[2020] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV000121

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**CARROL ANN LAWRENCE-AUSTIN**	**APPELLANT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**RESPONDENT**

Written submissions filed by Ballantyne, Beswick & Co for the appellant

Written submissions filed by Miss Patrice Hickson for the respondent

2 October 2020

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MORRISON P

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

PHILLIPS JA

[2] This is an appeal from the decision of Palmer-Hamilton J, made on 15 July 2019, whereby she refused to recuse herself from hearing a claim filed by the Director of

Public Prosecutions (the respondent) against Carrol Ann Lawrence-Austin (the appellant) and other persons, and the hearing of two applications by the appellant to strike out the respondent's claim. The appellant made an application for recusal on the basis that: the learned judge served in the respondent's office for over a decade; had served as Senior Deputy Director of Public Prosecutions in that office; was employed to the respondent when the claim was initiated; and had ascended to the bench two years before the hearing of the claim and the applications. The appellant alleges that the fact that the learned judge held a position of prominence in the respondent's office raised the question of bias in the mind of the fair-minded observer. As a consequence, the appellant contends that the learned judge ought to have recused herself from the hearing of the matter.

Background facts

[3] Jean Therese Brown was convicted of various offences in the United States of America, which include bulk cash smuggling, conspiracy to commit bulk cash smuggling, murder in aid of racketeering, and conspiracy to distribute more than 1000 kilograms of marijuana in the United States. These activities were alleged to be part of a larger scheme of transporting United States currency to Jamaica. In order to render that money untraceable, it had also been alleged that family and friends of Miss Jean Brown purchased properties in their names using the said sums. Those convictions of Miss Brown led to several foreign forfeiture orders, entered by the District Court for the District of Maryland, Northern Division in the United States of America, dated 13 October 2010, 18 April 2011 and 9 May 2016. These orders sought forfeiture of money

and real property purchased and held in the names of relatives and friends of Jean Brown.

[4] In seeking to register those foreign forfeiture orders in Jamaica, the Designated Central Authority for Jamaica, the respondent, filed a claim and various notices of application for court orders in the Supreme Court of Judicature of Jamaica. The defendants to that claim are: Jean Brown; Mavis Grant (her mother); Carrol Ann Lawrence-Austin and Patrice Albergati Libreina Christie (her sisters); Gentle Anthony Mott (whose relationship with Jean Brown is unknown); and Carl Bancroft Smith (the deceased father of Jean Brown's youngest child). The process of registration of these foreign forfeiture orders was initiated on 18 May 2015, when Campbell J granted the respondent's ex parte application for registration of the foreign forfeiture orders dated 13 October 2010 and 18 April 2011. A notice of application was also filed on 26 July 2017, seeking registration of the foreign forfeiture order dated 9 May 2016.

[5] In response to the respondent's applications for registration of the foreign forfeiture orders, the appellant's notices of application for court orders filed on 3 August 2016 and 11 October 2018, with supporting affidavits, sought to have, inter alia, the respondent's claim struck out for various reasons. The appellant contended that she had never been served with any document concerning forfeiture proceedings in the United States, although she was the registered owner of four of seven properties which were the subject of the foreign forfeiture orders. She denied that those properties were criminal properties. In fact, she stated that one property was her primary residence, which she purchased using money from her savings. She denied having a close

association with her sister, Jean Brown, and indicated that since Jean Brown's departure from Jamaica in 1995, she has had limited contact with her. She further stated that her sister had entered into the consent forfeiture order without any consultation with her. For all these reasons she stated that the foreign forfeiture orders were not enforceable in Jamaica.

[6] The hearing of the respondent's claim and the appellant's applications to strike out the claim filed 3 August 2016 and 11 October 2017 were fixed for hearing on 15 July 2019.

The application for recusal

[7] One of the appellant's attorneys-at-law, Miss Terri-Ann Guyah, had set out, in an affidavit sworn to on even date, the facts as they had unfolded on 15 July 2019.

[8] It appears that once it became apparent from the court list that Palmer-Hamilton J was assigned to the hearing of these matters, the appellant's attorneys wrote the registrar of the Supreme Court requesting that the learned judge recuse herself from hearing the matter. That letter, although referred to in the affidavit, was not placed before this court. In any event, the learned judge did not recuse herself, and so the parties appeared before her for the hearing of the respondent's fixed date claim form and the appellant's applications to strike out the claim. All the parties were represented by counsel, save and except, Miss Jean Brown and the estate of Mr Carl Bancroft Smith. It was decided that the appellant's application to strike out the claim should be taken first.

[9] Miss Guyah then made an oral application to the learned judge, for her to be recused from the case. She informed the learned judge that the appellant had communicated to her attorneys-at-law that she was "uncomfortable" with the matter being before the learned judge as "she was a Senior Director of Public Prosecutions only two (2) years ago and so was [then] in the employment of the [respondent]". Counsel indicated to the learned judge, that senior counsel, Captain Paul Beswick, was expected to attend court, as it was he who had received the instructions from the appellant, and who had written the letter to the registrar. However, in the absence of senior counsel, Miss Guyah submitted to the learned judge that she was a creature of instructions, and was not casting any doubt on the transparency or integrity of the court.

[10] Miss Guyah further deponed that it was the appellant's firm belief that a period of two years was insufficient to establish distance between the time that the learned judge had been employed to the respondent's office, and her deployment on the bench. Additionally, while at the respondent's office, the learned judge had held a very high position with great oversight. Counsel submitted it was the appellant's belief that the learned judge would not have been able to give an unbiased hearing of the matter, nor would there be any appearance of justice being done in the circumstances. Miss Guyah proceeded to ask the learned judge to recuse herself.

[11] The learned judge commented that the Chief Justice of Jamaica had also been employed to the respondent's office, to which Miss Guyah replied that he had departed the respondent's employ over a decade ago and has been a judge since then.

Thereafter, the learned judge indicated that since being appointed to act as a puisne judge (on 9 January 2017), she had already heard several cases relating to the respondent's office. She stated further, that while employed at that office, she had not been involved in any matter similar to the one then before her, nor had the instant matter ever been brought to her attention while there, as there is a particular unit at that office which deals with those matters, and those matters are assigned to particular counsel. The learned judge relied on her professional integrity, her judicial oath taken on her appointment as a puisne judge, and the fact that she was a "creature of law". The learned judge refused to recuse herself from hearing the matter, and counsel therefore commenced submissions on the application to strike out the claim.

[12] Shortly thereafter, Captain Beswick arrived and the application for the learned judge to recuse herself was reopened. Captain Beswick endeavoured to persuade the learned judge that, as she had held "a position of prominence", and as she had been in an "exalted position" at the respondent's office, the learned judge's deep association with the respondent's office raised the question of bias. He relied on the cases of **Dimes v Grand Junction Canal** (1852) 3 HL Cas 759; 10 ER 301 and **R v Sussex Justices, Ex parte McCarthy** [1924] 1 KB 256, to support his contention that a judge should not sit to hear a matter in which she has an interest, and that justice should not only be done, but appear to be done.

[13] The learned judge enquired of Captain Beswick, what was the interest that she allegedly had in the matter. While clarifying that he had no intention of casting any doubt on the integrity and sagacity of the court, Captain Beswick explained that as a

senior member of the respondent's office, where she had great oversight and control, the learned judge would have had an interest in protecting the integrity and success of the respondent's office to which she was recently employed. "Sufficient time had not passed", he said, "for one to feel that there is a separation of interests". In response to a query from the court, although Captain Beswick could not identify what, in his view, amounted to an appropriate period of separation, he emphasised the appellant's deep discomfort and lack of desire to continue the proceedings before the learned judge.

[14] The learned judge once again refused to recuse herself. As the hearing of the application to strike out the claim had begun before her, the learned judge enquired of counsel whether the appellant's application was being withdrawn. Captain Beswick indicated that while he was not withdrawing the application, he was, however, withdrawing the submissions on the application. The learned judge informed counsel that she would be proceeding with the matter in their absence. Both Miss Guyah and Captain Beswick exited the learned judge's chambers. Immediately thereafter, they attended on the registrar, and obtained a time later that day for the learned judge to hear the appellant's application for permission to appeal her decision not to recuse herself. After hearing the application, the learned judge refused it having regard to dicta in **R v Sussex Justices**. The following is counsel's note of the judge's oral reasons for her refusal:

> "1. [In R v Sussex Justices,] [t]he acting clerk to the Justices was a member of the firm of solicitors who [was] acting for one of the parties in the matter to be decided by the Justices.

2. As Lord Hewart Chief Justice stated, the question is whether one is so related to the case in any respect. Nothing is to be done which would create a suspicion that there is any improper interference with the course of justice.

3. I maintain that I am not connected with the case in any respect as was highlighted [or] as was borne out in [**R v Sussex Justices**] and no good cause was shown to move me to recuse myself from hearing this case.

4. There is therefore no merit in the application for leave to Appeal.

5. The reasons given in the affidavit of Ms Terri-Ann Guyah, in paragraph 11 remain the same, therefore the Amended Notice of Application for Leave of Appeal is refused."

The appeal

[15] The appellant's application for permission to appeal was renewed before this court. It was granted on 17 December 2019, and on 19 December 2019, a notice of appeal was filed. The appellant relied on five grounds of appeal. They are:

"a. The learned judge failed to give the application for her recusal, due and just consideration, rendering her decision on the matter immediately at the hearing of same and thereby failing to show that she had given proper consideration of the submissions for and on behalf of the [appellant].

b. The learned judge erred in failing to appreciate that having served at the Office of the Director of Public Prosecutions, the Respondent/Claimant in this matter, in a Senior position as the Senior Deputy Director of Public Prosecutions in excess of a decade, while this instant claim was initiated from that office and was being investigated through the Mutual Legal Assistance Unit, during the tenure of the learned Judge, and that the Judge's departure from that office

in 2017 when this instant matter was started in 2015, and a file which would reasonably have been brought to the Respondent/Claimant's attention years before, while the learned Judge held a Senior Office in the said Respondent's office, would give the fair minded observer the impression and belief that she would not be fair and unbiased in her hearing of the matter, as she would be virtually the prosecution and Judge in the same matter.

c. The learned judge failed to give due consideration to the fact that the instant claim being a relatively large case as it straddles both the criminal and civil arena, and concerned Financial Crime and Mutual Legal Assistance investigations, would have been of significant importance to the Respondent's office, of which the learned Judge was a part, and no doubt would have been discussed amongst the senior members of staff of the office during the tenure of the learned Judge as a Senior Deputy Director of Public Prosecutions and so to the fair minded observer the learned Judge would not be an impartial and unbiased person to conduct the tribunal hearing the instant application.

d. That the learned Judge in the Court below failed to appreciate that just over two (2) years has passed since her ascension to the Supreme Court bench from the office of the Respondent and so this short period would not have been sufficient time for the fair minded observer to believe that she would have sufficiently disassociated herself from active files which existed in the Office of the Respondent for which the learned Justice Palmer-Hamilton held a senior position and which would have whether directly or indirectly she would have knowledge of.

e. The learned Judge in Chambers erred in failing to recognise and appreciate that her judicial function required the exercise of a discretion which would permit the Appellant to have her claim heard, particularly as the claim is one initiated by the state to deprive her of her right to property, by her decision not to recuse herself would have breached her rights

> under the Charter of Fundamental Rights and Freedoms to a fair trial by an impartial tribunal."

[16] The appellant asked for: (i) the decision by Palmer-Hamilton J refusing to recuse herself to be set aside; (ii) the matter to be remitted to the Supreme Court to be heard by a different judge; and (iii) that the appellant's applications to strike out the claims filed by the respondent to be fixed for hearing as soon as possible, simultaneously with the trial of the fixed date claim form.

Submissions of the appellant

[17] Counsel submitted that the claim had been instituted in 2015, at a time when the learned judge held the position of Senior Deputy Director of Public Prosecutions in the respondent's office. Working in such a senior capacity, he argued, would have permitted her access to the claim, all the evidence in support, the arguments and the instructions of the foreign government. He submitted, further, that the instant claim:

> "... being one which involves the Assets Recovery Agency and numerous other state entities, resulting in wide scaled and multi-jurisdictional arrests, and proceedings both in the Supreme Court and the Parish Courts, would by no means not be classified as a major case in the [respondent's] Office, as it would have required significant resources and the input and guidance of senior prosecutors, such as [the learned judge]..."

This, he said, would give rise to a "reasonable apprehension or suspicion" on the part of a fair-minded observer that the learned judge might be biased, and that her opinion might be tainted due to her perceived biases or previous knowledge. That, he said, may

give the appearance of a judge sitting in her own cause which would warrant automatic disqualification.

[18] Counsel referred to the leading case of **In Re Pinochet** [1999] UKHL 52, and particularly, the seminal speeches of Lord Hope of Craighead and Lord Hutton, where several other authorities on the subject of bias were referred to and commented on. Counsel submitted that based on the authorities as distilled by the House of Lords, disqualification from participating in the judicial process does not have to be on the basis of a direct pecuniary interest, it may be a direct or indirect interest in the proceedings, pecuniary or otherwise, or by association. Counsel stated that, in the instant case, "it was not being alleged that the learned judge was actually biased, but rather that the connections to a party or an interest was sufficient to create suspicion of bias". "The court", he said, "was duty bound to avoid the possibility of appearing to be influenced", and "the only time such an influence may be accepted is where it is disclosed by the tribunal and waived by the parties".

[19] Counsel submitted that the years of close association of the learned judge to her former office were extremely relevant, especially since the learned judge had stated that she had no connection to matters similar to the matter at bar. However, the well-publicised matter of the Commission of Enquiry into the extradition of Christopher "Dudus" Coke in 2010-2011, was based on a request through the Treaty between the Government of the United States of America and the Government of Jamaica on Mutual Legal Assistance in Criminal Matters (the Treaty), through the Ministry of Foreign Affairs, with which the learned judge had some familiarity as senior counsel, as the

record of proceedings noted her representation in the matter on behalf of the respondent's office. The instant matter, counsel argued, was also based on the Mutual Assistance (Criminal Matters) Act (MACMA), which is the statute that gave effect to the country's obligations under the Treaty. This area, he said, was well within the learned judge's recent professional knowledge and operations. As a consequence, this relationship would have created serious doubts in the mind of a fair-minded and informed observer, as to whether the learned judge's ability to act impartially and adjudicate on the matter fairly might not have been impaired. All of those matters ought to have been taken into consideration by the learned judge, before deciding to sit and hear the trial of the claim.

[20] Counsel submitted, further, that the matter is one of grave import, as it concerns issues relative to depriving Jamaican citizens of their property, in favour of a foreign power, which is represented by the very same office that the learned judge worked in for many years. Not enough time had passed, counsel argued, to raise the presumption of impartiality; in fact, to the contrary, the suspicion of bias must arise, which would do little, he said, to preserve confidence in the administration of justice. As a consequence, it was therefore inappropriate for the learned judge to hear the matter, and she ought to have recused herself. The appeal, he submitted, therefore, ought to be allowed.

Submissions of the respondent

[21] Crown Counsel submitted that the facts of the cases relied on by Captain Beswick, namely, **In Re Pinochet** and **R v Sussex Justices**, are readily distinguishable from the facts of the instant case. She referred to the fact that the court

in **In re Pinochet** had stated that the facts were "striking and unusual". Crown Counsel set out the principles emanating from **In re Pinochet**, indicating that there are two maxims long accepted as being the statement on the law, namely, that justice must not only be done but must manifestly appear to be done; and that a judge cannot be a witness in his own cause.

[22] Counsel also referred to the case out of this court, **Hurbert Smith v Board of Management of the Queen's School** [2016] JMCA Civ 51, which cited with approval **Barbados Turf Club v Eugene Melynk** [2011] CCJ 14 (AJ), a case from the Caribbean Court of Justice, in which it was stated that:

> "Where, as in this case, the Respondent contends that the decision of the tribunal was tainted by apparent bias, the appropriate test 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 re Medicaments and Related Classes of Goods* (No. 29) [2001] 1 WLR 700 at pp. 726-727]."

[23] In applying that test to the instant case, Crown Counsel set out the facts which, in her view, differed significantly from the facts of the cases relied on by the appellant. They are as follows:

> "(a) The learned judge is no longer a part of the Office of the Director of Public Prosecutions (ODPP);
>
> (b) The learned judge cannot be said to have an interest in the outcome of the hearing;
>
> (c) The learned judge has said that she has sat in matters involving the ODPP in the two years since her

> ascension to the bench and there were no previous questions of bias;
>
> (d) There is no evidence that at the time when the learned judge was a member of the ODPP the case file or any other such case file came to her attention as she was not a member of that unit at the time the case was being considered by the office."

Crown Counsel stated that there are no other facts in the instant case to impute bias, potential or otherwise, and so it was her contention that the learned judge had acted correctly.

[24] Crown Counsel submitted that the issue was really one of impartiality, and the right to a fair trial. She said that the cases concerning issues relative to those at bar, have stated the question to be one of apparent bias, and the test to be an objective one. She relied on **The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd** (1970) 123 CLR 361, from the High Court of Australia, to support her contention that there is generally no disqualification based on past membership of an association, but acknowledged that in that case, the learned judge had recused himself although he had not been required to do so. Counsel cautioned that every case depended on its own peculiar facts.

[25] Crown Counsel also relied on the principles emanating from **Locabail (UK) Ltd v Bayfield Properties Ltd and another et al** [2000] QB 451, which referred to the United Kingdom Guidelines in the Judicial Code of Ethics, to state, inter alia, that it would be difficult to conceive of an objection relying on the real danger of bias succeeding, 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". Counsel referred to the situations which do not require a judge to recuse himself, namely, "rumour, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" and additionally, "mere familiarity with the defendant(s), or the type of charge, or kind of defence presented".

[26] Counsel concluded that, based on the principles stated in the law; the distinguishing features of the instant case; the fact that the learned judge had, since her ascension to the bench, sat on matters involving the respondent where there was no issue as to her impartiality; and the fact that her association with the respondent would have no bearing on the outcome of the case, the learned judge was correct in refusing to recuse herself.

Issue

[27] Having perused the initiating documentation, the grounds of appeal, submissions, and all other relevant material placed before us, I have concluded that there is really only one issue in this appeal, with several sub-matters for consideration. I have endeavoured to set them out below:

> Did the learned judge give the issue of her recusal from hearing the matter due consideration, so that the informed and fair-minded observer would not possibly think that she was biased, having regard to:
>
> (i) her employment as a senior deputy director of public prosecutions in the respondent's office

up until two years before the hearing of the claim and the applications;

(ii) her being employed at the respondent's office at a time when the matter commenced;

(iii) the complexity and comprehensive nature of the claim and its notoriety; and

(iv) the fact that the application had the potential to deprive the appellant of her property, contrary to section 15 of the Constitution of Jamaica (grounds (a) to (e))?

Discussion and analysis

[28] MACMA has endowed the respondent with extraordinary powers and responsibilities. Section 27(1)(a)-(d) provides for the Central Authority, on request from a foreign state, to make arrangements for the enforcement of (a) a foreign forfeiture order against tainted property that is believed to be in Jamaica; or (b) a foreign pecuniary penalty order, where some or all of the property available to satisfy the order is believed to be located in Jamaica. The Central Authority must be satisfied that a person has been convicted of an offence to which those orders relate, and the offence must be one which, if it had been committed in Jamaica, those orders could have been made by a court in Jamaica. The conviction and the order must not be subject to any further appeal in the foreign state.

[29] Section 27(2), (3) and (4) of MACMA stipulates that if a foreign state requests the Central Authority to make arrangements for the enforcement of a foreign restraint order, foreign forfeiture order or a pecuniary penalty order, made in respect of a criminal offence, against property believed to be located in Jamaica, the Central Authority may, in its discretion, apply to the Supreme Court for registration of the order. The court may register the foreign order if satisfied that the circumstances warrant such registration. The orders so registered may be enforced as if they were made by a court in Jamaica in respect of a prescribed offence (which is set out in the definition section of MACMA).

[30] The respondent appeared to have been proceeding under the sections mentioned above, and the appellant challenged the processes allegedly utilised thereunder.

[31] Given the respondent's powers under MACMA, the appellant had raised a concern with regard to the learned judge's former affiliation with the respondent's office. The appellant has stated quite clearly that her application to the learned judge for her to recuse herself from hearing the matter, was not based on actual bias or of any lack of integrity or honesty on her part. It is based on apparent bias, through the lens of the informed observer, and the close association of the learned judge to the respondent's office, her former place of work for many years, "not too long ago".

[32] The issue, therefore, was whether there was judicial impartiality or alternatively, apparent bias, and whether, in keeping with the proper administration of justice, the

learned judge ought to have been disqualified from hearing the matter, and so should have recused herself.

[33] In the Commentary on the Bangalore Principles of Judicial Conduct, published by the United Nations Office on Drugs and Crime, the perception of impartiality is captured in this way at paragraph 52:

> "Impartiality is the fundamental quality required of a judge and the core attribute of the judiciary. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice, thereby destroying confidence in the judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance through a perceived conflict of interest, the judge's behaviour on the bench or his or her associations and activities outside the court."

[34] Lord Hope of Craighead in **In Re Pinochet**, in accepting that "one of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered", made it clear that "[i]n civil litigation the guiding principle is that no one may be a judge in his own cause; nemo debet esse judex in propria causa". The second guiding principle is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to done" (see **R v Sussex Justices**). In **In Re Pinochet**, Lord Browne-Wilkinson suggested that there were two ways in which a person could be conceived of as a judge in their own cause, he stated:

> "... First [the principle] may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial ..."

[35] In relation to the second cornerstone of our legal system, in **R v Sussex Justices**, Lord Hewart CJ also made the following statement:

> "... the question depends not upon what actually was done, but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice."

[36] The law is well settled with regard to the test for apparent bias. It has moved away somewhat from the approach laid down in **R v Gough** [1993] AC 646 in the speech of Lord Goff of Chieveley, where the test was formulated in the headnote as "whether, in all the circumstances of the case, there appeared to be a real danger of bias". The current test is found in the well-known statement of the Lord Hope of Craighead in **Porter and v Magill** [2002] 1 All ER 465, where he stated that the reference to "real danger" should be deleted as it no longer served any useful purpose,

and that the question should now be "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".

[37] In **Helow v Secretary of State for the Home Department and another** [2008] 1 WLR 2416, Lord Hope of Craighead gave clarity to the concept of the fair-minded and informed observer, in paragraphs 1-3 of his judgment. He stated:

> "1 ... the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word 'he'), she has attributes which many of us might struggle to attain to.
>
> 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."

[38] In spite of that comprehensive description of the fictitious fair-minded informed observer, as stated by Mason CJ and Mc Hugh J in the leading judgment in **Webb v The Queen** [1994] HCA 30, it remains important:

> "... to keep in mind that the appearance as well as the fact of impartiality is necessary to retain the confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality."

[39] So, although it is an objective test of the circumstances, it is the "court's view of the public's view, not the court's own view, which is determinative" (see **Webb v The Queen**).

[40] In **In re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700, Lord Phillips of Worth Matravers MR, having canvassed several authorities dealing with the development of the law in relation to the approach to be taken to bias, stated

at paragraph [83] that the principles to be derived from the line of cases were as follows:

> "(1) If a judge is shown to have been influenced by actual bias, his decision must be set aside.
>
> (2) Where actual bias has not been established the personal impartiality of the judge is to be presumed.
>
> (3) The court then has to decide whether, on an objective appraisal, the material facts give rise to a legitimate fear that the judge might not have been impartial. If they do the decision of the judge must be set aside.
>
> (4) The material facts are not limited to those which were apparent to the applicant. They are those which are ascertained upon investigation by the court.
>
> (5) An important consideration in making an objective appraisal of the facts is the desirability that the public should remain confident in the administration of justice."

[41] It is important, then, for the court to ascertain all the circumstances, and then to ask whether those circumstances could lead the fair-minded observer to conclude that there was a real possibility that the tribunal was biased. In paragraph [86], Lord Phillips set out what those were. He stated:

> "The material circumstances will include any explanation given by the judge under review as to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the viewpoint of the fair-minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair-minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced.

> Thus in *R v Gough*, had the truth of the juror's explanation not been accepted by the defendant, the Court of Appeal would correctly have approached the question of bias on the premise that the fair-minded onlooker would not necessarily find the juror's explanation credible."

[42] In the Privy Council case of the **Attorney General of the Cayman Islands v Tibbetts** [2010] UKPC 8, Lord Clarke speaking on behalf of the Board, endorsed the statement of Mummery LJ (with whom Latham and Carnwath LJJ agreed) in **AWG Group Limited v Morrison** [2006] EWCA Civ 6, where he also put the test in this way:

> "The test… is that, having ascertained all the circumstances bearing on the suggestion that the judge was (or would be) biased, the court must ask 'whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility… that the tribunal was biased'."

[43] Lord Clarke also stated that it was therefore for the court "to ascertain the circumstances". He said that:

> "the court must approach the issue in two stages. First it is for the court to find the facts on the balance of probabilities. It is then for the court to decide on a balance of probabilities whether, with knowledge of the facts so found, the putative observer could conclude that … [the fact finder would and might accept the evidence based on a previous relationship and knowledge]."

[44] In the light of the principles gleaned from these authorities, I will now examine the circumstances of this case:

1. The respondent is operating in this matter as the Central Authority pursuant to MACMA and the Treaty.
2. There are provisions in MACMA empowering the respondent to file proceedings to register forfeiture orders at the request of a foreign state.
3. The learned judge was formerly employed to the respondent's office, holding a position of Senior Deputy Director of Public Prosecutions, which is a position of seniority in that office.
4. The matter commenced in the respondent's office in 2015, when the learned judge was still employed in that senior capacity.
5. The orders prayed for by the respondent relate to final registration of forfeiture orders depriving Jamaican citizens of their registered properties.
6. The learned judge had indicated that the specific matter had not been brought to her attention while employed to the respondent's office; those matters were acted on in a different unit by specific counsel; which position was not accepted by the appellant.

7. The learned judge was affiliated with an extradition matter subject to similar processes on behalf of the respondent's office.

8. The learned judge was only elevated to the bench in 2017, two years before the hearing of the matter.

9. The learned judge said that she relied on her professional integrity, the judicial oath taken on her appointment as a puisne judge, and the fact that she was a "creature of law".

[45] In this case, the issue is, on a balance of probabilities, what facts would the court accept in this case, and whether, on a balance of probabilities, the court would find that the fair-minded observer, with the facts as found by the court, would have concluded that there was a possibility of bias on the part of the learned judge.

[46] There was, as indicated in this case, no suggestion or claim of actual bias or personal interest. It is clear that the learned judge had no personal interest, pecuniary or otherwise, in the outcome of the litigation. There was no evidence that the learned judge had an interest in the outcome of the matter, she having left the respondent's office for a period of two years, having been a judge in that period. There is therefore no way, in my view, that the learned judge could have been considered a judge in her own cause in this case. That contention by the appellant was, in any event, really based on an apprehension of the real possibility of bias. And although Lord Hope has given us the description of the informed fair-minded observer, it can prove a challenge on

occasion, to decide how much knowledge ought to be ascribed to this fictional hypothetical character. However, it is for the court, in the first instance, to ascertain the material circumstances on a balance of probabilities, and then assess what the fair-minded informed observer with knowledge of those facts would conclude.

[47] In this case, there is no doubt that the learned judge would have been familiar with the importance of the hierarchy of the officers within the respondent's office. She would also have been familiar with the role of the Senior Deputy Director of Public Prosecutions as she interfaced with the head of the department, the respondent herself. She would have been aware of the manner in which matters are processed in that office; would have known of the different units established therein with specific professional attorneys assigned thereto; and would also have known of her participation in the notorious matter of Christopher "Dudus" Coke, an extradition matter concerning the respondent's office. She would have known of the constant level of discussion between colleagues at a very senior level at the respondent's office. And the effect of the years of professional collegiality in the office, and the deference which would be paid by senior officers of the respondent to the person who held the top position in the office, namely, the respondent, a position recognised by the Constitution of Jamaica.

[48] There was no evidence of the effect on the learned judge: (i) of the fact that the matter which was before the court, had been commenced while the learned judge was still in the respondent's office; and (ii) had been commenced by the respondent herself, as the named claimant, having been designated as the Central Authority under the Act. A question must arise with regard to what information may have been disclosed to the

learned judge, even inadvertently, in 2015, when the matter relating to the foreign state would have arisen, when she was still employed at the respondent's office in a senior prosecutorial position. That question, and how conclusive the judicial oath taken by her, was to her, would remain inconclusive having been challenged by the appellant, but would be additional information for consideration.

[49] It is a fact that the learned judge had only recently left the respondent's office, two years before the hearing of the claim. Although many other matters emanating from the respondent's office may have been before the learned judge, the important question was, was this the first or only matter before her, in which the respondent herself was the claimant, with the onerous responsibility of acting in concert with a foreign state, to register forfeiture orders, relating to property in Jamaica, allegedly owned by Jamaicans, where the tension between the contending situations would likely be intense? There was no evidence on this, so this aspect of the matter would also remain inconclusive, but a matter for consideration. However, in that situation, would there have been any likely perceived influence on the learned judge by her former "boss"?

[50] The learned judge also appeared to have relied heavily on the fact that she had taken the judicial oath. There is no doubt that great weight must be given to the taking of the judicial oath, recognising that it requires one to swear "to uphold and defend the Constitution of Jamaica" and to "administer justice to all persons alike in accordance with the laws and usages of Jamaica without fear or favour, affection or ill will". Indeed, Lord Mance in **Helow** noted that L'Heureux-Dubé and McLachin JJ in **R v S (RD)**

[1997] 3 SCR 484 had "identified the taking of the judicial oath as often the most significant occasion in the career of a judge". They said at paragraph 117 of that judgment that:

> "Courts have rightly recognised that there is a presumption that judges will carry out their oath of office … This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold the presumption can be displaced with 'cogent evidence' that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias ..."

The learned justices went on to say, however, at paragraph 119 that:

> "The requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes. It has been observed that the duty to be impartial:
>
> > 'does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested to the grave.
> >
> > True impartiality does not require that the judge has no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind'."

[51] This view caused Lord Mance to caution how to treat the judicial oath for these purposes. He said:

> "... [t]he judicial oath appears to me more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practise and display. But on no view can it or a judge's professional status and experience be more than one factor which a fair-minded observer would have in mind when forming his or her objective judgment as to the risk of bias."

[52] In fact, Lord Walker of Gestingthorpe earlier in the judgment in **Helow**, stated that "the fair-minded and informed observer would be tending towards complacency if he treated the fact of having taken the judicial oath as a panacea".

[53] So, in spite of taking the oath, one may still be influenced by former attitudes and sympathies, which could lead one to be concerned about possible bias. Nearly four decades ago in **R v Barnsley Licensing Justices, Ex p Barnsley and District Licensed Victuallers' Association** [1960] 2 QB 167, Delvin LJ stated that:

> "Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."

[54] And, in **In Re Pinochet**, Lord Nolan commented on how he viewed the consequence of unconscious bias. He stated that "in any case where the impartiality of a judge is in question the appearance of the matter is just as important as the reality".

[55] A question also arises as to whether these facts are similar to those of **R v Sussex Justices** and **Locabail v Bayfield**. The clerk in **R v Sussex Justices** was connected to a law firm of one of the parties, and although he had retired with the justices when they had gone to engage in deliberations, they did not consult with him. The learned judge was previously connected to the respondent's office, but states that there was no consultation on the matter. The court, in referring to the fundamental principle that justice must not only be done, but must manifestly appear to be done, quashed the appellants conviction on the basis that what appeared to be done, created a suspicion that there had been improper interference with the course of justice. The instant case also raises the question of whether justice could be done or manifestly appears to be done.

[56] In **Locabail v Bayfield**, there were five applications for permission to appeal against various judicial decisions which raised the issue as to whether judges hearing those matters were disqualified on the grounds of bias. The facts in two of those cases are related to those in the instant case, where a deputy High Court judge, was a solicitor Queen's Counsel, in a firm of solicitors of which he was a senior partner. It was alleged he was disqualified from hearing those matters because his firm had, in the past, acted for parties who could be affected by the outcome. It was held that that judge did not have a sufficiently significant pecuniary or proprietary interest in the outcome of the trial to be automatically disqualified. The court stated that disqualification of a judge would not be automatic where the potential effect of any decision on the judge's personal interest is so small as to be incapable of affecting his

decision one way or the other. But the court also said that where there is any doubt, it should be resolved in favor of disqualification.

[57] There is no doubt, in my mind, on examination of these circumstances, that the court ought to find the facts, set out in paragraphs [44] and [47] herein, on a balance of probabilities, and continue to be cognizant of those that remain inconclusive (see paragraphs [48]-[50] herein). On further examination, in my view, the fair-minded and informed observer with knowledge of the facts so found, would, on a balance of probabilities, have cause to conclude that there was a real possibility of bias on the part of the learned judge.

[58] It is also my opinion, the case having not yet begun, it would be far more prudent to exercise a precautionary approach, to disqualify the judge on the basis of the clear possibility of apparent bias, and recuse the learned judge before the commencement of the trial of the matter, and from the re-opening and re-hearing of the appellant's two applications to strike out the claim. The facts of this case fit easily into the principle that "justice should not only be done but must manifestly and undoubtedly appear to be done".

[59] With regard to this court's hesitance to interfere with the exercise of a judge's discretion, pursuant to the well-known and accepted principles in these courts, I am reminded of the statement of Mummery LJ in **AWC Group Limited**, which reads:

> "…I do not think that disqualification of a judge for apparent bias is a discretionary matter. There was either a real possibility of bias, in which case the judge was disqualified

> by the principle of judicial impartiality, or there was not, in which case there was no valid objection to trial by him. On the issue of disqualification an appellate court is well able to assume the vantage point of a fair-minded and informed observer with knowledge of the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias."

[60] I agree with that approach. Having reviewed all the material submitted, in my view, the learned judge had not given the issue of her recusal from the matter due consideration, particularly from the vantage point of the fair-minded informed observer. I would, therefore, conclude that the appellant has persuaded me on the relevant issue identified in the case, and would therefore have succeeded on grounds of appeal (a) to (d). Although I acknowledge the appellant's constitutional right to property, there is no need at this interlocutory stage to embark upon a discourse as to whether it had been breached due to the learned judge's refusal to recuse herself. It is therefore unnecessary to make a finding in relation to ground (e).

Conclusion

[61] In the light of all of the above, I would allow the appeal, and set aside the order of Palmer-Hamilton J. I would also remit the matter to the Supreme Court for hearing of the trial of the fixed date claim form, and the appellant's two applications to strike out the claim, to be heard, together, by a different judge. In the light of the circumstances of this case, and the issues canvassed in this appeal, I would make no order as to costs.

FOSTER-PUSEY JA

[62] I have had the opportunity of reading the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

MORRISON P

ORDER

1. The appeal is allowed.
2. The decision of Palmer Hamilton J made on 15 July 2019 is set aside.
3. The matter is remitted to the Supreme Court for the hearing of the trial of the fixed date claim form and the appellant's applications dated 3 August 2016 and 11 October 2018, to be heard, simultaneously, by a different judge.
4. No order as to costs.