**[2013] JMCA Civ 15**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 70/2012**

**APPLICATION NO 16/2013**

**BEFORE: THE HON MRS JUSTICE HARRIS JA**
**THE HON MR JUSTICE DUKHARAN JA**
**THE HON MRS JUSTICE LAWRENCE-BESWICK JA (Ag)**

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| **BETWEEN** | **BARTHOLOMEW BROWN** | **1ST APPELLANT** |
| **AND** | **BRIDGETTE BROWN** | **2ND APPELLANT** |
| **AND** | **JAMAICA NATIONAL BUILDING SOCIETY** | **RESPONDENT** |

**Bartholomew Brown represents himself**
**Bridgette Brown in person**

**Mrs Helene Coley-Nicholson instructed by Garth McBean and Co for the respondent**

**9 and 19 April 2013**

**HARRIS JA**

[1] The appellants have placed two matters before this court, namely, an appeal from the judgment of Pusey J delivered on 2 May 2012 and an application for court orders.

**Background**

[2] On 6 June 2007, the appellants instituted proceedings against the respondent claiming damages against it under several heads. A defence was filed out of time by the respondent on 2 April 2008. On 8 May 2008, the Master granted leave to file the defence. An application by the appellants for leave to file an appeal out of time was refused by this court on 24 October 2008 and it was ordered that the matter should proceed to case management conference.

[3] On 24 November 2008, the case management conference was listed before Morrison J who, on an application by the respondent, struck out the appellants' statement of case for the reason that it was statute-barred. He granted summary judgment to the respondent. The appellants thereafter filed an application in the Supreme Court to set aside Morrison J's orders. On 5 February 2009, the application was refused by Anderson J for want of jurisdiction. A renewed application made by the appellants on 26 February 2009 was also refused by Brooks J.

[4] On 9 March 2009, the appellants appealed the orders of Morrison J and Brooks J (as he then was). While the appeal was pending, the appellants filed applications seeking, among other things, orders: to vary the Court of Appeal's order, to revoke the orders made in the Supreme Court; and for an injunction. This court, being of the view that the application for the injunction had been overtaken by the appeal, proceeded with the hearing of the appeal and on 4 March 2010, the appeal against the order of Morrison J was allowed but was dismissed in respect of the order of Brooks J. The

matter was thereafter remitted to the Supreme Court for a case management conference. The case management conference having been conducted, the matter was fixed for trial in June 2011. The trial commenced before Evan Brown J but was aborted.

[5] A new trial has subsequently been fixed for 22 April 2013. In the interim, on 16 February 2012, the appellants filed a notice of motion in the court below seeking constitutional redress. The notice of motion was dismissed by Pusey J on 2 May 2012. That document was not placed before this court. However, the judgment of the learned judge shows that the order which the appellants sought is that:

> "…judges are bias [sic] and were sitting in their own cases; it is impossible for the Claimants to get a fair hearing in this matter…"

[6] The grounds upon which they relied in support of the motion were stated by the learned judge to be as follows:

> "…
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> i) Their [the appellants] matter has been prejudiced by some judges and some court staff of the Supreme Court and the Court of Appeal.
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> ii) They have at no time since the filing of the Claim had an independent and impartial tribunal.
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> iii) That judges had conflicts of interest but still sit [sic] on the case.
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> iv) Judges breached the rules of natural justice and that some named judges were biased and prejudicial.
>
> v) Applications filed by the Claimants have not been heard."

[7] The appellants filed 20 prolix and improperly framed grounds of appeal, the majority of which are inapplicable to the appeal. However, there are some from which the following may be gleaned:

1. The learned judge erred as he ruled that the matter should proceed to trial although liability has been established by the judgment of the Court of Appeal, delivered on 4 March 2010.

2. The learned judge was biased in that he found that the appellants failed to show that the judges of the Court of Appeal had prejudged the issues in making the decisions of 24 October 2008 and 4 March 2010.

3. The learned judge's decision of 2 May 2012 shows that he was sitting as a judge in his own cause.

4. The learned judge was wrong in finding that there was no evidence that the judges of the Court of Appeal and the Supreme Court, who had at various stages made rulings in all the appellants' applications, were biased.

5. The learned judge erred in failing to acknowledge that the judges of the Court of Appeal and the Supreme Court were biased and it would have been impossible for the appellants to receive a fair hearing.

6. The learned judge failed to acknowledge that the judges who heard the applications had financial and other interests in the outcome of the case and were sitting in their own cause.

7. The learned judge affirmed bias on his part as well as all the other judges who heard the appeal and the applications in contravention of the appellants' constitutional rights.

[8] The appeal against the order of Pusey J will first be considered. At paragraphs 8 to 10 of his judgment the learned judge said:

> "8. I am of the view that the proper way for the Browns to make this application was by virtue of Fixed Date Claim Form. When an applicant seeks constitutional relief he needs to set out in a clear and comprehensible way the remedy he seeks. Constitutional relief's [sic] granted in cases where other means of relief are not readily available. However, despite the procedural deficit of the application in the circumstances of these cases I think it prudent to consider that [sic] whether the relief sought should be granted.
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> 9. In my view, the relief sought should not be granted for two main reasons.
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> 10. Firstly, the Applicants have failed to show that the judges mentioned had some financial or other interest in the matter before the court or have pre-judged the matter in some way due to bias. The Browns have complained about demeanour of the judges who have ruled against them, and that some of these judgments are wrong in law. However, those complaints are not an indication of bias."

[9] The learned judge also stated that the appellants were highly critical of judges by stating that their decisions were wrong in law. This he regarded as mere innuendoes and suspicion which do not give rise to bias.

[10] He went on to state at paragraphs 11 to 14:

> "11. For a court to consider whether bias exists there must be an evidential basis. In this case, there is no evidential basis. The test of bias as set out in Porter v Magill (2002) 1 ALL ER 465 is:
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> > '…whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the tribunal was biased.'
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> 12. Secondly, the Applicants have indicated that there are some judges that have dealt with them fairly. That means that it is possible to have a fair trial in this matter. In their affidavits, the Browns have commended Cooke JA (now retired) Sykes J and Sinclair-Haynes J among those who gave the matter a fair hearing.
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> 13. In fact, they mention that Sykes J indicated a real concern of an appearance of bias disclosing his mortgage holder and also that he knew the Managing Director of the Respondent's Company.
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> 14. In conclusion it is clear that the issue that the Browns complained of are really in relation to the judges [sic] view of the law and not in relation to actual incidences of bias.
>
> Therefore the application fails."

[11] Oral submissions were made by Mr Brown, most of which were unrelated to the appeal against the judgment of Pusey J. The appellants have put before this court extensive written submissions, the majority of which have no relevance to the appeal. However, the following complaints against the judgment of the learned judge can be extracted from these submissions:

1. The learned judge erred in his interpretation of part 56 of the Civil Procedure Rules, and sections 20(2), 25(2), 25(3) of the Constitution. The appellants were wrong to file an application by

way of motion. The learned judge stated that the appellants should abandon their claim and begin anew. If they had done so, it would mean that they would be regarded as vexatious litigants when in fact it cannot be said that they could be classified as such.

2. The appellants are entitled to judgment against the respondent by virtue of the judgment of the Court of Appeal delivered on 4 March 2010 and this the learned judge failed to recognize.

3. The learned judge and all the other judges who heard the various applications in the Court of Appeal and in the Supreme Court were judges in their own cause and this, the learned judge failed to acknowledge. The learned judge knew he was sitting in his own cause due to statements he made in court. It has been established that all the judges had financial interests and other interests in the outcome of the case but this, the learned judge ignored.

4. A decision of the Court of Appeal made on 24 October 2008 and the judgment delivered on 4 March 2010 show that the judges had pre-judged the matter before the court. This also applies to all the judges who made orders on the various applications which came on for hearing before them.

5. The learned judge misapplied the law and the fundamental facts in holding that there is no evidential basis of bias although the appellants had clearly established that judges are biased, and that their constitutional rights had been breached. The decisions of the judges were prejudicial to the appellants and as a consequence they did not receive a fair hearing.

[12] Mrs Helen Coley Nicholson, in written submissions made reference to rules 56.1(1)(b), 56.1(2), and 56.9(1) (b) of the Civil Procedure Rules (2002) (CPR), and submitted that the appellants, in claiming constitutional relief, must do so by way of a fixed date claim form and not by a notice of motion as the words "must be" in rule 56.9 (1)(b) mean that a fixed date claim form must be used.

[13] It was also submitted that spurious and unsubstantiated allegations of bias on the part of several judges were made by the appellants but no evidence to satisfy the test of bias exists. She cited the cases of ***R v Gough*** [1993] AC 646, ***R v Bow Street***, ***Metropolitan Stipendiary Magistrate ex parte Pinochet (No 2)*** [1999] 1 All ER 577, ***Porter v Magill*** [2002] 2AC 357 and ***Helow v Secretary of State for the Home Department*** [2008] 1 WLR 2416, in support of her submission.

[14] Rule 56.1(1)(b) of the CPR provides for an application for relief under the Constitution. It states:

> "This Part deals with applications-
>
> (a) …
> (b) by way of originating motion or otherwise for relief under the Constitution.
> …"

Rule 56.1(2) states that generally such applications are referred to as "application for an administrative order".

[15] Rule 56.9(1) provides for the making of an application for an administrative order by way of a fixed date claim form. It states:

> "An application for an administrative order must be made by a fixed date claim in form 2 identifying whether the application is for-
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> (a) judicial review;
> (b) relief under the Constitution;
> (c) a declaration; or
> (d) some other administrative order (naming it),
> and must identify the nature of any relief sought."

[16] The learned judge stated that the appellants' application ought properly to have commenced by fixed date claim form. The appellants' complaint is that their constitutional rights have been breached and they are entitled to proceed by way of notice of motion. Could they have begun their application by this procedure? In answering this question, one must look at the relevant rules. Rule 56.9(1) (b) specifies that an application for constitutional relief must be by fixed date claim form. However rule 56.1(1) (b) expressly speaks to applications for relief under the Constitution "by way of originating motion or otherwise". It is clear from rule 56.1 (1) (b) that the use of the words "or otherwise" must be construed to mean that in addition to the commencement of proceedings for constitutional redress by a notice of motion, an application may be made by another process. Such other process would include an application proceeding by way of fixed date claim form as rule 56.9(1) (b) so permits. Accordingly, an applicant would not be precluded from commencing an application for constitutional relief by a notice of motion or by the alternative procedure stipulated by rule 56.9(1) (b), namely, by fixed date claim form. In seeking constitutional relief, proceeding by fixed date claim form is not a mandatory requirement, as submitted by

the respondent. Therefore, the appellants would have had the option of commencing their proceedings either by a notice of motion or by fixed date claim form.

[17] Although the learned judge had made the finding that the matter ought to have proceeded by fixed date claim form, he rightly went on to give consideration to the appellants' application. The gravamen of their complaint is that they are entitled to a judgment in light of the ruling of this court on 4 March 2010 and that all the judges who dealt with the interlocutory applications filed by them in this court and the court below were biased.

[18] The law of bias is well settled. There are a number of cases which speak to the fundamental principle that a man cannot be a judge in his own cause, see ***R v Gough***, ***R v Bow Street Metropolitan Stipendiary Magistrate (No 2)***, ***Porter v Magill and Medicaments and Related Classes of Goods (No 2)*** [2001] 1 WLR 700. For years a variety of tests have been enunciated in the law of bias. Over the years, as the law developed, the test has continually been redefined. In ***R v Gough*** the "real danger" test that a decision maker is biased in the conduct of proceedings before him had been accepted as the true test. This test, however, has been modified to be one, in which, a fair minded, impartial observer, who is cognizant of all the facts of the case, would find that a decision maker is biased: see ***Porter v Magill***.

[19] There must be evidence of real bias. Therefore, a party who alleges bias must adduce evidence in proof of such allegation. Mere suspicion on the part of an impulsive or irrational person does not amount to bias see: ***Locabail (UK) Ltd v Bayfield***

***Properties Ltd*** [2000] QB 451. The existence of bias must be obvious to a reasonable man, that is, one who has been classified as a fair minded observer. "The characteristics of the fair minded informed observer are now well understood:- he must adopt a balanced approach and will be taken to be a reasonable member of the public neither unduly complacent nor naïve nor unduly cynical or suspicious," per Lord Bingham in ***R v Abdroikov*** [2007] 1 WLR 2679.

[20] An examination of the interlocutory proceedings in which the appellants and the respondent were involved, in this court and in the court below, discloses that there is no evidence to show: that Pusey J or any of the judges had an interest in the cause between the appellants and the respondents; or that they had any financial or proprietary interest in the outcome of the case; or that they had in any way obtained a benefit from the decision in the case; or that they had pre-determined the issues before them. There is no evidence adduced by the appellants to show that, in the applications which came before the learned judge or any of the other judges, they had not made decisions in keeping with the relevant law and the facts before them. The appellants had chosen to embark on a speculative and contumacious exercise to support their baseless allegations against the judges. In all the circumstances, an objective observer, being fully aware of all the facts would not form any reasonable apprehension of bias on the part of the judges. The learned judge rightly found that the appellants' complaints did not reveal any evidence of bias.

[21] The appellants contended that they were not afforded a fair hearing and this was due to bias on the part of the learned judge and his failure to find that the judges who heard their appeals or applications were also biased. Could it be said that they did not receive a fair hearing and consequentially, their constitutional rights were infringed? The answer to this question admits of and demands a simple answer. There is no evidence to show that all the appeals or applications made by the appellants were not properly considered in accordance with the law governing each appeal or application. Nor is there any evidence that the judges who adjudicated on the matters had done otherwise. There is nothing to show that there had been any infringement of the appellants' constitutional rights. Clearly, no breach of such rights has been established. The appellants' complaint of bias dispossessing them of a fair hearing is baseless, misconceived and clearly without merit.

[22] It is obvious that, the Court of Appeal having set aside the order of Morrison J, the appellants have been labouring under a mistaken belief that they are entitled to a judgment which ascribes liability to the respondent. This has led them to burden the courts with unnecessary and unfounded applications. They, having not obtained the orders which they incorrectly seek, have unjustifiably attacked the integrity of the judges. They would be well advised to desist from making frivolous and vexatious applications and permit the trial to proceed in the forum in which it has been listed.

[23] I now turn to the appellants' application for court orders. In this application they seek an order for an interim payment of $10,000,000.00, alternatively, an order that the "Pleading and Particulars of Claim in Claim No 02360/2007 for fraudulent

misrepresentations, fraud and non disclosure of Audit Report affirmed these facts". They also seek an order to strike out the defence and for the restitution by the respondent of a sum of $600,000.00 with interest.

[24] This application is not an interlocutory application incidental to the appeal, nor does it emanate from a decision of a judge of the court below from which an appeal has been lodged. As a consequence, this court has no jurisdiction to entertain the application.

[25] The appeal is dismissed. The application for court orders is refused. Costs are awarded to the respondent, to be taxed if not agreed.

**DUKHARAN JA**

[26] I have read in draft the judgment of my sister Harris JA. I agree with her reasoning and conclusion and have nothing to add.

**LAWRENCE-BESWICK JA (Ag)**

[27] I too have read the draft judgment of Harris JA and agree with her reasoning and conclusion.

**HARRIS JA**

**ORDER**

The appeal is dismissed. The application for court orders is refused. Costs are awarded to the respondent, to be taxed if not agreed.