JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 62/17

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

BETWEEN	**GRACE TURNER**	**APPLICANT**
AND	**UNIVERSITY OF TECHNOLOGY**	**RESPONDENT**

Owen Crosbie instructed by Owen Crosbie & Company for the applicant

Gavin Goffe, Adrian Cotterell and Jahmar Clarke instructed by Myers Fletcher & Gordon for the Respondent

23 October 2017

ORAL JUDGMENT

MORRISON P

[1] This is an application for permission to appeal against a decision of Simmons J given in the Supreme Court on 17 March 2017.

[2] In a letter addressed to me as the President of the court on 19 October 2017, Mr Owen Crosbie for the applicant wrote the following:

> "While we have no doubt that Mr Justice Brooks is capable of hearing any matter objectively you will of course agree with us since the appeal involves a judgment involving Mr

> Justice Brooks which was criticized as manifestly irregular and unlawful as shown in the records and which judgment is material in this appeal, Brooks, JA would be a judge in his own cause and so the matter should be taken out the list for a date to be fixed by the Registrar."

[2] When the matter came on for hearing this morning, Mr Crosbie formally moved an application for Brooks JA to recuse himself from hearing this application. He also added a further application that I should similarly recuse myself, in that, at an earlier stage of the proceedings, I had also had some connection with the matter in which Brooks JA had been involved. I will explain the circumstances in a moment.

[3] Mr Crosbie submitted that justice must not only be done, but must appear to be done and that, if Brooks JA and I were to participate in the hearing of this application, it would appear that we were both acting as judges in our own cause. He was anxious to assert, however, that he had every confidence in the integrity and competence of both Brooks JA and me. It was the appearance of bias that learned counsel was seeking, he said, to avoid.

[4] Mr Goffe opposed the application, taking the position that, because neither Brooks JA nor I have had anything to do with the matter that is before the court this morning, the question of either or both of us being judges in our own cause simply does not arise.

[5] In considering Mr Crosbie's application, it is necessary to state for the record the circumstances to which he directs attention. It is as follows. The litigation between the present applicant and the respondent has been ongoing for some time. In 2013, an issue arose between the parties concerning an amendment to a document filed in the

Supreme Court by the respondent which involved amending the respondent's name in the proceedings. The amendment was made without permission, as the rules allowed. The applicant applied to strike it out and, when a judge in the court below refused that application, she appealed to this court against that decision.

[6] The appeal ('the previous appeal') was heard on 25 November 2013, by a panel of the court comprised of Harris, Dukharan and Brooks JJA. On that date, judgment was reserved. On 19 December 2013, which was the last day of the Michaelmas term, a panel of the court comprised of Panton P, Brooks JA and myself announced that, for reasons to be given at a later date, the appeal would be dismissed.

[7] Subsequently, on 13 June 2014, the written reasons for this decision were published in a judgment written by Harris JA. But, by that time, it appears that a question had arisen as regards the fact that the panel which delivered the judgment on 19 December 2013 was differently constituted from the panel which had heard the appeal. It is no doubt this question which led to Harris JA adding (at paragraph [33]) a postscript to the judgment issued on 13 June 2014, in which she said this:

> "When our decision was handed down on 19 December 2013 it was, out of sheer convenience, delivered by a panel that was available to do so on that date. It has come to our attention that, subsequent to the delivery of our decision, counsel for the appellant expressed concern about the delivery of the judgment by a differently constituted panel. From time to time due to the unavailability of all or some members of the panel of judges that heard submissions in a particular matter, an available panel is constituted for the sole purpose of delivering the decision arrived at by the original panel. We wish to make it abundantly clear that our decision, which is as indicated in paragraph [1] hereof, was arrived at through the deliberations of only the judges of appeal who sat and heard the submissions of counsel for

> both parties. Its delivery by a differently constituted panel in no way affects it validity."

[8] And there the previous appeal rested, there having been no further appeal from Harris JA's judgment.

[9] So, in summary, the involvement of Brooks JA of which the applicant now complains is that he was a member of the panel that heard and adjudicated on the previous appeal; and my involvement is said to be that I was a member of the panel which handed down the decision on the previous appeal.

[10] The litigation between the parties has continued and there has now arisen between the parties a dispute about a default judgment which has been entered by the respondent against the applicant and her attempts to set it aside. An application to set aside the default judgment having been made unsuccessfully before Simmons J in the Supreme Court, and the judge having refused leave to appeal, the applicant now seeks leave to appeal against her decision from this court.

[11] It is in these circumstances that Mr Crosbie has submitted that the presence of Brooks JA and me on the panel hearing the application for leave to appeal against Simmons J's decision gives rise to the appearance of bias, on the basis that we will be judges in our own cause.

[12] We have considered the submission carefully, since it naturally affects the integrity of the court itself and goes to the very root of the judicial oath which all judges of the court take. Having done so, we are completely satisfied that the application is without merit and ought to be dismissed.

[13] The fact is that different issues will arise from time to time particularly in long running litigation of this sort and, if it were the case that any judge of appeal who has at any previous stage had any connection at all with the litigation in however tenuous a manner, should be disqualified from hearing any subsequent matter that arises, it would, it seems to us, bring the court into a state of paralysis.

[14] We agree with Mr Goffe that the matter which is now before the court is completely different from that which was before the court in the previous appeal and that no question of either Brooks JA or me being a judge in his own cause arises on the facts of this case. The application is therefore dismissed.

[15] In the result, we are therefore back where we started this morning, which is that we are ready and prepared to hear the application for leave to appeal against Simmons J's decision.