EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION
CLAIM NO. SLUHCV2017/0137

BETWEEN:

FOREST SPRINGS LIMITED

Claimant/ Respondent

And

BLUE WATERS SAINT LUCIA LIMITED

Defendant/ Applicant

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini High Court Judge

Appearances:
Mrs Petra Nelson and Mrs Esther Greene-Ernest for the Claimant/ Respondent
Ms Renee St Rose with Ms Rowanna-Kay Campbell for the Defendant/Applicant

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2018: November 1
2019: April 16

2019: May 2, [Re-Issued]

DECISION

[1] ST ROSE-ALBERTINI, J. [Ag]: The defendant, Blue Waters Saint Lucia Limited, has filed an application seeking an order that I recuse myself from the hearing of assessment of damages, which flows from a judgment in default of defence obtained by the claimant, Forest Springs Limited.

[2] The application is premised not on an allegation of actual bias against the defendant, but that there would be an appearance of bias, since I concluded inter alia that the defendant had no realistic prospect of successfully defending the claim on an earlier application to set aside the default judgment. Because of this ruling, the defendant says that I am unable to bring a fair, open and impartial mind to decide the case that it intends to advance at the hearing, and that I am not likely to be persuaded by the evidence or the submissions of Counsel, having made the previous findings.

[3] The claimant opposes the application.

The Issues

[4] Two issues arise for consideration; namely:-

1. What is the proper procedure for filing an application for recusal?
2. Whether the test for disqualification on grounds of apparent bias has been satisfied?

Procedural History

[5] The claim was transferred to the Commercial Court, with an extant application to set aside the default judgment obtained against the defendant. As the designated judge for that court I am required to adjudicate over commercial claims, from commencement to disposal. The application was heard and dismissed and the next step would be assessment of damages.

[6] The defendant sought leave to appeal and a stay of execution, which were refused by the appellate court.

[7] Following this, the parties returned before me on 6th June, 2018 for further directions on assessment of damages. The claimant's initial evidence was contained in an affidavit filed on 7th June, 2017. Counsel for the claimant, Mrs Nelson, took the view that a referee with accounting expertise would be required to assist the Court with certain aspects of the assessment, which she believed would be very involved.

[8] Counsel for the defendant, Ms St Rose requested the opportunity to file further evidence on behalf of the defendant before making a determination on the need for a referee. Directions were given for filing and exchange of affidavit evidence and the matter adjourned for consideration of the appointment of a referee, pursuant to Part 40 of the Civil Procedure Rules 2000 ("CPR").

[9] On 2nd July, 2018 the defendant applied for an extension of time to file its affidavit evidence and time was extended to 31st July, 2018. As a result the time for filing the claimant's affidavit in reply was varied.

[10] On 27th July, 2018 the defendant applied for a further extension of time to file its affidavit evidence and time was extended to 31st August, 2018. Consequently time was again varied for the claimant's reply and the matter adjourned to 1st November, 2018 for consideration of the appointment of a referee.

[11] On 3rd October, 2018 the defendant filed the application for recusal and on 5th October, 2018 the claimant filed a Notice of Objection.

The Application

[12] In summary, the grounds of the application are that in refusing to set aside the default judgment against the defendant I made findings of fact in my decision of 7th March, 2018 on issues which are directly relevant to assessment of damages, without a trial. In the circumstances, the defendant fears that there is a real danger or possibility that I will not be able to consider the evidence presented on assessment of damages with a fair, open and impartial mind. In particular the defendant refers to my findings at paragraphs 32, 34, 40, 42, 43, 45, 54 of the decision and says that the case it intends to present at the hearing is diametrically opposed to these findings.

[13] The defendant further says that on appeal, the Court of Appeal although refusing the appeal, stated in its oral reasoning that they could not disturb the exercise of my discretion even if they did not agree with it.

[14] Given the nature of these findings the defendant says that I should recuse myself from the hearing because a fair-minded and informed observer, having all the facts, would conclude that there was a real possibility of apparent bias. The defendant further asserts that it is entitled to a hearing before a fair minded and impartial tribunal, and having made these findings at a preliminary stage of the claim and reached the conclusions that I did, there is a real likelihood of bias should I preside over the assessment of damages.

[15] The defendant also says that if there is any room for doubt as to whether I should hear the case, such doubt should be resolved in favour of recusal.

[16] The application is supported by an affidavit deposed by a director of the defendant, in which he repeats the grounds of the applications and makes some other assertions.

[17] He deposed that the defendant was instructed by its Legal Practitioners to request my recusal from these proceedings, as the defendant wishes to have a fair and impartial adjudicator that will approach the matter with an open mind, free from any possibility of bias.

The Defendant/ Applicant's Submissions

[18] In written skeleton arguments, Ms St Rose stated that the defendant first submitted a letter to the Registrar of the High Court dated 18th September, 2018 inviting me to recuse myself from the proceedings. The request was made further to the decision of the Court of the United Kingdom El Farargy v El Faragy et al[1] where the court at paragraph 32 of the decision urged that:

> *"[32] …….. first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal. Whilst judges must heed the exhortation in Locabail not to yield to a tenuous or frivolous objections, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in*

[1] [2007] EWCA Civ 1149

judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour."

[19] She stated that a judge may be recused from presiding over a case on the ground of apparent bias, if on examination of all the relevant circumstances the court concludes that a fair-minded and informed observer, having all the facts, would conclude that there was a real possibility that the judge would be biased. This test is established in Porter v Magill[2], and in Drury v British Broadcasting Corporation[3] it was said that if there is any room for doubt as to whether the Judge should hear a case, that doubt should be resolved in favour of recusal. Counsel expressed the view there is sufficient doubt which should be resolved in favour of the defendant.

[20] In oral submissions, Counsel reiterated that the application is not premised on actual bias but that there would be an appearance of bias in relation to the subsequent hearing because of my findings in the earlier decision. She did not agree that the assessment would involve a detailed accounting exercise, as stated by Counsel for the claimant and contends that the defendant's affidavit contains new and contested facts, with significant issues to be determined in relation to evidence pertaining to damages.

[21] She considered this application to be a sensitive one as the defendant is entitled to have an impartial hearing and must convince the Court of the risk of bias and that the disqualification test has been satisfied.

The Claimant/ Respondent's Submissions

[22] Mrs Nelson, in oral submissions, argued that the claimant views this application as a further abuse of the court processes by the defendant, to delay litigation.

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[2] [2002] 2 AC 357
[3] [2007] EWCA Civ 605

[23] She contends that on an application to set aside default judgment a court must apply the criterion set out in CPR13.3. One of the considerations is to assess the chances of success of a defence. In doing so a court must operate within the confines of the rules to arrive at a decision on all the evidence which is before it. In weighing these considerations questions were asked and clarification sought in relation to matters raised in the defence, to assist in assessing the chances of success. The Court was obligated to reach a decision only on the material before it and in doing so no personal preference or interest was shown to either party. No snide remarks or comments were made about any of the parties or the case for either party. She stated that justice was dispensed in a fair, reasoned and impartial manner and the present case is to be distinguished from the authorities relied on by the defendant, due to the notable absence of any similar conduct on the part of the Court, to warrant recusal.

[24] Mrs Nelson agreed that the test is as stated in Potter v Magill but questioned whether the defendant as a party with a personal interest in the claim could be equated to a fair minded and informed observer, in coming to conclusions about apparent bias. No evidence was adduced to show that the Court had failed to act within the considerations permitted by the rules of court and the law in arriving at the findings made. If the Court had overstepped its jurisdiction or made erroneous findings the Court of the Appeal had the opportunity to review the decision and would have intervened to set it aside. She stated that it was not correct to say that the appellate court did not agree with the decision, as the defendant has suggested. She submitted that the defendant is not without self-interest and would be apprehensive, sensitive and subjective in assessing these matters. The authorities clearly state the conclusion must be that of the fair minded and informed observer who is not unduly sensitive, is informed of all the relevant facts and is objective. Such observer would understand the Court's constraint in applying the relevant rules and would not come to the conclusion that by doing so, the Court would not be impartial in the subsequent proceedings.

[25] In concluding, Mrs Nelson stated that the paramount considerations when dealing with assessment of damages would be different to those on an application to set aside a default judgment. The latter would be concerned with issues of liability and whether the defendant

had a good chance of defeating the claim, as opposed to assessment of damages which would involve considering various heads of assessment, loss of business and the like, which is an exercise in accounting. She says that the issue of liability crystalized when default judgment was entered and it is not open to the defendant to raise these issues in the assessment proceeding. In considering the earlier application there could have been no pre-determination of the sort of issues which would arise on assessment of damages. She invited the Court to dismiss the application, as the defendant had not provided any plausible reason for recusal and suggested that the Court refrain from setting a precedent whereby a litigant who is unhappy with a reasoned decision which is not in its favour, may simply opt to go to another judge, under the guise of an application for recusal.

Issue 1 : What is the proper procedure for bringing the application?

[26] Ms St Rose relied on the postscript of Lord Justice Ward in El Faraghy v El Faraghy stated at paragraph 18 above, in support of the defendant's course of action in making the request for recusal in a letter to the Registrar of the High Court. This was not considered to be the proper method and the Registrar requested that a formal application be made.

[27] It is trite that in this jurisdiction an application for recusal is no different from any other interlocutory application governed by Part 11 of the CPR. Once filed, the application must take its ordinary course and be given a hearing date. It must be served on the opposite side, with liberty to respond and then the matter is determined. A dis-satisfied party is entitled to pursue an appeal to the appellate court.

[28] In El Faraghy a judge refused to recuse himself on the basis of apparent bias occasioned by a series of inappropriate comments and jokes which he made during the course of pre-trial review. These comments were described by the appellate court as "*singularly unsatisfactory, unfortunate and embarrassing*". In allowing the appeal, the court found that the jokes made by the judge would inevitably be perceived as racially offensive, mocking and disparaging of the appellant's nationality, ethnic origin and faith, such that to the fair minded and informed observer there was a real possibility that the judge would carry into his judgment the scorn and contempt that the words conveyed.

[29] It was in this context the court found that the judge had erred in refusing to recuse himself and the postscript was penned by Lord Justice Ward. The extent to which it has been adopted by English courts is unclear. Subsequent decisions from that jurisdiction indicate that recusal applications continue to be heard in the usual way, before the respective judge, with review by an appellate court, where a party is dissatisfied with the outcome.

[30] The postscript has certainly not been adopted in this jurisdiction and it is not the practice to initiate such applications by way of a letter. Barring any guidelines or practice direction from the designated authority, the court office is required to adhere to the CPR on matters of procedure. Moreover, it is only reasonable that a judge who is asked to be disqualified from hearing a matter ought to be given the opportunity to assess the basis of the application and apply the relevant law, in arriving at a position. If the judge errs in so doing, it is the prerogative of every applicant to seek redress from the appellate court. Such is the process by which litigants are protected from judicial error or misconduct, of the kind displayed in El Faraghy.

Issue 2: Has the test for recusal been satisfied?

The Applicable law

[31] In this jurisdiction the law is well established. The seminal case is Porter v Magill[4] which sets out an objective standard for disqualification. It is "*whether the fair minded and informed observer, having considered all the facts, would conclude that there was a real possibility or danger that a tribunal was biased."* Bias has been defined to include instances where a judge might unfairly regard with favour or disfavor the case of a party in a matter before the judge.[5] The law also recognizes that pre-determination of a case may arise when a judge reaches a final conclusion before he or she is in possession of all the relevant evidence and argument, and the test for disqualification is the same.[6]

[4] At para 102-103 of the judgment
[5] Fraser v The Judicial and Legal Services Commission, Civil Appeal No.3 OF 2005
[6] Vance Amory v Thomas Sharpe HCVAP 2009/013

[32] Legal authorities describe the fair minded and informed observer as one who is properly informed of all the relevant facts, is balanced and of fair mind, not overly or unduly sensitive or suspicious, is of a sensible and realistic disposition and exemplifies balance, intelligence and restraint[7]. Sometimes referred to as the hypothetical observer, he or she is the sort of person who will always reserve judgment on every point until he or she has seen or fully understands both sides of the argument. The test is concerned with the opinion of the fair minded observer and not necessarily the subjective fears of the litigant in question.[8] It has been said that there must be a measure of detachment in assessing whether there is a real possibility of bias, as the litigant involved in the case would be far from dispassionate and lacks the objectivity which is the hallmark of the fair-minded observer. The informed observer must also be treated as knowing all the relevant facts and circumstances and not only those that are publicly available.[9]

[33] Recusal for apparent bias is not discretionary, it is either that there is a real possibility of bias in which case the judge is disqualified, or there is not. The burden is on the party who makes the application.[10] Hariprahshad-Charles J in Andre Penn v DPP[11] considered some circumstances which may give rise to automatic recusal and stated:-

> "*Bias is presumed and gives rise to an automatic disqualification where: (1) a judge is shown to have a personal interest in the outcome of the case; (2) the interest of a spouse, partner or family member of the judge is so close and direct as to render the interest of that other person for all practical purposes indistinguishable from an interest of the judge; or (3) where the judge has an interest in the subject-matter arising from the judge's promotion of a particular cause"*

[34] Other authorities establish that a real danger of bias may arise if on any question or issue in proceedings, a judge has expressed views in the course of a hearing, in such extreme

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[7] Locabail (UK Limited v Bayfield Properties Limited [2000] 1 All ER 65; Vance Amory v Thomas Sharpe HCVAP 2009/013; Panday v Virgil TT2009 HC 260 at para 62;

[8] Kimyani v Sandhu [2017] EWHC 151 (Ch)

[9] Harb v HRH Prince Abdul Aziz bin Fahd bin Abdul Aziz [2017] EWHC 151 (Ch)

[10] Supra note 5

[11] BVIHCR2009/0031

and unbalanced terms, as to throw doubt on the ability to try the issue with an objective judicial mind. However it is accepted that there is nothing wrong in a judge giving some indication of his or her current thinking during the hearing of a matter. A judge may also alert counsel to the difficulties a litigant may face with respect to a matter or point in issue. The overarching principle is that a closed mind should not be shown and the law would not sanction conduct that may prematurely indicate a closed mind.[12]

[35] The application must have a solid foundation and must be scrutinized with appropriate care to ascertain all the circumstances which the applicant says has a bearing on the suggestion that a judge was or is likely to be biased. The authorities also say that although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[13] In that regard the words of Chadwick LJ in Dobbs v Triodos Bank NV[14] are instructive. He said:-

> ***"It is always tempting for a judge against whom criticisms are made to say*** *that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant -- whether it be a represented litigant or a litigant in person -- criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by*

[12] Benjamin Exeter v Winston Gaymes et al SVGHCVAP2016/0021; Wade v Week MNIHCV2017/0037

[13] Andre Penn v DPP; Fraser v The Judicial and Legal Service Commission

[14] [2005] EWCA 468 at para 7-8

criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised -- whether that criticism was justified or not." [Emphasis added]

[36] In Locabail (UK) Ltd. v Bayfield Properties Ltd[15] the court agreed with the posture of Callaway JA in Clenae Ply. Ltd. & Others v Australia and New Zealand Banking Group Ltd[16] that:-

"If objection is then made, it will be the duty of the judge to consider the objection and exercise his judgment upon it. He would be as wrong to yield to a tenuous or frivolous objection as he would to ignore an objection of substance."

[….]

***"As a** general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him by his head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.* [Emphasis added]

[37] Finally the law recognizes that a party may waive the right to allege bias if appropriate disclosure has been made by a judge and that party raises no objection to the judge hearing or continuing to hear a case. To be valid, the waiver must be clear and unequivocal, and made with full knowledge of all the facts relevant to the decision whether to waive or not. That party may not thereafter complain of the matter disclosed, as giving rise to a real danger of bias, as to do so would be unjust to the other party and undermine both the reality and the appearance of justice.[17] The law also recognizes that delay in making an application where a litigant has appeared on previous occasions, without giving notice of an intention to seek the judge's recusal, may be treated as a waiver of that right.[18]

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[15] Supra note 7

[16] [1999] VSCA 35

[17] Locabail (UK) Ltd v Bayfield Properties [2000] 1 All ER 65, para [15]); Horace Fraser v The Judicial and Legal Services Commission

[18] JSC BTA Bank v Ablyazov and others [2012] EWHC 3023 (Comm)

Discussion

[38] It is undisputed that no allegation of actual bias has been made. Any suggestion of error would have been dispelled by the Court of Appeal when the application for leave to appeal and stay of execution were refused. It is noteworthy that from my reading of the oral decision of the court as contained in the Digest of Decisions of 14th – 24th May, 2018 there was no finding in my decision which was considered erroneous or which offended the application of the law to the evidence, for the purposes of the default judgment application. It stands to reason therefore, that the defendant's complaints are essentially criticisms of my findings and the law clearly says that such criticisms do not amount to a good reason for recusal.

[39] The fair-minded observer who makes the relevant inquiries would know and understand that on the earlier application I was required under CPR13.3 to assess the evidence before me, to arrive at a conclusion on the chances of success of the defence put forward by the defendant. In so doing I would have been exercising a judicial function on the basis of established rules and authorities, relevant to the exercise of that function. The reasons for each finding were clearly stated in my decision and I reached these conclusions solely on the basis of the evidence presented by the parties for the purposes of that hearing. The authorities clearly state that findings against a party do not by themselves give rise to an appearance of bias[19]. That would not constitute a proper basis for the hypothetical observer to conclude that I would have a predisposition of bias towards the defendant in subsequent proceedings.

[40] The Privy Council's decision in Strachan v The Gleaner Co Ltd and another[20] is instructive on the approach to be taken, on an application for assessment of damages. There Lord Millet said:-

[19] Supra note 17 at para 35 & 54 of the judgment
[20] [2005] UKPC 33 at para 16

> ***"16.*** *In their Lordships' opinion……., once judgment has been given (whether after a contested hearing or in default) for damages to be assessed, the defendant cannot dispute liability at the assessment hearing: see Pugh v Cantor Fitzgerald International [2001] EWCA Civ 307; The Times, 30 March 2001 citing Lunnon v Singh (unreported) 1 July 1999; Court of Appeal (Civil Division) Transcript No 1415 of 1999. If he wishes to do so, he must appeal or apply to set aside the judgment; while it stands the issue of liability is res judicata. The second is that, whether the defendant appears at or plays any part in the hearing to assess damages, the assessment is not made by default; the claimant must prove his loss or damage by evidence. It is because the damages were at large and could not be awarded in default that the court directed that they be assessed at a further hearing at which the plaintiff could prove his loss. The third is that the claimant obtains his right to damages from the judgment on liability; thereafter it is only the amount of* ***such damages which remains to be determined."***

[41] Applying the above principles to the facts of the present case it would be correct to say that the matters which I considered in the earlier decision concerning the defendants prospect of success in defending the claim, would not arise again or be part of the considerations for assessing damages. I agree that CPR 12.3 (a)[21] entitles a defendant against whom default judgment has been entered, to be heard on assessment of damages. In George Blaize v Bernard La Mothe[22] the Court of Appeal underscored the pivotal role of cross examination to the judicial process and the fairness of proceedings. It is the mechanism by which the case of the other party can be effectively challenged and is important to the judicial process, in asserting the right of a party to explain and comment on all the evidence adduced or observations submitted, with a view to influencing the court's decision.

[21] As amended

[22] Grenada HCVAP 2012/004 delivered on 9th October, 2012, at para 14-15

[42] The fair-minded and informed observer would understand that at an assessment hearing a court is required to consider afresh all the evidence before it, under the scrutiny of cross examination, to arrive at a fair and impartial decision in accordance with established principles of law on damages. This informed observer would also know that judges by their very oath of office are required to administer justice without fear or favour and by their training are able to dis-abuse their minds of irrelevant pre-dispositions and would not conclude that there was any real possibility of apparent bias, because of the findings made for a different purpose, in an earlier decision.

[43] In EI Faraghy the court helpfully distilled these considerations by reference to dicta from earlier cases[23] which said:-

> *"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for*

[23] Millar v Dickson [2002] 1 W.L.R.1615; President of the Republic of South Africa v South African Rugby Football Union (1999) 4 S.A. 147, 177

apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."[24] [Emphasis added]

[44] It should be noted that the cases which were cited by the defendant concerned peculiar and incisive criticism of a party, by a judge. They stand in sharp contrast to the instant case where no such conduct is in issue and the Court has only undertaken a judicial function as required by the rules which governed the defendant's application to set aside the default judgment. A fair-minded observer would know that I was duty bound to undertake such assessment and in that regard the findings made could not be a basis for apparent bias. In JSC BTA Bank v Ablyazov it was said in similar circumstances that a fair-minded observer would know that judges are trained to have an open mind and do frequently change their minds during the course of any hearing. The business of the court would not be done if judges were to recuse ourselves for entering the court having formed a preliminary view of the prospects of success of a case.

[45] It is notable from the plethora of cases on this subject that the question of apparent bias is fact driven and will ultimately turn on the specific facts of each case. It is not demonstrated by the mere fact that a judge, earlier in the same case or a previous case, has commented adversely on a party or a witness, or found the evidence of a party or witness to be unreliable.[25] Generally where the objection is made on the basis of a previous adverse ruling without more, findings of pre-judgment or apparent bias will be rare and not considered as a good reason for recusal. I am not persuaded that a fair-minded observer having considered this information would conclude that I would not be able to have a fair, open and impartial mind in considering the evidence or submissions of Counsel, at the assessment hearing.

[46] In JSC BTA Bank v Ablyazov the objection taken was that it was inappropriate for a judge to hear a trial because he had heard and determined a committal application against the applicant and sentenced him to imprisonment. The applicant took the view that to

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[24] At para 24 of the judgment

[25] Otkritie International Investment Management Ltd and others v Urumov and others [2014] EWHC 1323 (Comm), at para 13 – 16.

conduct the trial in those circumstances would give rise to a risk of justice not being seen to be done and that a fair-minded and informed observer would conclude that there was a real possibility of bias in relation to the issues to be considered at the trial, having regard to the judge's previous involvement in the case. Similarly, in the present case the defendant's objection is based on findings made in relation to issues and material previously considered and on which this Court had expressed a view, for the purposes of an earlier application.

[47] Dismissing the application, Teare J at first instance held that the subjective fears of the complainer were not a necessary pre-requisite to a successful application to recuse. On hearing the application, the court would be concerned with considering whether counsel's submission that there is an appearance of bias is correct and not with counsel's belief that it is correct. He concluded on these facts, that the fair-minded observer would conclude there was no real possibility that the judge would be biased against the applicant, by reason of pre-judgment. He also concluded that delay in making an application might be regarded as waiving the right to apply for recusal, where an applicant had appeared whether in person or by counsel, on previous occasions, and gave no notice of an intention to seek the judge's recusal. Teare J also held that permitting an application to be made at this late stage would be unfair to the other parties and would undermine both the reality and the appearance of justice.

[48] On appeal, the appellate court considered two main questions;- (1) whether judges' interlocutory decisions would require them to recuse themselves from the rest of the proceedings on the ground of apparent bias; and (2) in what circumstances would litigants who have not expressly waived their right to object to a particular judge hearing their case nevertheless be held to have done so by conduct.

[49] Rix LJ delivering the court's decision agreed that there will be very few cases where interlocutory decisions by judges will give rise to an appearance of bias that would require them to recuse themselves from sitting on subsequent applications in the case or on the trial. He distinguished the instance where a judge has sat in a previous case concerning one of the parties, but added that even in such cases, the authorities confirm that the mere

fact that a judge has decided a case adversely to a party in the past or criticised the conduct of a party or his lawyers will rarely if ever be a ground for recusal.[26] He then stated:-

> *"……., it seems to me that, unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge* ***.....***
>
> *In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not "pre-judging" by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case* ***[...] He is judging the matter before him,*** *as he is required by his office to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. […] The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments"*[27]*.* [Emphasis added]

[50] The court then concluded that even though Teare J had, among other things, already found that the applicant and other witnesses for him had not been telling the truth and, on an application for contempt of court, had sentenced him to 22 months imprisonment, apparent bias did not arise on these facts. The court also held that the applicant had waived his right to object to the judge hearing the trial, having raised no objection to the judge determining three further interlocutory matters and a pre-trial review had come and gone before raising the objection. It was said that his conduct in continuing to participate in proceedings in this way, without objection, amounted to a clear and unequivocal waiver.

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[26] *Howell v Lees-Millais* [2007] EWCA Civ 720

[27]. At para 69-70 of the judgment

[51] I consider the above principles equally applicable to the present case, considering that the defendant represented by Counsel appeared before me on three consecutive occasions, (6th June, 18th July, and 10th August, 2018) and willfully engaged in case management directions to facilitate filing of affidavit evidence, two applications for extension of time to file such evidence and adjournments for consideration of the appointment of a referee. On these occasions Counsel gave no indication that the defendant feared that there was an appearance of bias. It can therefore be said that the defendant's conduct in continuing to participate in the proceedings, without objection, amounted to a clear and unequivocal waiver, as explained above, and on that basis alone I would be obligated to dismiss the application.

[52] In an article entitled: *When Should a Judge Recuse Himself* [28] the appellate decision in JSC BTA Bank v Ablyazov was analysed in relation to the commercial court practice of a single designated judge and the following was said:-

> *"The case could have had serious implications for the commercial court practice of having, where possible, a single designated judge deal with complex litigation from start to finish, including dealing with all the various interlocutory applications that may arise before trial in such cases. However, the Court of Appeal's decision leaves that practice intact.*
>
> *There are two practical lessons to be learned. First, an application for recusal will require evidence of inappropriate judicial conduct, not merely an adverse or even a seriously adverse judgment. If the application is to be based on a comment made by the judge during an interlocutory hearing, a very good note of proceedings will be required. Secondly, an application for recusal must be made promptly. In particular, the pre-trial review should be regarded as the last possible time at which an application could be raised unless, of course, the grounds for making the application only arise after that date.*

[28] LNB News 11/12/2012 62/UK Legal News Analysis – Published 11th December, 2012

……..the Court of Appeal evidently found it difficult to understand why the designated judge would be more likely to be affected by his own earlier judgments than any other judge picking up ***the case……."*** Emphasis added]

[53] In this jurisdiction the commercial court was introduced specifically to deal with such matters in a more efficient and expeditious manner. I do not agree that the circumstances are such that there are other judges readily available to attend to the case. It was filed in 2017 and transferred to this court because of its suitability for this court. In my view justice certainly cannot be done or be seen to be done by moving a claim around from judge to judge, on an unfounded allegation of apparent bias. While there may be circumstances in which a fair-minded observer might entertain a reasonable apprehension of bias by reason of pre-judgment if a judge subsequently hears a case, having expressed clear views about a question of fact which constitutes a live and significant issue in the subsequent case, the case at bar does not present this narrative.

[54] Applying the foregoing principles to the present case, I am fully persuaded that the allegations of pre-judgment or apparent bias are unfounded, and at its highest, this application is tenuous and frivolous. The defendant has not advanced any valid reason why I would approach the assessment proceedings with a disposition of partiality. There can be no doubt about what the proper course should be. A judge is only required to decline to adjudicate for proper and sufficient reason. A fair-minded and informed observer seized of all the relevant information and the facts of this case would not conclude that there was a real possibility of apparent bias by reason of my findings in the earlier decision. It is the law that I should resist the temptation to recuse myself from a case merely because an unfounded criticism has been made by a party to the proceedings. I accept also on the authorities that recusal should never be an indulgence to a litigant or an excuse for avoiding embarrassment.

Conclusion

[55] For these reasons, I will not recuse myself and I make the following orders:-

1. The application is refused and dismissed.

2. There is no order for costs.

3. The matter will be listed by the court office for further directions.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar