord, but it is a simple situation where either Mr. Smith deems to be examined or not. And all this Court really needs to do, is to make an order that he be committed to prison for a two week period. But the order is not to take effect, if in the meantime, within a three month period, Mr. Smith participates in the cross-examination.

There is nothing to defend. There is nothing for Mr. Martin to get up to speed on. The facts are so simple, to the extent, my Lord, that there is no evidence in opposition mounted by Mr. Smith in the meantime. So the best he can do, is now to accuse this Court, as he has done multiple times to other judges, that they are biased against him. Either having the appearance of bias for some reason or having actual

bias.

Now, we have not heard of any accusation of bias against your Lordship until this very moment. And one would have thought - - and I remember the first bias application I made, was to try and ask Justice Gonsalves-Sabola as he then was, to recuse himself. I was terrified that I was going to be sent to jail by the judge for contempt at that very moment Luckily Chief Justice Telford Georges was sitting next to him, who told him to calm down. They went out and they went and they considered the matter, came out and ruled, came out and ruled that my application was ill-founded and required me to proceed with the case.

So, that is usually what happens. These recusal applications don't have to be so complex. If, indeed, he has a valid ground, he stand up and make it now. Your Lordship can take it into consideration and decide what to do.

Thank you.

MR. MARTIN: My Lord, I think what my learned friend has missed in all that he has been talking, is the serious nature of this application. And he is asking me . . . I say to the Court, that I have only gotten

those documents three days ago. And I have been given strict instructions as to what the first step should be. And I have executed that first step. And not because, my Lord, an application for recusal is made, it means that there is any disrespect to the Court.

THE COURT: No. No. No.

MR. MARTIN: When I made the application before your learned sister Justice Charles, she said, "Mr. Martin, you know I have broad shoulders."

I was before your Lordship, this is about the third time, and I believe the more I come before your Lordship, the more I learn about your Lordship. And when you said yesterday, "Mr. Martin, in that constitutional matter number five, if I should rule against your application for recusal, I would grant you leave once it is applied for right there and then". I commended your Lordship for that.

Matters of bias are what they call matters that is in your subconsciousness. And a judge does not necessarily have to be - - you could be the greatest judge in the world. Everybody remembers the dime injunction case, where the judge had shares in the company but he ruled - - they call it - - it is of an

insidious nature. It is there and you don't know it is there and all we do is try to guard against it being used against an innocent party. That's all.

Well, I come back to the point that this is a very serious matter. And normally, what my learned friend should take into consideration, the question of delay - -

THE COURT: Just a moment

MR. MARTIN: Very well, my Lord.

THE COURT: Let me just say, before you continue, Mr. Martin.

MR. MARTIN: May I sit?

THE COURT: Yes, you may.

I do not allow the use of cellphones in my court for obvious reasons. I'm not certain that the proceedings are being recorded. And as a measure of extreme caution, and it's as a result of experience. I entertained an ex parte application, and before we could get out the door good, the entire cadre of press had it blow for blow. Ex parte. Which, of course, ruins the whole purpose of an ex parte application. And so, from that day, to now, I do not allow the use of cellphones in my court. If counsel has to look or consult the

phone for a date, simply ask the Court and I will grant that permission.

MR. MARTIN: I appreciate that. I'm in agreement with that, my Lord. I think my learned Mr. Keod Smith is also in agreement with that as well.

But getting back, my Lord, considering the serious nature of the application, matters of delay or adjournment, granting of adjournment, can always be dealt with in the form of costs, if the Court deems it appropriate to exercise it's discretion to grant costs of an adjournment. But costs is always an answer to it, unless the applicant can show, that he would suffer a more - - some serious prejudice which, of course, will not be the answer to.

And so I'm submitting, my Lord, that the fact of the application is to send Mr. Keod Smith to jail which is a serious matter, whether it is delayed or not. whether it is made with an execution period, should he fail within two weeks or not, it is a serious matter. Nobody wants that. And my learned friend should permit me an opportunity in the circumstances, having just been instructed, to actually properly prepare a case for my client.

I don't see why he shouldn't want to do that, my Lord. And I'm asking the Court to grant an adjournment in this matter and permit me to properly prepare a defence for my client. And taking into consideration that he has only been served by a substituted service last Friday. He said his chamber was served. And I got it like about three, four days afterwards. I got like a bundle of documents.

THE COURT: All right, Mr. Martin, I have heard what you said.

Are you finished?

MR. MARTIN: Yes, my Lord.

THE COURT: Yes. I heard what you said, but I'm still hard pressed to be asked to give an adjournment, based on an application that you said has been filed but we have no sight of it, so I'm going to proceed with this matter.

MR. MARTIN: But I would not be able to participate because I have not had an opportunity to prepare.

THE COURT: I don't think that that would be an issue, because we are not going to finish this matter today. So I'm going to proceed and - -

MR. MARTIN: Bearing in mind that I, as senior counsel say that there is a recusal application that was filed. And we could always - - and it is easy to send somebody - -

THE COURT: Mr. Martin, I have already made a decision.

MR. MARTIN: Very well.

You can send somebody down to the registry to pick up the documents.

THE COURT: I had offered to do that, but that was refused. So I am going to proceed.

MR. SMITH QC: Thank you, my Lord.

MR. MARTIN: I did not refuse anything, my Lord.

THE COURT: Well, you said you wouldn't be able to do that. That's what you said, Mr. Martin.

MR. MARTIN: No. I couldn't get my copies but the registry has their copies.

THE COURT: Let's proceed. You have Mr. Martin Junior there and he can go off and . . .

MR. MARTIN: He represented somebody. Somebody will have to go with him. I don't think they are going

to give it to him. If somebody from the court goes.

MR. SMITH QC: I am obliged, my Lord, on behalf of my client that we are proceeding.

My Lord, I think the document that we should start with is the notice of motion.

THE COURT: Now, can you - - we have several bundles.

MR. SMITH QC: Yes. I'm going to make sure that your Lordship is looking at –

THE COURT: I have separate sets of bundles.

MR. SMITH QC: Could Mr. Keod Smith speak quieter please.

So the first document that I would take the Court to.

THE COURT: Yes.

MR. SMITH QC: Is the motion filed on the 8th of February, 2017.

THE COURT: Yes. I'm saying which bundle are we going to be operating from?"

[21] Later on during the hearing, Mr. Martin produced the filed recusal Notice of Motion and the Court, as it said it would, ceased hearing the committal proceedings and arranged a date to hear the recusal application.

[22] Mr. Martin has said to the Court that he is relying on:-

a) The Turnquest Affidavit filed May 01st, 2019;

b) Supplemental Affidavit of Keod Smith, filed May 09th, 2019;

c) Second Supplemental Affidavit of Keod Smith filed May 13th, 2019;

d) Submissions dated May 09th, 2019.

[23] All of the information contained in the above affidavits and the submissions mirror the information and legal position of the 2nd Respondent in action No. 2019/PUB/CON/0005. In the instant case Mr. Keod Smith is the 6th Respondent.

[24] I take it that counsel for the 6th Respondent did not wish to chew the same food twice which is why he would have said up front:

> **"I will not go through the affidavits and leave it to the court to decide. I am doing this for reasons which I need not disclose to anyone."**

[25] In light of how this application has been conducted by the 6th Respondent, there is a need to firstly lay out the following affidavits relied upon by the 6th Respondent.

SUPPLEMENTAL AFFIDAVIT FILED MAY 09TH, 2019

COMMONWEALTH OF THE BAHAMAS 2013/PUB/jrv/00012

IN THE SUPREME COURT

Public Law Division

SUPREME COURT
MAY 09 2019
Nassau, Bahamas

IN THE MATTER of an application for judicial review
THE QUEEN
And
THE HON PERRY G. CHRISTIE, Prime Minister of The Bahamas
(in his capacity as the Minister Responsible for Crown Lands)
1st. Respondent

THE HON PHILIP E. BRAVE DAVIS, Deputy Prime Minister (in his capacity as the Minister of Works and Urban Development and the Minister Responsible for Building Regulations)
2nd. Respondent

THE HON GLENYS HANNA-MARTIN, Minister of Transport and Aviation (in her capacity as the Minister Responsible for Ports and Harbours)
3rd. Respondent

THE TOWN PLANNING COMMITTEE
4th. Respondent

PETER NYGARD
5th. Respondent

KEOD SMITH
6th. Respondent

Ex Parte
COALITION TO PROTECT CLIFTON BAY & 2 others
Applicants

SUPPLEMENTAL AFFIDAVIT

I, Keod Smith of the Western District of the island of New Providence in the Commonwealth of the Bahamas, Counsel and Attorney-at-law, make oath and say as follows:-

1. That I am the person named as 6th. Respondent in this action and that this affidavit is supplemental to my principal Affidavit sworn herein on my behalf by Mr. Whanslaw Turnquest on the 30th. day of April, A. D. 2019.

2. That the facts giving rise to Action No. 2019/PUB/con/00005 are related to or connected with the facts in Action No. 2013/PUB/jvr/00012. Likewise, the facts in the just mentioned two actions are connected with or related to the facts in CLE/gen/Action No. 01116 of 2018. The parties in all of these actions are set up in a way that there are those connected with the Coalition on the one side and Mr. Peter Nygard and me on the other side.

3. That I, along with my present attorney, Mr. Martin, appeared before His Lordship Mr. Justice Keith Thompson in these proceedings and in proceedings in the above Action No. CLE/gen/01116/2018 on or about the 4th. of October, 2018. At that time Mr. Martin and I were seeking an injunction on behalf of Mr. Peter Nygard, the 5th. Respondent herein, against the Provost Marshal, restraining him (the Provost Marshal) from further executing upon and holding or being in possession of Nygard Cay.

4. That about a day or two before Mr. Martin and I appeared before His Lordship in open Court for the first of second time we met with him in the reception area of his Chambers and arranged to appear before him along with all parties concerned, including the Coalition, on or about the 4th. of October, 2018. Notice was served on all parties and all parties were represented at the subsequent hearing.

5. That whatever I say about the above appearance and what transpired at it can be confirmed or corrected by the transcript of such hearing, which transcript Mr. Martin tried without success to obtain. Copies of Mr. Martin's two letters to His Lordship's Clerk are now produced and shown to me and are hereto attached as exhibits **"Exh. KS 1, KS2 and KS23".**

6. At the said hearing it was made clear by His Lordship that he was in communication with Mr. Fred Smith and his firm of Callenders and Co. It appeared to both Mr. Martin and me that His Lordship believed that we were not being truthful in our dealings with the matters with which we were then dealing. We were put to intense scrutiny by His Lordship. His Lordship questioned why Mr. Fred Smith's client, the Coalition, was not joined in the above Action No. CLE/gen/01116/2018, Nygard v. the Provost Marshal. He spent some time on this point, to which Mr. Martin simply and firmly said that he had no objection to the Coalition being joined as a party, as it had a stake in the outcome of the action. But what Mr. Martin considered strange is the involvement of His Lordship to the extent of asserting that Mr. Martin ought to have joined the Coalition and his having contacted Callenders and Co. and or Mr. Fred Smith QC. I am advised by Mr. Martin and I verily believe that these matters and what really transpired at the said hearing amounted to or possibly amounted to a subconscious preference for Mr. Fred Smith and his clients, the Coalition, and that such matters amounted to bias or possible bias against Mr. Nygard, and, if I were involved in the aspect of the matter that was being dealt with, a likely or potential bias against me, as a party to this action.

7. That I believe that there were two hearings before His Lordship in respect of the above matters, Mr. Fred Smith, QC, not being present at the first hearing. At the second hearing His Lordship accused both Mr. Martin and me with having commenced another proceeding, to which Mr. Martin firmly informed His Lordship that His firm was Martin, Martin and Co. or words to that effect, and that he had nothing to do with my firm. It is my view and also the view of Mr. Martin that the above second hearing provided bias or a potential for bias against

me and that on that basis only His Lordship should recuse himself from these proceedings or any part of them. His above question as to my commencing another proceeding amounted to a bias or potential bias against me as a party to these proceedings, which bias or potential bias now affect the fair and independent hearing or these proceedings by His Lordship.

7. That the bias reared its head at the hearing on the 2nd. of May, 2019. Mr. Martin informed His Lordship that he had only taken instructions to act for me in these proceedings about two days ago and that he had filed on about the previous day an application for him to recuse himself from these proceedings. When His Lordship appeared to want to move ahead with the contempt hearing against me, on the basis that Mr. Smith was not served and he did not have the recusal documents before him, Mr. Martin informed His Lordship that he is a senior member of the Bar and ought to be believed when he said he had filed the recusal motion. His Lordship proceeded with the contempt hearing against me, also in spite of the request by Mr. Martin for an adjournment to prepare for such hearing, pointing out to His Lordship that the matter was a serious one, the fact that costs would suffice for any prejudice the other side/s would suffer and the fact that he did not have time to prepare, he having only been appointed as stated above. It was only when Mr. Martin was able to obtain from his office copies of the Notice of Motion for His Lordship and Mr. Fred Smith QC that His Lordship discontinued the contempt hearing and set a date for the hearing of my recusal application.

8. That, as informed by Mr. Martin, at the hearing on the 1st. of May, 2019, His Lordship was informed by Mr. Martin that he and Mr. Smith QC, as well as Mr. Keod Smith, were before the Court of Appeal on the 2nd. of May, 2019, on a

substantive hearing and that to appear before him on the 2nd. of May would be in conflict with the Court of Appeal date. His Lordship informed Mr. Martin that he should write to the other sides and agree a suitable date, in the place of the 2nd., for appearing before him. A letter was written to Mr. Smith QC and copied to the Court. On the 2nd. of May, 2019, Mr. Fred Smith QC was able to persuade His Lordship to proceed against me without regard to my new attorney's need to prepare a defence on my part and to have my recusal motion heard before any other matter was dealt with.

9. The failure to give my attorney an adjournment and opportunity to prepare for the hearing of the serious application of committal against me made me fearful of being shortchanged in respect of my constitutional rights to a fair and independent hearing, where I should be allowed an ample opportunity to prepare and present my defence. I feared that the refusal of His Lordship to consider that my recusal application was made and to give precedence to its hearing before anything else put me at a serious disadvantage before His Lordship and was in further breach of my constitutional rights to a fair hearing. Mr. Fred Smith QC, at the hearing of 2nd. May, urged His Lordship to proceed with his contempt hearing and His Lordship simply acceded to his request without regard, or proper regard, to my attorney's request for an adjournment and the need to hear my recusal application before any other matter be dealt with.

10. Pursuant to Mr. Martin's appearance on another recusal application or applications, and having spoken with His Lordship, Mr. Martin wrote a letter to Mr. Fred Smith QC attempting to agree a date for the hearing of the recusal application or to appear before His Lordship. I believe that this letter was referred to by Mr. Martin at the hearing on the 2nd. of May. This letter was copied to His

Lordship's clerk. A copy of this letter is now produced and shown to me marked exhibit **"Exh. KS4"**.

11. That these proceedings and the above related or connected actions are controlled by Mr. Fred Smith QC insofar as the parties against or in opposition to the said Mr. Nygard and me are concerned. These and other actions, not mentioned, stretching back to 1913, concern a long legal struggle between the Coalition and its related parties against Mr. Nygard and me. I believe that His Lordship is insidiously affected by favouring the parties in opposition to Mr. Nygard and me, and that there has been bias or a potential or possibility of bias shown by His Lordship in the above related or connected actions where appearance/s was or were made before His Lordship, and in particular during the hearing before His Lordship on the 4th. of October, 2018, or thereabout and the hearing on the 2nd. of May, 2019.

12. That the carriage of this action was at all material times with and is still with Justice Grant-Thompson. There was no rational reason for the hearing of the contempt application to be taken before His Lordship, and for His Lordship to have taken carriage of the contempt proceedings after the said hearing of the 4th. October, 2018, which hearing forms a part of the reasons for my present recusal application.

13. That the conduct of the said hearings before His Lordship has always been with remarks by His Lordship that did not favour Mr. Nygard or me; I view the perception or Mr. Nygard and me in the face of the Court during the said hearings as being, frankly speaking, not favourable. My earnest and preferable desire is for my matters in these proceedings and the said connected or related actions be dealt with by another Judge.

14. That to the best of my knowledge, information and belief the contents of this affidavit are correct and true.

SWORN at Nassau, N. P.,)
Bahamas this 9th. day of)
May, A. D. 2019)

Before me,

NOTORY PUBLIC

SECOND SUPPLEMENTAL AFFIDAVIT FILED MAY 13TH, 2019

COMMONWEALTH OF THE BAHAMAS 2013/PUB/jrv/00012

SUPREME COURT
MAY 13 2019
Nassau, Bahamas

IN THE SUPREME COURT

Public Law Division

IN THE MATTER of an application for judicial review
THE QUEEN

And

THE HON PERRY G. CHRISTIE, Prime Minister of The Bahamas (in his capacity as the Minister Responsible for Crown Lands)
1st. Respondent

THE HON PHILIP E. BRAVE DAVIS, Deputy Prime Minister (in his capacity as the Minister of Works and Urban Development and the Minister Responsible for Building Regulations)
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THE HON GLENYS HANNA-MARTIN, Minister of Transport and Aviation (in her capacity as the Minister Responsible for Ports and Harbours)
3rd. Respondent

THE TOWN PLANNING COMMITTEE
4th. Respondent

PETER NYGARD
5th. Respondent

KEOD SMITH
6th. Respondent

Ex Parte
COALITION TO PROTECT CLIFTON BAY & 2 others
Applicants

SECOND SUPPLEMENTAL AFFIDAVIT

I, Keod Smith of the Western District of the island of New Providence in the Commonwealth of the Bahamas, Counsel and Attorney-at-law, make oath and say as follows:-

1. That I am the person named as 6th. Respondent in this action and that this affidavit is supplemental to my principal Affidavit sworn herein on my behalf

by Mr. Whanslaw Turnquest on the 30th. day of April, A. D. 2019, and the my Supplemental Affidavit filed herein on the 9th. day of May, 2019, all of which have been filed in support of my recusal application.

2. That, to the best of my recollection, when I appeared with Mr. C. A. Martin before His Lordship in this action a few days prior to our appearance on the 4th. of October, 2018, on an Ex parte application on behalf of the 5th. Respondent, Peter John Nygard, for an injunction restraining the Provost Marshal from executing upon and seizing Nygard Cay, His Lordship informed Mr. Martin that he did not do or believe in Ex parte applications and that he always preferred all of the parties to be before him, or words to that effect. The transcript for that appearance in respect of this assertion is relied on. The hearing was adjourned so as to allow all parties to be served and have an opportunity to appear in the hearing of such application.

3. That, contrary to the above position taken by His Lordship at that said first hearing or injunction application on behalf of Mr. Nygard, His Lordship entertained an Ex parte application on behalf of Mr. Fred Smith QC and the other Applicants in 2019/PUB/con/00005 for an injunction against Mr. Nygard and me and did in fact grant such injunction on an Ex parte basis, as was sought. Further, His Lordship failed to include in the Injunction Order a return date so as to give Mr. Nygard and me an opportunity to seek to vacate or challenge such Ex parte injunction. Coupled with this, my application for a date for the hearing of my recusal application in the said Action No. 2019/PUB/con/00005 was not easily obtained.

4. When Mr. C. A. Martin and I appeared for the second time before His Lordship on the 4th. of October, 2018, I had a pending Ex parte application at such

appearance for leave to apply for judicial review. At the very outset of the hearings for this date His Lordship launched an attack against me for bringing such application and somehow implicated Mr. Martin in it. Later on during my appearance before him on this very same date he informed me that he did not believe in Ex parte applications and that all of the parties concerned had to come before him, and I undertook to serve the other parties with the application, in spite of the fact that the rules required the application to be Ex parte. Thereafter, I made every possible effort to get a date for the hearing of such application before His Lordship but was given none.

5. That my attorneys continue to wait for the transcripts in respect of the said first and second hearings before His Lordship for an injunction in favour of Mr. Nygard and against the said Provost Marshal.

6. That I ask that these proceedings be stayed or adjourned pending the delivery of the said transcripts to my attorneys for the purpose of allowing him a full and complete opportunity to prosecute my recusal application on the basis of all available evidence.

7. That to the best of my knowledge, information and belief the contents of this affidavit are correct and true.

SWORN at Nassau, N. P.,)
Bahamas this 10th. day of)
May, A. D. 2019)

Before me,

NOTORY PUBLIC

[27] Mr. Martin began by pointing out paragraph 5 of the affidavit of Whanslaw Turnquest ("The Turnquest Affidavit."), filed May 01st, 2019 in the instant action. However, I highlight paragraph 3 which provides:

> **"3. The 6th Respondent adopts his supporting affidavit filed in Action No. 2019/PUB/CON/00005 on the 28th February, 2019 as though they was herein set out and repeated verbatim, a copy of which affidavit is now produced and shown to me marked Exhibit "EXH. KS 1".**

[28] Paragraph 22 provides:

> **"That this affidavit is in support of the recusal application by or on behalf of the 6th Respondent, Keod Smith, set out in his Notice of Motion filed herewith."**

[29] In essence therefore these are the very same arguments which were used in Action No. 2019/PUB/CON/00005. The affidavit filed 28th February, 2019 is the main affidavit which sought my recusal.

[30] I now understand why Mr. Martin said which documents he was relying on without enumerating all the documents. What he said was that he was **"leaving it to the court for reasons he didn't have to disclose."** The mere statement is loaded with suspicion and could be taken as sharp practice.

[31] In any event I will wade through the muddied water created by Mr. Martin.

THE LAW:

[32] Section 20 (8) of our constitution has been set out above at paragraph 12.

[33] One of the primary considerations in matters such as these is to determine whether the application by the 6th Respondent for redress is in fact a constitutional matter. In this regard, paragraphs 36 to 45 of Ruling No. 22 in Action No. PUB/MJRV/12 of 2013 speak to this point put by the 6th Respondent.

> **"(36) There is no dispute that the Sixth Respondent may use any method to move the court with respect to his alleged breach of his constitutional right. The Stay Notice of Motion made reference to Article 20 (8) of the Constitution. The Notice of Adoption and the Keod Smith Recusal Application and the Keod Smith Amended Recusal Application made reference to Article 28 of the Constitution.**
>
> **(37) The Notice of Adoption alleged, inter alia,**
>
> > **"whereby Keod Smith has been deprived of a fair hearing on issues affecting him and his legal interest in violation of his common law right to a fair hearing and his constitutional right as set out in Article 20(8) of the Constitution of The Bahamas 1973."**
>
> **(38) Article 20 (8) of the Constitution provides –**
>
> > **"(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of**

any civil right of 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."

(39) In considering any application for redress pursuant to Article 28 of the Constitution the court must have regard to the Proviso to Article 28 (2) of the Constitution. The Proviso provides:-

> **"Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."**

(40) The court has to consider whether there are adequate means of redress available to the Sixth Respondent.

(41) The Sixth Respondent has filed two applications for recusal. These applications have not been heard.

(42) In Harrikissoon v. Attorney General of Trinidad and Tobago 1980 AC 265 the Privy Council considered applications to the Supreme Court for constitutional redress. Lord Diplock stated at page 268 –

> **"The notion that whenever there is a failure by an organ of government or a public authority or public officer to**

comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

(43) The court must also determine whether the application by the Sixth Respondent for redress is a constitutional matter. Constitutional matters were certified by the Privy Council in Durity v Attorney General of Trinidad and Tobago 2002 3 WLR 955. Lord Nicholls of Birkenhead stated –

> **"29. Constitutional proceedings are not capable of being brought between subjects. Of their nature**

they concern claims brought by a claimant against the state in respect of the failure, or alleged failure, of the state to secure the claimant the fundamental human rights and freedom and protections enshrined in Chapter 1 of the Constitution."

(44) The court has to consider whether the fact that the Sixth Respondent has made application for the Keod Smith Committal Application to be stood down pending the hearing of the Peter Nygard Recusal Application No. 2 and Keod Smith Recusallvpplication and the Keod Smith Amended Recusal Application is a constitutional matter. The court also has to determine if there is an alternate remedy available and whether the Sixth Respondent has exhausted the alternative remedy.

(45) In Malcolm Johnatty v Attorney General for Trinidad and Tobago 2008UKPC – 55, Lord Hope of Craighead in giving judgment for the Committee stated –

> **"21. The fact that these alternative remedies were available is fatal to the appellant's argument that he ought to have been allowed to seek a constitutional remedy. In Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265, 268 Lord Diplock warned against the misuse of the right to apply for constitutional redress when other procedures were available. He said that its value would be seriously diminished if it was allowed to be sued as a general substitute for the normal procedures for invoking judicial control of administrative action. This warning has been repeated many times. In Hinds v Attorney General of Barbados [2001] UKPC 56; [2002] 1 AC 854 Lord**

Bingham of Cornhill said that it remained pertinent. In Jaroo v Attorney General of Trinidad and Tobago [2002] UKPC 5; [2002] 1 AC 871, para 39 Lord Hope of Craighead said that before he resorts to this procedure the appellant must consider the true nature of the right that was allegedly contravened and whether, having regard to all the circumstances of the case, some other procedure might not more conveniently be invoked. In Attorney General of Trinidad and Tobago v Ramanoop [2005] UKPC 15, [2006] 1 AC 328, para 25 Lord Nicholls of Birkenhead said that where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take such a course. The appellant was unable to point to any such circumstances in this case."

[34] Having cited the above, and after careful consideration; the constitutional ground fails. The 6th Respondent has not satisfied the court that his constitutional right to a fair hearing has been breached or that there were no other adequate means of redress.

[35] Counsel for the Sixth Respondent submitted, that Mr. Justice Thompson is biased against the Sixth Respondent in that Mr. Justice Thompson was or had a position which is more favourable to the Applicants and as a result thereof, the Sixth Respondent cannot receive a fair hearing.

[36] The primary allegation is that Mr. Justice Thompson penned a tribute to the late Dr. Reginald Lobosky as a result of Mr. Justice Thompson having worked with Dr. Lobosky and his wife Mrs. Sarah Lobosky in two law firms.

[37] Of special note is paragraph 5 of the affidavit of the Second Respondent which reads:-

> **"The most recent law firm referenced herein was that of Messrs. Harry B. Sands Lobosky & Company, the attorneys herein for the Applicants."**

[27] The record will reflect that Mr. Justice Thompson at no time was ever an employee of Messrs. Harry B. Sands, Lobosky & Company.

[28] The Allegation as the court sees it, is primarily directly related to the allegation set out in the Amended Notice of Motion filed February 28th, 2019, and the Keod Smith Affidavit filed also on February 28th, 2019 and the Supplemental Affidavit filed on May 13th, 2019.

[29] An affidavit was sworn in the instant action by Ms. Lakeisha Hanna, ("the Hanna Affidavit") and filed May 13th, 2019. It was filed in opposition to the 6th Respondent's application for recusal of Mr. Justice Thompson. The Applicants rely on the Hanna Affidavit in opposition to this Notice of Motion. The Affidavit is of some importance as it relates to the application for recusal and the primary grounds for recusal. In this regard, we set out the Hanna Affidavit below:-

I, **LAKEISHA HANNA**, of the Western District of the Island of New Providence one of the Islands of The Commonwealth of The Bahamas, **MAKE OATH** and say as follows:

1. I am an Attorney and Counsel duly admitted to practice law in The Bahamas. I am an associate at the law firm of Messrs. Harry B. Sands, Lobosky & Company, attorneys for the Plaintiffs herein. In my capacity as aforesaid, I am duly authorized by the Plaintiffs to swear this Affidavit on their behalf.

2. The facts stated herein are within my personal knowledge and they are true and correct to the best of my knowledge and belief. Where the facts are not within my personal knowledge, I state the source of my knowledge and belief.

3. I make this Affidavit in response to an Amended Notice of Motion and Affidavit in support, both filed on 28th February 2019, by the Second Defendant, Keod Smith on an application for Mr. Justice Keith Thompson to recuse himself from hearing matters in this action.

4. I also make this Affidavit in response to the Notice of Motion of the First Defendant, Peter Nygard and the Affidavit of Whanslaw Turnquest filed in support therefore, both filed on 1st May 2019 on an identical application to have the Honourable Judge recuse himself from hearing any matters in this action (together "**the Application**").

5. One of the grounds of the Application is that there is or has been the presence of bias or the possibility/appearance of bias on the part of His Lordship against the Defendants as follows:

   a. On the website of Harry B. Sands Lobosky & Co. (attorneys for the Applicants) His Lordship wrote a tribute article about the late Reginald Lobosky whose name is still featured in the name of the firm as Harry B. Sands Lobosky & Co. and whose widow (Sarah Lobosky) is mentioned in the article, she being a current active partner of the said firm;

   b. In the aforesaid Reginald Lobosky Tribute the following is stated by His Lordship: "Eventually he (Reginald) and Sarah, his wife, left Higgs & Johnson and went off on

their own, and I went with them. They started their own firm – Lobosky & Lobosky and I facilitated the purchase of their very first office building";

c. His Lordship indicated in the aforesaid tribute the following "...I always stayed in touch with Mr. and Mrs. Lobosky. I guess I could say that I really looked at them as my surrogate parents – that's how close we were."

6. I have been informed by Mrs. Sarah Lobosky, a Partner in this firm in the area of corporate and conveyancing, and verily believe that Attorney Keith Thompson, as he then was, was a law pupil of her late husband, Dr. Reginald Lobosky in the area of litigation when both Dr. and Mrs. Lobosky were partners in the law firm of Higgs & Johnson. Mrs. Lobosky and Dr. Lobosky formed their own law firm, Lobosky & Lobosky, in 1997 and then Attorney Thompson joined them as an Associate lawyer until on or about the end of 1998 or beginning of 1999 when he left to take a position at Arawak Homes and Sunshine Holdings Limited as in-house Counsel.

7. I am further informed and verily believe that in 2001 Dr. and Mrs. Lobosky closed Lobosky & Lobosky and joined several former partners of the firm Harry B. Sands & Company to form a new partnership under the name Harry B. Sands, Lobosky &

Company. Attorney Thompson was never a partner or associate employee of Harry B. Sands, Lobosky & Company.

8. In April 2004 Dr. Lobosky died and the firm was thereby dissolved. A new firm of the remaining partners was formed in 2004 under the same name, Harry B. Sands, Lobosky & Company ('**HBSL**'), which carries on the practice of law to date.

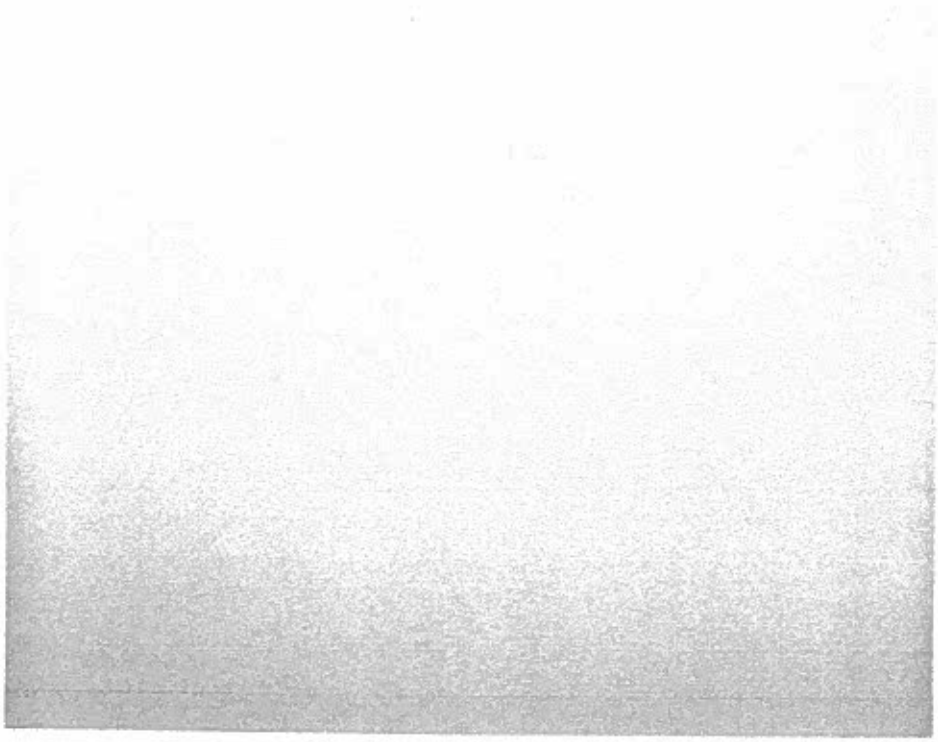
9. I am further informed by Mrs. Lobosky that she has had no continued personal or professional contact with Mr. Justice Keith Thompson since his departure from Lobosky & Lobosky on or about the end of 1998 or beginning of 1999. Sometime later, Mrs. Lobosky informed me that in her capacity as then Managing Partner of HBSL she gave evidence in Industrial Tribunal Action IT/NES/1713/12 Alpheus McKenzie v Harry B. Sands, Lobosky & Company wherein then Vice President Keith Thompson ruled against HBSL on 3rd October, 2013. A copy of the Decision is now attached hereto and marked "LH1".

10. Mrs. Lobosky informs me, and I verily believe, that she is not involved in and has no interest in the outcome of this current, or any, action between the parties.

11. I am further informed by Ms. Camille Cleare, Managing Partner of HBSL that in or about October 2017, whilst in the process of updating the HBSL website, she asked his Honour the Vice President of the Industrial Tribunal, as he then was, to give a

tribute to the late Dr. Reginald Lobosky, such content to be published on the website. The then Vice President agreed.

12. Mr. Justice Keith Thompson was not sworn in as a Judge of the Supreme Court until 13th August, 2018.



[30] Of special note is paragraph 9 of the Hanna Affidavit where the affiant states that:-

""Then Vice President Keith Thompson ruled against HBSL on 3rd October, 2013.

[31] The principle as it relates to a recusal on an allegation of bias was approved by the Court of Appeal of the **UK in LOCABAIL (UK) Ltd. v. BAYFIELD PROPERTIES and OTHERS 2000 1 All ER 65.** In this case, the Court of Appeal laid down the principles and guidelines when dealing with the disqualification of a judge on the ground of bias:-

> **"Where it is alleged that there is a real danger or possibility of bias on the part of a judicial decision-maker, that danger will be eliminated and the possibility dispelled if it is shown that the judge was unaware of the matter relied upon as appearing to undermine his impartiality. Accordingly, in applying the real danger or possibility of bias test, it is often appropriate to inquire whether the judge knew of the matter in question. To that end, a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he knew. Although the court is not necessarily bound to accept such a statement at its face value, there is no question of cross-examining or seeking disclosure from a judge. Furthermore, the reviewing court must disregard any statement by the judge concerning the impact of any knowledge on his mind or decision. Such a statement is of little value in view of the insidious nature of bias, and it is for the reviewing court to assess the risk that some illegitimate extraneous consideration may have influenced the decision (see P. 75 of a, d, f, g post) R. v Gough 919930 2 All ER 724 considered."**

[32] In **Locabail** the Court of Appeal held -

"4. In considering whether there is a real danger of bias on the part of a judge, everything depends on the facts, which may include the nature of the issue to be decided. However, a judge's religion, ethnic or national origin, gender, age, class, means of sexual orientation cannot form a sound basis of an objection. Nor, ordinarily, can an objection be soundly based on the judge's social, educational, service or employment background or that of his family; his previous political associations; his membership of social sporting or charitable bodies; his Masonic associations; his previous judicial decisions; his extra-curricular utterances; his previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or his membership of the same inn, circuit, local Law Society or chambers (see p 77 f to h, post).

5. In contrast, a real danger of bias may well be thought to arise if there is personal friendship or animosity between the judge and any member of the public involved in the case, if the judge is closely acquainted with any member involved in the case, particularly if that person's credibility may be sufficient in the outcome of the case; if, in a case where the judge has to determine an individual's credibility, he has rejected that person's evidence in a previous case in terms so outspoken that they throw doubt on his ability to approach that person's

evidence with an open mind on a later occasion; if the judge has expressed views, particularly in the course of the hearing, on any question at issue in such extreme and unbalanced terms that they cast doubt on his ability to try the issue with an objective judgment to bear on the issues. However, no sustainable objection can arise merely because, in the same case or a previous case, the judge has commented adversely on a party or witness or found their evidence to be unreliable. Furthermore, other things being equal, the objection will become progressively weaker with the passage of time between the event which allegedly gives rise to a danger of bias and the case in which the objection is made (see p 77 j to p 78 c, post).

[33] The question of apparent bias was considered in the House of Lords in **PORTER V. MAGILL 2002 2 AC 357**. In this case **LORD HOPE** endorsed the approach as per **LORD PHILLIPS M.R. in RE MEDICAMENTS** and **RELATED CLASS OF GOODS (No. 2) 2001 1 WLR 706** at page 727 –

"..... The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a REAL POSSIBILITY or

a REAL DANGER, the two being the same that the tribunal was biased, (our emphasis)."

[34] In the case of **CORAL BEACH MANAGEMENT CO. LTD. V. ANDERSON [2014] 1 BHS J. No. 147,** the characteristics of a fair minded and informed observer were considered. Evans J. addressed the law on recusals and bias where she stated;

"THE LAW ON RECUSAL/BIAS

The test for determining whether there is perceived bias was formulated by Lord Phillips, M.R. in Re Medicaments and Related Classes of Goods (2) [2001] 1 W.L.R.; re-stated in Porter v. Magill [2002] 2 W.L.R. 37 at 83H-84A; affirmed in the Privy Council case of George Meerabux v. The Attorney General of Belize, Privy Council Appeal No. 9 of 2003; and cited with approval in a number of local cases, including: Stubbs v. Attorney General [2009] 3 BHS J No. 135; 2009 No. 95; Conticorp S.A. and others v. The Central Bank of Ecuador et al and others [2009] 3 BHS J No. 126; SCCiv. App. No. 50 of 2009; Bryan Knowles v. Regina No. 46 of 2009; Rami Weissfisch v. Amir Weissfisch et al No. 53 of 2009.

In Magill v. Porter, 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."

In the **George Meerabux** case the Privy Council said;

"The issue of apparent bias having been raised, it is nevertheless right that it should be thoroughly and carefully tested. Now that law on this issue has been settled, the appropriate way of doing this IN A CASE SUCH AS THIS, WHERE THERE IS NO SUGGESTION THAT THERE WAS A PERSONAL OR PECUNIARY INTEREST, is to apply the Porter v. Magill test. The question is what the fair-minded and informed observer would think." [Emphasis added].

Then in the Conticorp S.A. case the Court of Appeal (Dame Sawyer, P., Longley, J.A. and Blackman, J.A.) noted that;

"The word bias when used in connection with judicial proceedings means that 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 TIRBUNAL 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 – see Lord Phillips of Worth Matravers, M.R. in the case of in re Medicaments and Related Classes of Goods (No. 2) [2001] 1 W.L.R. 700 at page 726 to 727". [emphasis added).

As I understand the authorities and the relevant principles, in applying the aforesaid test, the Court is 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] E.W.C.A. Civ 117 at para 27.

Over the years, several characteristics have been attributed to the "fair-minded and informed observer". He/she:

(1) is objective and is not to be confused with the complainant, so that "any assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively." Helow v. Secretary of State for the Home Department [2008] 1 W.L.R. 2416.

(2) is not a member of the judiciary, nor a member of the legal profession: Giles v. Secretary of State for Work and Pensions [2006] 1 WLP 781.

(3) is "neither complacent nor unduly sensitive or suspicious when he examines the facts that he can look at"; Johnson v. Johnson [2000] 201 C.L.R. 488, 509, para 53;

(4) is "the sort of person who always reserves judgment on every point until he/she has fully seen and understood both sides of the argument", Helow v Secretary for the Home Department supra.

(5) knows that fairness requires that a judge must be, and must be seen to be, unbiased; knows that judges, like anybody else, have their weaknesses; will not shrink from the conclusion, if it can be justified objectively, that things they have said or done or associations that they have formed may make it difficult for judges to judge the case before them impartially." Helow v. Secretary for the Home Department supra.

(6) is also aware of the "legal traditions and culture of this jurisdiction"; Taylor v. Lawrence [2003] Q.B. 528, per Lord Woolf, C.J.

(7) must be taken to know that judges are trained to have an open mind; El Farargy v. Farargy [2007] E.W.C.A. Civ 1149; and must not only be aware of the traditions of judicial integrity and of the judicial oath,

but must "give it great weight"; Robertson v. HM Advocate 2007 SLT 1153.

In the case of **The President of the Republic of South Africa and others v. South African Rugby Football Union and Others**, even though these observations were directed to the reasonable suspicion test, their Lordships' opinion expressed at para 48 is instructive:

> "... the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or **WILL NOT BRING AN IMPARTIAL MIND TO BEAR ON THE ADJUDICATION OF THE CASE, THAT IS, A MIND OPEN TO PERSUASION BY THE EVIDENCE AND THE SUBMISSIONS OF COUNSEL**. [Emphasis added]

So, what are the correct facts which have a bearing on the allegation of apparent or perceived bias in this case, of which the fair-minded and informed observer would be aware?

In my judgment, they include the following;

(1) The relationship, such as it was, existed approximately 29 years ago. There is no evidence that it continued beyond 1985. It may have but, frankly, I do not know.

(2) At the time, I was not a lawyer, but a legal secretary in the firm of Callenders & Co., who, like many law firms in The Bahamas, provided registered office facilities, which sometimes included the provision of nominee shareholders, officers and directors for companies incorporated under the Companies Act.

(3) Barefoot Postman Limited was one such company.

(4) Except for providing the aforesaid service/facility as an employee of Callenders & Co., to my knowledge, I have had no involvement with Barefoot Postman Limited.

(5) I do not now, nor ever had any financial interest in Barefoot Postman Limited.

(6) I have no personal, familial or financial interest in the outcome of the cases involving the parties hereto. Indeed, no such interest is alleged.

(7) I have not been employed with Callenders & Co., since December 1994.

(8) The transaction involving the sale and purchase of Units 2714 and 2716 between Barefoot Postman Limited and the defendants

occurred in 2006, some 21 years after the 1985 date of the aforesaid annual statement and deed of settlement compromise and release.

(9) I was not in any way involved with the aforesaid transaction involving Barefoot Postman Limited and the defendants.

(10) The only action where Barefoot Postman Limited was named as a party has already been determined by me. The decision has not been set aside nor appealed and the defendants who had an opportunity to participate in that action declined to do so.

(11) The present action is a claim by the Condominium Association for possession of Unit 2714 aforesaid and the defendants' 2010 action is an action by the defendants against the plaintiff for relief from oppression of minority pursuant to section 285 of the Companies Act.

I am also mindful of the observation of Mason, J. in the High Court of Australia in the case of In Re JRL ex-parte CJL [1986] 161 C.L.R. 342 at 352, cited with approval in the case of the President of the Republic of South Africa and Others v. South African Rugby Football Union and Others supra, that, 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."

[35] I hasten to point out that the 6th Respondent does not allege actual bias on my part. What he does allege is "perceived bias"; that is that there is a perception that my former relationship with Dr. Reginald Lobosky and Mrs. Sarah Lobosky is perceived bias.

[36] In the House of Lords case of LOCABAIL (UK) Ltd. v. BAYFIELD PROPERTIES Ltd. and ANOTHER [2000] Q.B. 451 their Lordships stated;

> **"..... a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and <u>any member of the public involved in the case</u>; or if the judge were closely acquainted with <u>any member of the public involved in the case,</u> particularly if the credibility of that individual could be significant in the decision of the case; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective mind ... In most cases, we think, the answer, one way or the other will be obvious."**

[37] This statement by the House of Lords is a direct reference to a member of the public involved in the case. Counsel for HBSL are not members of the public in

this context. As for Mrs. Sarah Lobosky, she is neither a member of the public in this context nor is she involved in the case.

[38] The House of Lords in LOCABAIL (supra) joined forces in certain observations in a case from the Constitutional Court of South Africa, **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA V SOUTH AFRICAN FOOTBALL UNION 1999 (4) S.A. 47 at page 177,** where the South African Constitutional Court said;

> **"It follows from the foregoing that the correct approach to this application for the recusal of members of this court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse**

themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

[39] It is to be restated that on March 6th and 7th, 2013 in Action **IT/NES/1713/12 ALPHEUS McKENZIE V. HARRY B. SANDS, LOBOSKY & COMPANY**, Mrs. Sarah Lobosky gave evidence on behalf of HBSL. In my capacity as Vice President, I ruled against HBSL and awarded the Applicant in that matter $9,750.00 with interest at 10% per centum per annum from the date of judgement until paid in full. That decision was appealed and upheld by the Court of Appeal.

[40] In a somewhat similar case **BAKER V QUANTUM CLOTHING GROUP [2009] EWCA** Civ 566, the recusal application alleged a connection between the judge and the attorneys for one of the parties (as in this case). This application was interpreted as being "a novel type of application in the court's experience." In fact paragraph 16 carried a sub-heading; "**NOVELTY OF THE APPLICATION.**" Here the English Court of Appeal said;

"16 Before considering the substance of the applications in detail, we draw attention to the fact that the complaint here is not that there is a connection between Lord Justice Sedley and Mrs. Baker but an indirect link between the Lord Justice and Mrs. Baker's solicitor. This is a novel type of application in our experience. We do not think that a tenuous connection between a judge and a firm of solicitors in the case could ever be regarded by the well informed observer as a giving rise to a possibility of bias. In *Locabail (UK) Ltd v Bayfield Properties [2000] QB 451, in paragraph 25, the Court of Appeal* sought to give practical guidance about the kind of situations in which the judge ought to or need not recuse himself. One of the factors, which would not normally give rise to the need for recusal was the 'previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him.' We observe that the connection alleged in this application, which relies on an indirect link between Lord Justice Sedley and Wake Smith (via the BTA) is far more tenuous than the link between a judge and a firm of solicitors by whom he has previously been instructed."

[41] It is the opinion of this court that the above statement of the English Court of Appeal is more than directly applicable to the instant case. The relationship as alleged is more than too remote. There has been no personal relationship or professional contact with the Loboskys since September of 1998, some twenty-one (21) years

ago. Additionally, there is no link in any way or fashion whatsoever between counsel for the Plaintiffs and Mr. Justice Thompson.

[42] There was some mention of Mr. Justice Thompson making statements to counsel which were not favourable to the 6th Respondent and that the applicants were judge shopping. Nothing could be further from the truth. The Affidavit filed May 09th speaks to the discretion exercised by myself in an application. The Second, Supplemental Affidavit also contains allegations for which no evidence has been produced and also speaks about the exercise of the judge's discretion.

[43] Therefore, in my judgement, the fair minded, fully informed observer having the relevant facts, 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 this matter with the present parties on the ground that my former relationship with Dr. Lobosky and Mrs. Sarah Lobosky some twenty-one (21) years ago and the lack of evidence to support the allegations would create perceived or apparent bias as against the Sixth Respondent in the instant matter.

[44] In light of the foregoing, and what is presently before me I decline to recuse myself from hearing matters involving the parties hereto on the ground of perceived or apparent bias as alleged by the 6th Respondent.

[45] It is now common knowledge that the 5th and 6th Respondents have made it their practice to seek the recusal of every judge they have appeared before in the Supreme Court. I make this observation due to the fact that not only is it a serious abuse of process but worst yet a clogging of the system when the curtain appears to be closing the last act of the production. This has become a notorious fact for the 5th and 6th Respondents for which judicial notice should be taken.

[46] The judicial notice taken is made pursuant to section 80 of the Evidence Act, Chapter 65 which provides:-

> **"The court shall take judicial notice of the following facts:-**
>
> **(a) .....**
>
> **(b) .....**
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> **(c) .....**
>
> **(d) .....**
>
> **(e) .....**
>
> **(f) .....**
>
> **(g) .....**
>
> **(h) .....**
>
> **(i) .....**
>
> **(j) all notorious facts;**

(k) all other matters which it is directed by any Act to notice."

[47] I close this decision with the quote from the **LOCABAIL** case (supra) where their Lordships found force in the South Africa case **PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA V SOUTH AFRICAN RUGBY FOOTBALL UNION 1999** (supra).

[48] In the LOCABAIL case (supra) at paragraphs 24 and 25 their Lordships said;

> **"24. In the *Clenae* case [1999] V.S.C.A. 35 Callaway J.A. observed, at paragraph 89 (e);**
>
> **"As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application."**
>
> **25. "It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be**

soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same In, circuit, local Law Society or chambers (see *K.F.T.C.I.C. v Icori Estero S.p.A.* (Court of Appeal of Paris, 28 June 1991, International Arbitration Report, vol. 6, 8/91))."

[49] I have stayed the committal proceedings to hear this recusal application of the Sixth Respondent and have concluded that in the circumstances, I decline to recuse myself. Therefore in the circumstances costs for this application are awarded to the Applicants to be taxed if not agreed.

Dated this 17th day of March, A.D., 2021.

Keith H. Thompson
Justice