[2023] JMCA App 24

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA

APPLICATION NO COA2022APP00283

BETWEEN	**ANDREW HAMILTON**	**1ST APPLICANT**
AND	**SAMAR DAVIS**	**2ND APPLICANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

AND

APPLICATION NO COA2023APP00028

BETWEEN	**ANDREW HAMILTON**	**1ST APPLICANT**
AND	**SAMAR DAVIS**	**2ND APPLICANT**
AND	**WEBSTER CAMPBELL**	**3RD APPLICANT**
AND	**THE ASSETS RECOVERY AGENCY**	**RESPONDENT**

Lenroy Stewart and Daniel Beckford instructed by Wilkinson Law for the applicants

Mrs Caroline Hay, KC and Zurie Johnson instructed by Caroline P Hay Attorneys-at-Law for the respondent

22, 25 May and 29 September 2023

Civil practice and procedure - application for extension of time to seek leave to appeal – delay of five months in making of the application – whether there is a real prospect of success on appeal

Civil practice and procedure – bias – apparent bias – pre-judgment – whether a series of adverse rulings sufficient to demonstrate bias – basis on which judge should accede to a request for recusal – whether learned judge should have allowed the applicant to make a second application for recusal

Appeal – bases for granting leave to appeal – Court of Appeal Rules, rule 1.8(7)

STRAW JA

[1] On 30 December 2022 the applicants, Andrew Hamilton and Samar Davis, in application no COA2022APP000283 ('the first application'), sought from this court, among other orders, an extension of time within which to apply for leave to appeal against the decision of Jackson-Haisley J ('the learned judge') made on 28 July 2022, refusing to recuse herself from the hearing of claim no. SU2019CV04077 The Assets Recovery Agency v Andrew Hamilton and others ('the 2019 claim'). Subsequently, on 30 January 2023, the aforementioned applicants, along with a third applicant, Webster Campbell, in application no COA2023APP00028 ('the second application') sought leave to appeal from this court in respect of orders made on 13 January 2023. Jackson-Haisley J also made these orders, which were related to a renewed application for the learned judge to recuse herself from the hearing of the 2019 claim.

[2] After receiving both written and oral submissions from the parties, this court, on 25 May 2023, made the following orders:

> "1. In the matter of application COA2022APP000283, the extension of time to apply for leave to appeal against interlocutory orders, is refused.
>
> 2. The notice of application for leave to appeal against interlocutory orders COA2023APP00028, is refused.
>
> 3. In relation to application COA2022APP000283, costs to the respondent, to be agreed or taxed. In relation to application COA2023APP00028, costs to the respondent to be agreed or taxed."

[3] We promised to provide the reasons for our decision in writing and this is a fulfilment of that promise.

Background

[4] Both claim no 2013HCV03440 Assets Recovery Agency v Andrew Hamilton and others ('the 2013 claim') and the 2019 claim are relevant to civil recovery orders against the applicants in respect of their real and personal assets, pursuant to section 57 of the Proceeds of Crime Act ('POCA'). The claims are predicated on allegations that certain properties are recoverable properties under the POCA, as they were obtained through the unlawful conduct of the 1st applicant, Mr Hamilton. He is the 1st respondent in each claim and the only common respondent in both claims.

The first application - Permission for extension of time to apply for leave to appeal against interlocutory order

Affidavits in respect of the first application

[5] The first application was supported by two affidavits of Andrew Hamilton filed 30 December 2022 and 10 May 2023, respectively. By these affidavits, Mr Hamilton detailed some of the history of the matter and the circumstances leading up to the application for the learned judge to recuse herself.

[6] He deposed that in 2013, after the commencement of the 2013 claim, a preliminary point was taken on behalf of the applicants challenging the legal status of the Assets Recovery Agency ('the ARA'), the respondent herein. The point having been dismissed by Sykes J (as he then was), the decision was appealed. The appeal was dismissed by this court in December 2017 and, consequently, an application for leave to appeal to the Judicial Committee of the Privy Council ('the Privy Council') was made. Whilst the latter application was pending, it was learnt that Dukharan JA, a member of the panel that gave the decision of this court, had retired, prior to delivery of the judgment and had not received the requisite permission from the Governor-General to continue as a Judge of Appeal, in order to facilitate delivery of the judgment. In the circumstances, in 2019, an application was made to set aside the judgment of this court along with a request for the re-hearing of the appeal. Although not indicated in his first affidavit (which pre-dated the hearing of the application for a re-hearing), the evidence subsequently provided to this

court is that the application for re-hearing was ultimately granted on 27 February 2023 and the judgment of this court was declared a nullity. It was ordered that a new date should be set for the re-hearing of that appeal.

[7] Mr Hamilton further explained (in his first affidavit) that, on 23 November 2020, the respondent made an application for default judgment in the 2013 claim, as the applicants had failed to file a defence in the matter. Thereafter, in March 2021, the applicants sought a stay of those proceedings and then in November 2021 made an application for the provision of legal fees. The stay of proceedings was sought in light of the then pending application before this court for a re-hearing of the appeal and in light of the possibility that on a re-hearing, the applicants may be successful.

[8] Mr Hamilton indicated that all these issues were placed before the learned judge and, notwithstanding that, she refused to grant a stay of proceedings and entered judgment in favour of the respondent, granting civil recovery orders, on 8 July 2022. It was arising from these circumstances that on 8 July 2022, the application was made for the learned judge to recuse herself in respect of the related claim, being the 2019 claim.

[9] Mr Hamilton explained that the delay in seeking leave to appeal was as a result of his inability to settle his legal fees in light of the restraint order in place since 2013, and the fact that the respondent did not grant further consent for the payment of his legal fees. He stated that although he is unable to pay his legal fees, his attorneys have agreed to continue representing him. Mr Hamilton also blamed the delay on the absence of lead counsel, Mr Ian Wilkinson KC, from the jurisdiction.

[10] Courtney Smith, as Director of Legal Services of the Financial Investigations Division ('FID'), which organization is statutorily designated as the ARA, gave a response to Mr Hamilton's first affidavit. He stated that the applicants had sought leave to appeal from this court, in respect of the learned judge's decision granting default judgment in the 2013 claim and that leave was denied on 11 November 2022. Further, that without

objection from the applicants' attorneys, it had been ordered in November 2021 by Bertram-Linton J, that both the 2013 and 2019 claims were to be heard together.

[11] Additionally, at the commencement of the application to enter judgment in respect of the 2013 claim, the learned judge enquired of the parties whether they had any objection to her presiding over the matters since she was the assigned case management judge. Both sides indicated that there was no objection.

[12] Mr Smith also sought to challenge the reasons proffered by the applicants for their delay in making the application. He underscored that the applicants' attorneys-at-law have consistently appeared in the matter and all related matters, at all court levels to include the Privy Council. Further that the parties were in discussions in relation to a consent order for the provision of legal fees and that it was the applicants' attorneys who indicated an inability to proceed with the order as framed. They subsequently travelled to the Privy Council with three attorneys and represented the applicants in those proceedings.

[13] In his affidavit in response to Mr Smith's affidavit, Mr Hamilton sought to reiterate that there was apparent bias. He pointed to eight applications relevant to both claims that were heard by the learned judge and stated that all eight were determined in favour of the respondent, without due consideration being given by the learned judge.

[14] In explaining the withdrawal of consent to the agreement for legal fees, Mr Hamilton stated that the sums in the agreement amounted to less than 20% of what his attorneys had sought for legal fees and only dealt with the appearance in the Privy Council. Also, the agreement would have been prejudicial to other parties in the case in respect of whom no agreement had been reached regarding the provision of legal fees. He stated that his attorneys advised that their continued representation, despite not receiving legal fees, was only to ensure that justice is done and in keeping with their duty as officers of the court.

[15] Affidavit evidence was also put forward on behalf of the respondent by Ms Pretania Edwards, a legal officer of the FID. Although this affidavit was filed in the second application (COA2023APP00028), it was done in response to all affidavits filed by Mr Hamilton in both applications and addressed issues raised by Mr Hamilton in the first application. With specific reference to the application for legal fees, Ms Edwards indicated that none of the applicants in this matter were applicants in the application for legal fees.

[16] Further, she recounted that the parties initially intended to enter a consent order and that it was agreed to attend before the learned judge on 4 May 2022, in order to facilitate this. Therefore, no specific date had been set for the hearing of that application. On 4 May 2022, the applicants' attorneys represented an inability to proceed with the consent order and so indicated to the learned judge. Based on the indication of the applicants' attorneys, the application for legal fees was set to be heard on 8 July 2022, which date had previously been set for delivery of judgment in the 2013 claim. On that date, the learned judge proceeded to deliver her judgment on the 2013 claim, after which the applicants' attorneys sought to vary the restraint order for the release of fees. The learned judge handed down her decision on the application for legal fees on that date and provided reasons.

Submissions in support of the first application

Submissions on behalf of the applicants

[17] It was submitted on behalf of the applicants that there was a real prospect of success on appeal, as there was apparent bias in the manner in which the learned judge dealt with the various applications that came before her.

[18] In particular, bias was demonstrated in the learned judge's failure to recognize that the balance weighed in favour of the grant of a stay of proceedings, pending the outcome of the application for a re-hearing of the appeal on the legal standing of the ARA. Mr Stewart submitted that the approach of the learned judge demonstrated that she virtually ignored the practical effect of the prejudice that the applicants faced, in the

event that no stay of proceedings was granted and that the learned judge failed to take account of relevant factors. Mr Stewart also contended that the learned judge showed sympathy for the respondent, whereas she sought to penalize the applicants for the delay in the matter, much of which was institutional delay.

[19] Likewise, in the decision of the learned judge to grant civil recovery orders (in the 2013 claim where there was an application for default judgment) and the failure of the learned judge to hear and determine the application for legal fees, prior to considering the application for default judgment, there was an appearance of serious bias. Reliance was placed on the cases of **Lawrence-Austin v The Director of Public Prosecutions** [2020] JMCA Civ 47 and **Porter v Magill** [2001] UKHL 67. In respect of the application for the default judgment itself, counsel argued that there were various lacunae in the evidence and that the learned judge took account of affidavit evidence which ought not to have been considered. Reliance was placed on the case of **Glen Cobourne v Marlene Cobourne** [2021] JMCA Civ 24.

[20] A further limb on which Mr Stewart sought to satisfy this court that there was a real prospect of success on appeal, was the fact that the learned judge made findings in the 2013 claim that Mr Hamilton had engaged in conduct that generated criminal property. On this basis, therefore, he submitted that a fair-minded and informed observer would conclude that the learned judge's mind was closed in respect of certain aspects of the 2019 claim, given the similarities between the matters.

[21] He said the learned judge acted in haste to proceed with the matter and to rule against the applicants. He also stated that the learned judge showed general disregard for the fact that there were outstanding matters in superior courts, the outcome of which could have affected her decision.

[22] In relation to the application for an extension of time, Mr Stewart cited the case of **Leymon Strachan v The Gleaner Co Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 ('**Leymon**

Strachan') and submitted that in addition to having shown an arguable appeal with a real prospect of success, the applicants had provided an adequate and justifiable explanation for the delay and there was no undue prejudice to the respondent.

Submissions on behalf of the respondent

[23] Mrs Hay KC, on behalf of the respondent, noted that this application was made some five months after judgment was given in the 2013 claim. Learned King's Counsel acknowledged the seminal principle in determining these cases to ensure that justice is done. She cited the cases of **Garbage Disposal & Sanitations Systems Limited v Green and Others** [2017] JMCA App 2 ('**Garbage Disposal**') and **Silvera Adjudah v The Attorney General of Jamaica** [2021] JMSC Civ 64.

[24] In addressing the reasons for the delay, learned King's Counsel referenced the affidavit of Mr Smith as it related to his evidence surrounding the consent order for legal fees and the fact that counsel has consistently appeared in the matters. She also indicated her inability to accept the explanation regarding Mr Wilkinson's absence from the jurisdiction, in light of the fact that most court hearings are held virtually.

[25] Regarding the allegation by Mr Hamilton that the learned judge declined to grant an application for legal fees, learned King's Counsel was at pains to point out that there was no application by Mr Hamilton for the provision of legal fees. There could therefore not have been any bias against Mr Hamilton with respect to the learned judge on this point.

[26] In submitting that the applicants have failed to demonstrate an appeal with a real prospect of success, reliance was placed on the cases of **Moo Young v Dewar and Others** [2017] JMCC Comm 12, **Otkritie International Investment Management Ltd and others v George Urumov** [2014] EWCA Civ 1315 ('**Otkritie International**') and **JSC BTA Bank v Ablyazov and Others** [2013] 1 WLR 1845 ('**JSC BTA Bank**'). Using these cases, learned King's Counsel submitted that the applicants have failed to

demonstrate that the fair-minded and informed observer would conclude that there was an appearance of bias.

Analysis and determination of the first application

[27] The principles concerning an application for extension of time within which to seek permission to appeal, are set out in the **Leymon Strachan** and **Garbage Disposal** authorities cited on behalf of the applicants and respondent, respectively. In **Leymon Strachan**, Panton JA (as he then was), at page 20, articulated the approach to be taken by the court in considering such applications. He enunciated as follows:

> "(1) Rules of court providing a time-table for the conduct of litigation must, *prima facie*, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable the Court has a discretion to extend time.
>
> (3) In exercising its discretion the court will consider -
>
> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) whether there is an arguable case for an appeal and;
>
> (iv) the degree of prejudice to the other parties if time is extended.
>
> (4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for extension of time, as the overriding principle is that justice has to be done."

Each of these principles will be considered, as appropriate.

The length of the delay and the reasons for delay

[28] The delay of five months, in light of the circumstances, is significant. There should have been a sense of urgency compelling the application before this court after the learned judge refused the initial request for recusal. The application ought to have been

made within 14 days of that refusal. The reason for the delay, in conjunction with the length of the delay, lacks cogency and cannot be described as adequate and justifiable considering the history of the proceedings, both in this court and the court below. However, the major issue is whether this court is of the view that the applicants have a real prospect of success in the appeal, as defined in **Swain v Hillman** [1999] EWCA Civ 3053, that is, a realistic as opposed to a fanciful prospect of success.

Prospects of success

[29] Mr Hamilton exhibited the applicants' draft notice of appeal, which draft notice put forward the following proposed grounds of appeal:

> "(a) The learned Judge expressed views that may reasonably be perceived as demonstrating an appearance of bias and or/prejudging the Appellant's position in the proceedings; and
>
> (b) The learned Judge erred in concluding that the Appellants had not demonstrated an appearance of bias on her part; and
>
> (c) In all the circumstances the learned Judge erred in failing to recuse herself from CLAIM NO. SU 2019 CV 04077."

[30] The complaints raised by Mr Stewart are coloured by the determination of the learned judge in eight decisions handed down by her in favour of the respondent. These, according to Mr Hamilton's affidavit filed 10 May 2023, were:

1. The application for a stay of proceedings;

2. The oral application for leave to appeal the refusal of the application for a stay of proceedings and an oral application for a stay of execution (the refusal of the application for stay of proceedings was ultimately not challenged on appeal);

3. The respondent's application to enter judgment, in relation to which the learned judge granted civil recovery orders;

4. The application for leave to appeal the above mentioned decision and for a stay of execution of the orders (the subsequent application for leave to appeal to this court was refused);

5. The application for legal fees;

6. The application for leave to appeal the learned judge's decision refusing the application for legal fees;

7. The application for recusal; and

8. The application for leave to appeal the learned judge's decision to not recuse herself.

The first six applications are relevant to the 2013 claim. The applications listed at numbers seven and eight are relevant only to the 2019 claim.

[31] Counsel Mr Stewart was adamant that he was not contending that there were errors by the learned judge in relation to her determination of the factual and legal issues in the judgments handed down. But, her decisions in favour of the respondent and, in particular, her assessment of the issues of prejudice and delay, in her consideration of the request for stay of proceedings (this, in light of a pending court of appeal determination on the re-hearing of the appeal), was indicative of the appearance of bias. Further, that the real danger is that the learned judge, having just concluded the 2013 claim, in which she decided that there was unlawful conduct, might or will pre-determine and conclude that the properties in the 2019 claim were also derived from unlawful conduct.

[32] The test for apparent bias 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" (**Porter v Magill**). This court is well aware that the opinion of the

learned judge as to whether she could be impartial is not conclusive on the matter (see **Lawrence-Austin v The Director of Public Prosecutions** at para. [39]).

[33] In **Lawrence-Austin v The Director of Public Prosecutions**, Phillips JA, at para. [37], quoted paras. 1 – 3 of the judgment of Lord Hope of Craighead in **Helow v Secretary of State for the Home Department and another** [2008] 1 WLR 2416 ('**Helow**'), which, she opined gave clarity to the concept of the fair-minded and informed observer. Paras. 2 and 3 of that quotation are as follows:

> "2 The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious…, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.
>
> 3 Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

[34] In examining the complaint of the applicants, consideration will be given to the description of the fair-minded and informed observer expressed above. In **Stubbs, Davis**

and Evans v R [2018] UKPC 30 from the Commonwealth of the Bahamas, a decision of the Privy Council, Lord Lloyd-Jones expressed the following overarching principles in relation to the issue of bias, at paras. 15, 16 and 17:

> "15 … The appearance of bias includes a clear indication of a prematurely closed mind (*Amjad v Steadman-Byrne* [2007] EWCA Civ 625; [2007] 1 WLR 2484 per Sedley LJ at para 16). The matter was expressed by Longmore LJ in *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315 (at para 1) in the following terms:
>
> > 'The concept of bias … extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have 'pre-judged' the case.'
>
> 16 A judicial ruling necessarily involves preferring the submissions of one party over another**. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute**. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances **where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made.** It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case. (See generally, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 per Lord Bingham of Cornhill CJ at para 25; *Livesey v The New South Wales Bar Association* [1983] 151 CLR 288 at p 299.) **However, relevant factors are likely to include the nature of the previous and current**

issues, their proximity to each other and the terms in which the previous determinations were pronounced.

17 It is not acceptable for a judge to form, or to give the impression of having formed, a concluded view on an issue prior to hearing full argument by all parties on the point. *In re Q (Children)* [2014] EWCA Civ 918 provides a strong example. In care proceedings the judge expressed himself at a case management hearing in terms which made clear that he accepted the account given by the father and rejected the allegations made by the mother, in circumstances where the mother had not yet given evidence. The Court of Appeal allowed an appeal against an order made by the judge in a subsequent fact-finding evaluation. McFarlane LJ observed (at paras 53, 54 and 57) that there is a thin line between case management and premature adjudication. Here however, the judge had strayed beyond the case management role by engaging in an analysis, which, by definition, could only have been one-sided, of the veracity of the evidence and the mother's general credibility. The situation was compounded by the judge giving voice to the result of his analysis in unambiguous and conclusive terms in a manner that can only have established in the mind of a fair-minded and informed observer that there was a real possibility that the judge had formed a concluded and adverse view of the mother and her allegations at a preliminary stage in the trial process. Further examples are provided by *Amjad v Steadman-Byrne (Practice Note)* [2007] EWCA Civ 625; [2007] 1 WLR 2484 and *In re K (a child)* [2014] EWCA Civ 905; [2015] 1 FLR 927." (Emphasis supplied)

[35] The authorities also indicate that a series of negative decisions against a party is not sufficient to demonstrate bias (see **Otkritie International** at para. 16, and **Stubbs, Davis and Evans v R** at para. 23). In **Otkritie International**, the judge had recused himself. This was reversed on appeal with the direction that the judge should proceed with the trial. The judge had handed down a judgment relevant to committal proceedings of the respondent, prior to the recusal application. During those proceedings, he had made damaging findings about the respondent's fraudulent deception. Longmore LJ, who delivered the judgment of the court, stated at para. 13:

> "There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the applicant**; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome."**(emphasis supplied)

[36] Bias is not to be imputed by reason of a judge's previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown that the judge is likely to reach a decision "by reference to extraneous matters or predilections or preferences" (see para. 22 of **Otkritie International**). Judges should not be quick to give into a request for recusal (see paras. 13 and 32 of **Otkritie International**).

[37] There being no comprehensive list of factors that may be relevant to the issue of pre-judgment, the application of the principles is fact-sensitive (see para. 13 of **Otkritie International**) and the finding of pre-judgment is rare (see para. 65 of **JSC BTA Bank**). The authorities referred to above, set out further guidance relevant to the discussion on pre-judgment, as follows:

i. Where a judge, who prior to trial, had formed and expressed a view as to the credibility of a party or witness as a result of cross-examination, came to bear in mind his earlier findings and observations at the later trial, he would not be pre-judging by reference to extraneous matters, but would be carrying out his judicial assessment of the litigation before him; that unless the judge had committed some judicial error, such as the use of intemperate

language or some misjudgment (which might set up a complaint of the appearance of bias) the fair-minded and informed observer would be unlikely to conclude that there was a possibility of bias (see **JSC BTA Bank** at paras. 69 and 70);

ii. If the learned judge is judging the matter fairly and judicially, as he is required by his office to do, there should be no danger that the fair-minded and informed observer would consider there was any possibility of bias in the particular circumstances, unless there is evidence of him being "influenced for or against one or other party for reasons extraneous to the legal or factual merits" (see para. 70 of **JSC BTA Bank**); the "concepts of analogy or overlap are too general and amorphous to give definitive shape to the doctrine of pre-judgment in what must always be a fact-sensitive enquiry" (see para. 71 of **JSC BTA Bank**). At para. 46 of **JSC BTA Bank,** Rix LJ, in assessing the issue of disqualification of judges on the ground of bias set out as follows:

> "46 Thus the observations of foreign courts which this court in *Locabail* found particularly apposite and which are relevant to the current problem before us include the following:
>
> > '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 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' (*President of the Republic of South Africa v. South African Rugby Football Union* (1999) 4 SA 147 at 177, cited at para 21).
>
> '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' (*per* Mason J, *In re J.R.L.*, *Ex parte C.J.L.* (1986) 161 CLR 342 at 352 (HCA, cited at para 22)."

How the learned judge assessed the application for recusal and her reasons for not recusing herself

[38] There was no official document with the reasons for the decision of the learned judge relevant to the application. However, Mr Hamilton exhibited to his affidavit filed 10 May 2023, as "AH-10", a document entitled, "Counsel's notes of the decision of the Honourable Mrs. Justice Stephane Jackson Haisley on the application for recusal". It has not been disputed by the respondent, so it was examined in order to understand the rationale of the learned judge.

[39] The learned judge referred to the authorities of **Moo Young v Dewar & Others**, **Otkritie International**, as well as other authorities. She considered the test for bias on the footing of the fair-minded and impartial observer and highlighted the principle that the court is only to recuse itself if there is some actual bias or apparent bias. She determined that it is not enough that there is a series of adverse rulings. She did not accept that there had been any express waiver on the part of the applicants, to her hearing both matters, just because, at an earlier time, Mr Hamilton had indicated that

there was no objection to her hearing both claims. She considered as the fundamental starting point, the right to a fair trial by an independent and impartial tribunal by virtue of section 16(2) of the Charter of Fundamental Rights and Freedoms. The learned judge considered the factual circumstances in **Otkritie International** (as set out at para. [35] above) and concluded there was a need to be careful before acceding to a request for recusal. She noted that what had to be considered was whether the court could or could not give "genuinely a fair hearing" or whether the test of the fair-minded and informed observer was met. She also stated that it was always her custom to express herself in moderate and restrained terms and that no evidence had been put forward of any apparent bias. The learned judge therefore refused the application for recusal.

Assessment of the applicants' prospects of success on appeal

[40] Because of previous judgments or decisions, interlocutory or otherwise made in relation to the 2013 claim, this court is to consider whether it could be said that there was a real possibility that the learned judge would have had her mind closed or pre-judged her determination, in some respect, relevant to the decision which must now be made in the 2019 claim. I have found no indication to suggest such a state of affairs. In the case at bar, in particular, in relation to the application to enter judgment, there was no assessment in regard to credibility, as in the committal proceedings in **Otkritie International**. No defence or affidavits had been filed by Mr Hamilton or any of the other applicants in the 2013 claim. The basis of the evidence before the learned judge to determine if there was any unlawful conduct on the part of Mr Hamilton was his guilty plea in the United States courts in relation to drug trafficking and money laundering offences. This had been set out in the affidavit of one Ronald Rose filed on behalf of the respondent and was not contested. The learned judge had to assess, on a balance of probabilities, whether there was evidence that supported the respondent's case, that the real and personal properties listed in the claim could be said to have been generated from any unlawful conduct of Mr Hamilton. This is a similar determination that must be made in the 2019 claim.

[41] There is no evidence to suggest that the learned judge would be "influenced for or against one or other party for reasons extraneous to the legal or factual merits" instead of carrying out her "judicial assessment of the litigation" (see para. 70 of **JSC BTA Bank**).

[42] The parties in both claims include Mr Hamilton and the respondent. In the circumstances, it could be said that there would be great advantage to the parties and the administration of justice in securing judicial continuity.

[43] No complaint was made in relation to the issue of intemperate language by the learned judge in any of the matters brought before her for determination, in particular, as it related to the stay of proceedings and the application to enter judgment. I have read both judgments. The learned judge painstakingly examined the law and evidence before her, in arriving at her conclusions.

[44] Therefore, it was my determination that the learned judge did not err in refusing the application for recusal. In essence, the applicants are, at this stage, criticizing the outcome of the judgments and applications outside of the means provided to challenge these decisions that they believe to be wrong in law (the appellate process). Further, although the applicants have spoken of apparent bias, there has been no suggestion of unfairness by the learned judge beyond that she made adverse rulings against them in matters relevant to the 2013 claim.

[45] It was for these reasons that the application for an extension of time was refused, as, not only was the delay in making the application lengthy, without good reason being shown, but there was also no real prospect of mounting a successful appeal. It was therefore, not necessary, to determine the issue of prejudice, as it would clearly not be in the interests of justice for the respondents to defend an unmeritorious appeal.

The second application – Application for leave to appeal interim orders

Affidavits in support of the second application

[46] The second application was largely supported by both affidavits filed by Mr Hamilton in support of the first application, together with an additional affidavit that was also filed on 10 May 2023. By this latter affidavit, Mr Hamilton gave evidence that, on 13 January 2023, his attorneys indicated to the learned judge that they wished to make a second application requesting that the learned judge recuse herself. However, before they were able to indicate the basis on which they intended to make the application, the attorneys for the respondent intervened with a preliminary point to the effect that, the issue of recusal having been put before this court, the learned judge was *functus officio* and the issue was *res judicata*. The learned judge upheld the preliminary objection.

[47] Mr Hamilton exhibited notes of the hearing taken by his attorneys-at-law, exhibited as "AH-2", in order to demonstrate that the learned judge had an appearance of bias. He also detailed that he was informed by his attorneys-at-law and verily believed that the learned judge failed to allow them to file written submissions in response to authorities put forward by the respondent, and, also failed to allow them to argue the point that the applicants had not been served with the claim form and particulars of claim in the substantive matter (the 2019 claim). He asserted that this amounted to a breach of his constitutional rights to a fair hearing.

[48] A draft notice of appeal was also exhibited to Mr Hamilton's affidavit. By that draft notice, the proposed grounds of appeal were:

> "(a) The learned Judge erred in failing to permit the Appellants' Attorneys-at-law to advance an application for her to recuse herself;
>
> (b) The learned Judge erred in acceding to the Respondent's preliminary objection although she had not heard the basis or grounds of the said application for her to recuse herself;

> (c) The learned Judge's failure to permit the Appellants' Attorneys-at-law to advance the application for her to recuse herself deprived them of a fair hearing; and
>
> (d) The learned Judge's handling of the matter including statements made by her demonstrated an appearance of bias against the Appellants."

[49] Ms Pretania Edwards, in her affidavit in response to all three affidavits sworn by Mr Hamilton, deposed in relation to the eight applications of which the applicants complained that the learned judge ruled against them, that of the eight applications, four were applications for leave to appeal. Further, that in respect of the application for stay of proceedings, leave to appeal that decision was not sought. Also, Ms Edwards indicated that the learned judge had refused an application made by the respondent for the learned judge to defer her decision in the 2013 claim until the hearing of the 2019 claim.

[50] In relation to both applications for the learned judge to recuse herself, Ms Edwards pointed to the fact that neither application was made in writing or supported by any affidavit evidence and that there was six months intervening between them.

[51] Specifically, in relation to the second application, Ms Edwards, who was present at the hearing, outlined the sequence of events as follows:

(i) The attorneys for the respondent objected to the application, citing authorities.

(ii) Mr Stewart, for the applicants, was given time to consider the authorities and thereafter allowed to respond.

(iii) The learned judge took time to consider the submissions and upon her return, refused the application, with reasons.

(iv) Mr Stewart then requested time to prepare and file written submissions and this was refused.

(v) Mr Stewart then sought leave to appeal the refusal. Full submissions were made by both sides on the point, after which, the learned judge refused leave.

(vi) Mr Stewart then requested an adjournment, pending the decision of this court in relation to the first application. This was opposed and the learned judge refused the adjournment.

(vii) Mr Stewart also sought leave to appeal the decision to refuse the adjournment. This was opposed and it was at this point that the learned judge expressed concern about what appeared to her to be delay tactics.

(viii) Mr Stewart, on his request, was granted time to seek guidance from senior counsel. On his return, he requested time to seek leave to appeal from this court and possibly to allow his client to seek other representation. This request was refused.

(ix) On Mr Stewart's indication that he would not present the 3rd applicant's application, the substantive hearing proceeded, first on the service point. This hearing took some two and a half hours.

[52] Ms Edwards set out her observations of the learned judge's conduct as follows:

> "During that time, I observed the learned Judge and noted that she was patient, judicious and reasonable. I heard no injudicious language and observed no impatience from her. …"

Submissions in support of the second application

[53] In contending that the applicants had a real chance of success on appeal in respect of the second application, Mr Stewart focused on the applicants' proposed grounds of appeal. He submitted that the learned judge unjustifiably prevented the applicants from

advancing the bases on which they intended to make the second application for recusal, whilst allowing the respondent's attorneys to advance their preliminary objection. This, Mr Stewart submitted, was absolutely wrong. Further, that the learned judge's failure to allow the second application for recusal, deprived the applicants of a fair hearing and demonstrated bias. He relied on the case of **Stubbs, Davis and Evans v The Queen** and submitted that the learned judge had a "prematurely closed mind". He also cited the case of **Lawrence-Austin v Director of Public Prosecutions** in reiterating the point that justice should not only be done but must also be seen to be done.

[54] Learned King's Counsel, in response, submitted that the second application only advanced one point, that, because the learned judge allowed the point *in limine* to be made, she was biased. She relied on Ms Edwards' affidavit and the notes of the proceedings exhibited by Mr Hamilton in asserting that the applicants' attorney did not put forward any new bases for requesting that the learned judge recuse herself. At all material times, the hearing proceeded on the premise that the applicants' attorneys intended to advance the same grounds that were made in support of the first application for recusal. As such, the learned judge was correct in her decision and there was no merit in the proposed appeal.

Analysis and determination of the second application

[55] Rule 1.8(7) of the Court of Appeal Rules ('CAR') required the applicants to demonstrate that the proposed appeal had a real chance of success. Rule 1.8(7) states:

> "The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success."

As indicated at para. [27] above, a real chance of success denotes a realistic as opposed to fanciful prospect of success (**Swain v Hillman**).

[56] I have read the notes exhibited by Mr Hamilton as "AH-2". There are missing words and sentences in counsel's notes provided to the court but the fulcrum of the submissions

and rulings of the learned judge can be ascertained. The affidavit of Ms Edwards also contains a summary of that hearing. Both are, for the most part, congruent.

[57] Mr Stewart had filed no written application supported by an affidavit setting out the basis for this new application. Mrs Hay objected and took a preliminary point. The learned judge offered Mr Stewart some time to consider and respond to Mrs Hay's submissions and authorities. Counsel indicated that he would wish to file his submissions in writing. It appears that the learned judge was not prepared to grant an adjournment. Mr Stewart stated that the point of *res judicata* made by Mrs Hay was not meritorious. The following excerpt is taken from the notes of counsel for Mr Hamilton, relevant to the learned judge's ruling:

> "I have considered the request by Mr. Stewart and the point *in limine* by king's Counsel. I have previously heard an application and refused it and KC brought to the Court's attention that there is an application pending in the court of appeal [sic] I will say counsel Mr. Stewart says that the application can be made in a new [sic] there is no bar to making an fresh application [sic] it must be on new grounds otherwise it would be *res judicata* [sic] counsel must state the new ground since they have [sic] been five months and counsel would have had adequate time to file the new grounds to embark on this application [sic] no I Have been embark [sic] on a matter for five months [sic] in the absence of the new grounds I will not embark on the application for the recusal."

[58] It is apparent that the learned judge indicated that the application was *res judicata* unless there were new grounds and that counsel should have stated the new grounds since they had five months and adequate time to file the new grounds. On that basis, she refused to consider the application. Mr Stewart then requested time to file written submissions. This was refused and he then requested leave to appeal the decision of the learned judge.

[59] Mr Stewart did not, at that point in time, advance the new grounds. Instead, he asked for time to file written submissions (apparently in relation to the authorities relied on by the respondent in her submissions relevant to the preliminary point).

[60] Mr Stewart's reasons for seeking leave to appeal were then advanced. He reiterated that the court had shut the "4th defendant" (this is apparently, Andrew Hamilton Construction Company) out of advancing a meritorious argument in order to protect and secure their constitutional right to a fair hearing. He then stated that the court had not considered whether the previous decision "adverse to [Mr Hamilton] made in refusing to grant the stay of proceedings in the 2013 case … the failure to properly consider the application for legal fees and the handling of the civil recovery application coupled with the failure to give the [applicants] an opportunity to advance or renew their application for recusal indicates an appearance of basis [sic]".

[61] It was not apparent from the notes of the proceedings that Mr Stewart had new grounds on which to advance this second application. These new grounds should have been urged upon the court in response to the point *in limine,* as was indicated by the learned judge. Mr Stewart had five months beforehand to prepare submissions as to those new grounds. He did not do so. He was also allowed to make submissions as to why the point *in limine* should not have been entertained. The learned judge was correct in refusing to hear the application without new grounds being advanced.

[62] Counsel failed to demonstrate to this court how the learned judge erred in the exercise of her discretion in the circumstances. It is for these reasons that I concluded that there was no merit in the proposed appeal and, therefore, the application for leave was refused.

FOSTER-PUSEY JA

[63] I have read, in draft, the reasons for judgment of Straw JA and they accord with my own reasons for concurring with the orders made.

D FRASER JA

[64] I, too, have read, in draft, the reasons for judgment of Straw JA and they accord with my own reasons for concurring with the orders made.