Neutral Citation Number: [2024] CA (Bda) 6 Civ

Civil Appeal No.s 39, 40, 41, 41A of 2022;

and No. 36 of 2023

IN THE COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION BEFORE THE HON. ASSISTANT JUSTICE SOUTHEY
CASE NUMBERS 2021: No. 29; 2022: Nos. 178 and 179

BETWEEN:

MYRON ADWIN PIPER

RAYMOND GERALD DAVIS

LEYONI JUNOS

ROBERT G. G. MOULDER

Appellants

-and-

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

THE PREMIER OF BERMUDA

Respondents

AND BETWEEN

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Appellant

-and-

MYRON ADWIN PIPER

RAYMOND GERALD DAVIS

LEYONI JUNOS

ROBERT G. G. MOULDER

Respondents

The Appellants/Respondents appeared as Litigants in Person

Mr Delroy Duncan KC and Mr Ryan Hawthorne, of Trott & Duncan Limited, for the Commission of Inquiry

Ms Lauren Sadler-Best of the Attorney General's Chambers, for the Premier of Bermuda

Hearing Dates: 15 – 17 November 2023

Ruling Date: 22 February 2024

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APPROVED RULING

CLARKE P

1. This ruling relates to five different appeals, namely:

   (i) Appeal No 36 of 2023 in which the appellant is Mr Robert Moulder;

   (ii) Appeal No 39 of 2022 in which the appellant is the Commission of Inquiry into Historic Losses of Land in Bermuda ("the Commission");

   (iii) Appeal No 40 of 2022 in which the appellant is Ms Leyoni Junos - who is a co-administrator of the Civil Justice Advocacy Group;

   (iv) Appeal No 41 of 2022 in which the appellant is Mr Myron Piper;

   (v) Appeal No 41A of 2022 in which the appellant is Mr Raymond Davis (otherwise known as Khalid A Wasi).

2. All these appeals relate to or arise from the work of the Commission. The Commission was appointed by the Premier under the Commissions of Inquiry Act 1935 ("the Act") on **31 October 2019**. Its terms of reference required it to do the following:

> "*1. Inquire into historic losses of citizens' property in Bermuda through theft of property, dispossession of property, adverse possession claims and/or such other unlawful or irregular means by which land was lost in Bermuda;*
>
> *2. Collect and collate any and all evidence and information available relating to the nature and extent of such historic losses of citizens' property;*
>
> *3. Prepare a list of all land to which such historic losses relate;*
>
> *4. Identify any persons, whether individuals or bodies corporate, responsible for such historic losses of citizens' property; and*
>
> *5. To refer, as appropriate, matters to the Director of Public Prosecutions for such further action as may be determined necessary by that Office."*

The Commission submitted its report to the Premier on **31 July 2021**. The report was submitted to the House of Assembly on **10 December 2021**.

3. On **15, 16** and **17 November 2023** we heard submissions from the parties as to (a) whether the court should not require payment from the appellants other than the Commission of the usual court fees; (b) whether any form of protective costs order should be made; and (c) what estimate should be made of the length of time needed for the hearing of the appeals and whether they should be heard together. A hearing was fixed, by my direction, to address those issues, following a hearing before the Registrar which was intended to settle the relevant Records, but which did not achieve that aim.

4. The hearing before us was unexpectedly long for a number of reasons including (i) the fact that, at the commencement of the hearing, we were invited by one or more of the individual appellants to recuse, or consider recusing, ourselves from hearing the appeals[1] on the grounds of apparent bias; and (ii) what appeared to us to be the need to consider (a) the status of some of the appeals, and, in particular, whether they required leave; and (b) the content thereof in order to determine whether any form of protective costs order should be made. We were not assisted by the fact that, although the appellants were ordered to file

[1] Mr Davis indicated to us that he left it to Justice Bell to decide whether he should recuse himself, rather than saying that he had to do so. Mr Piper said that Justice Bell should do so. Ms Junos said that Justices Bell & Kawaley should recuse themselves. Mr Moulder said that all members of the Court should do so.

submissions in relation to the points for determination by **7 November 2023**, none were filed by then (other than by the Commission).

Recusal

5. Having heard the submissions of the parties, we declined to recuse ourselves from hearing any of the appeals and said that we would give reasons later, as we now do. We declined recusal on the basis that there was no need for it on any of the grounds put forward. In those circumstances, we do not regard it as necessary to consider the question as to who had standing to make any recusal application and whether the formalities for making one had been observed[2].

6. The test for whether a judge should recuse him or herself is well established. It is whether a fair minded and fully informed observer would conclude, on the facts, that there existed a real possibility of bias*: Porter v Magill* [2002] UKHL 77; *Helow v SOS for the Home Department* [2008] UKHL 62.

Justice of Appeal Bell

7. In relation to Bell JA, Ms Junos referred to the fact that, when in private practice, Bell JA had in 1991 been the attorney for the Bank of Bermuda in its civil case against Arnold Todd. Mr Davis had submitted a case before the Commission, alleging that an investigation by the Bank of Bermuda into an alleged fraud ring involving former bank manager Arnold Todd had had the result that some 87 black businessmen, including himself, were adversely affected because mortgages or loans were suddenly called in resulting in a heavy loss of real estate. Mr Davis also submitted a witness statement by Mr Dilton Robinson as an example of such an affected businessman, other than himself, who had suffered loss of land due to what the businessmen concerned considered as unjust and discriminatory actions by the Bank of Bermuda. The Commission declined to investigate the claims of both Mr Davis and Mr Robinson on the grounds that their matters were commercial disputes which fell outside

[2] The only Notice of Motion filed was by Ms Junos in Appeal No 40. She purported to file the Notice on behalf of Mr Moulder (who is not a party to Appeal No 40) and for whom she would appear to have no standing to make an application in an appeal which was not his.

its terms of reference. Mr Robinson is not a party to any proceedings against the Commission; we were told that he could not participate because of illness.

8. I will leave it to Bell JA to address these matters. I would only add that it seemed, and seems, to me wholly unnecessary for him to recuse himself because, as appears from paragraphs 97 to 98 below, he had - more than 30 years ago - acted for the Bank in relation to legal (not banking) matters and had no knowledge of the Bank calling in mortgages in consequence of any work that he was doing; or because he had acted for LP Gutteridge Ltd, Mr Robinson's employer; in connection with the termination of his employment as a real estate agent.

9. Mr Piper objected to Bell JA sitting on the appeals because he was the trustee of Jai Pachai's family trust and Mr Pachai had acted for a client against Mr Piper in a case that he had brought with the other Trustees of the Kwaanza Trust; [2006] Bda L.R. 24. That does not seem to me a basis for recusal either.

10. Reliance was also placed by Mr Piper on the fact that, so he said, Bell JA had made a costs ruling in 2015 in relation to litigation involving Mr Piper in the Court of Appeal. In fact, as appears from a CourtSmart recording of the relevant hearing (on 18 March 2015) which the Court has located, the application for costs was made to the Full Court, presided over by Baker P, who gave the judgment of the Court leaving the order for costs at first instance unchanged and awarding Ms Wynn half her costs of the appeal proceedings. Even if Bell JA had delivered the ruling on costs that would have been no ground for recusal; *a fortiori* when he did not.

Justice of Appeal Kawaley

11. The objection to Kawaley JA advanced by Ms Junos was that he was a personal friend of Mr Dilton Robinson and that Ms Junos understood from Mr Robinson that Kawaley JA always avoids sitting on any matters involving Mr Robinson's case against the Bank.

12. I will leave it to Kawaley JA to deal with why he declined to recuse himself, a decision with which I agree.

13. On **12 March 2018** a Court of Appeal consisting of Baker, P, Bell JA, and myself refused an application by Mr Moulder for permission to appeal. I gave the ruling, with which the other members of the Court agreed. The facts of the case in which we did so - *Moulder v Cox Hallett & Wilkinson* 2018 CA (Bda) 10 Civ - were somewhat complicated. They are summarised in my ruling. The case concerned a garden and a right of way, which Mr Moulder claimed to be his, but which Mr Michael Cranfield had sold to Mr and Mrs Slaughter on the basis that Mr Cranfield had title to the land and the right of way by virtue of over 20 years of adverse possession.

14. The history of the litigation was as follows. On **26 November 2010** the former Chief Justice, Sir Richard Ground, had delivered judgment in Action No 53 of 2010, which was an action brought by Mr Moulder against five parties, namely (i) Cox Hallett & Wilkinson ("CHW"), (ii) a salaried partner of CHW, the attorneys for the Slaughters, (iii) Mr Cranfield and (iv) and (v) the Slaughters. Ground CJ struck out the claim on the seven grounds which I set out at [17] of my ruling. On **17 June 2011** the Court of Appeal dismissed the appeal to it for which Ground CJ had given leave. Both at first instance and on appeal the action was held to be time-barred.

15. On **4 January 2017** Mr Moulder applied by way of Originating Summons to set aside the judgment of Ground CJ of **26 November 2010** on the grounds that it had, he claimed, been obtained by fraud, which was said to be constituted by the failure to disclose the pleadings in an action commenced in 2009[3] by the Slaughters against Mr Cranfield alleging fraudulent concealment by Mr Cranfield of a letter which Mr Moulder had written on 23 July 1999 to Conyers Dill & Pearman, Mr Cranfield's then attorneys disputing Mr Cranfield's title to the land. On **27 July 2017** Chief Justice Kawaley declined to set the 2010 judgment aside: [2017] Bda LR 82. On **12 March 2018**, as I have said, permission to appeal was refused on the ground that Mr Moulder had no real prospect of persuading the Court of Appeal that Kawaley CJ should have set aside the 2010 Action for fraud.

[3] There are reference in the ruling to "the 1999 Action", which would appear to be a misprint for the 2009 Action: see paras 28 and 29.

16. The circumstances described in the previous paragraph are not such as would cause the fully informed and fair-minded observer to think that there was a real possibility of bias in relation to the present cases. Absent some special circumstances, the fact that a judge in Case Y has previously reached a decision in Case X which is adverse to a party in Case Y is not something that would cause a fully informed and fair minded observer to think that there was a reasonable possibility of bias, such that the judge should recuse himself in Case Y, even though the judge has commented adversely on a party or a witness (or a case) or found the evidence of a party or a witness to be unreliable.

17. That is particularly so in a case such as the present where Case Y falls to be determined over 5 years after Case X[4] and raises an entirely different set of issues to which the soundness or otherwise of Mr Moulder's earlier case is completely irrelevant.

18. The law is set out in my judgment in *R v Wallington* [2022] CA (Bda) Crim 3 at [33], which makes reference to the decision of Lord Bingham in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451. See, also Shaw *v Dr Jan Kovac* [2017] EWCA Civ 1028 in which Lord Justice Underhill said at [86]:

> "*One can understand in human terms that a litigant may not like the prospect of a case being heard by a judge in front of whom they have failed on a previous occasion. But the system could not operate if that were recognised as a sufficient reason for requiring recusal. It is necessary to be dispassionate. An impartial observer will generally have no difficulty in accepting that a professional judge will decide the case before him or her on its own merits and will be unaffected by how they may have decided different issues involving the same party or parties. There will of course sometimes be particular circumstances which justify a real doubt about the judge's impartiality, but nothing relied on by Mr Berkley in this case came even remotely close to doing so".*

To the same effect is Lord Lloyd Jones in *Stubbs v R* [2018] UKPC 30 at [16].

[4] Speaking for myself, I had no recollection of the case until it was drawn to my attention in these proceedings.

19. The proper application of these rules is of great importance both in general and, in particular, in a small jurisdiction such as Bermuda. Our judicial system would risk being emasculated if every time a judge has to sit in a case, he must recuse himself if he has previously sat in a case which involves one (or more) of the parties. At its worst, too ready an acceptance of claims for recusal will come close to a situation where the parties can select the judge who is to sit, simply by criticising all the other judges: see Chadwick LJ in *Triodos Bank NV v Dobbs* [2005[EWCA Civ 468 at [7].

The current proceedings

20. The procedural history of these cases is complicated. I shall endeavour to summarise the position as succinctly as possible by reference to the different appeals. For reasons which will become apparent it is convenient to start with Appeals 39 (the Commission), 41 (Mr Piper), and 41 A (Mr Davis).

Appeals 39, 41 and 41 A

21. On **3 March 2022**, in Case No 29 of 2021 in the Supreme Court, Southey AJ ("the judge") granted Mr Davis and Mr Piper leave to issue judicial review proceedings (the form for which was filed on **27 January 2021**) against the Premier and the Commission on the first three out of four grounds. He refused to grant injunctive relief or to make a protective costs order. The order and the written reasons do not appear to have been served on Mr Davis until **16 March 2022**.

22. Ground 1 was, in summary, that the Commission was *ultra vires* Section 1 (2) of the Act, which requires the Commission to "*specify the subject of inquiry*" because the wording of the Terms of Reference was too broad and unspecific (e.g. by the undefined use of the word "*historic*", and the lack of specificity in relation to other terms e.g. "*other unlawful or irregular means*"), with the result that the Commission was said, in effect to be exercising an absolute discretion with regard to the Terms of Reference and what came within them. Alternatively, the Commission acted *ultra vires* section 6 of the Act because, if the Premier intended the Terms of Reference to be broad, the Commissioners were unlawfully restricting the remit by excluding certain individuals and/or corporate bodies from exposure and examination.

23. Ground 2 was that the Premier had acted unreasonably and irrationally in not giving more detail and specificity as to the parameters (timeframe) and persons covered by the Terms of Reference, to avoid the confusion that was said to have followed the Commission's erratic and unreasonable decisions.

24. Ground 3 was that "*to the extent that the terms of reference are lawful, the Commission of Inquiry failed to apply their true breadth*".

25. Ground 4 concerned the alleged conflict of interest of the members of the Commission.

26. On **28 March 2022** Mr Davis and Mr Piper (the appellants) filed in the Supreme Court a Notice of Appeal (entitled in the Court of Appeal) from the order of 3 March 2022, insofar as (a) it refused leave under ground 4 and to allow the appellants to provide evidence in relation thereto; and (b) declined to make a protective costs order. This filing was defective. The appellants needed leave to appeal, to apply, in the first instance, to the Supreme Court, for such leave, and to do so within 14 days of the decision of the Supreme Court: *Court of Appeal Act 1964* section 12 (2) (a), Order 2.3 (1) (a); Order 2.36. On **23 May 2022**, the judge made a number of case management directions in relation to the Davis/Piper judicial review applications. On **6 June 2022**, he rejected applications by these appellants for further disclosure and/or oral evidence.

27. By a Notice of Motion dated **21 June 2022**, filed in the Supreme Court (although headed in the Court of Appeal) on **30 June 2022**, the appellants sought leave to appeal the decision of 6 June 2022. On the same day, the appellants filed in the Supreme Court an application (dated **28 June 2022**) for leave to appeal the ruling of 3 March 2022 out of time. Both those applications were due to be heard **on 5 July 2022**, for which date a case management hearing had been fixed, but, in the event, they were not. In his judgment of **5 August 2022** at [62], the judge said that no party alerted the Court to these matters. Mr Davis told us that at the end of the substantive hearing he was told by the judge that there were no further matters before the Court on that day.

28. On **1** and **5 July 2022** the judge heard and rejected applications from all four of Mr Davis, Mr Piper, Mr Moulder, and Ms Junos to adjourn the Davis/Piper judicial review application until he had determined whether to accede to the applications (filed on **13 June 2022**) by

Mr Moulder and Ms Junos for leave to apply for judicial review in respect of their cases. The basis of the application for an adjournment was so that all the judicial review applications could be heard together.

29. Between **11** and **13 July 2022**, the judge heard the Davis/Piper judicial review applications on the grounds for which he had granted leave. On **11 July 2022**, the application for leave to appeal the decision of 6 June 2022 was heard, and then or thereafter leave was refused: see paragraph 62 of the judgment of 5 August 2022. The application for leave to appeal the **3 March 2022** ruling was not heard. No one raised with the judge that that application was extant and needed to be addressed.

30. On **5 August 2022**, the judge gave judgment in respect of the judicial review application. The parties will of course be fully aware of its content. In it the judge observed that the issues raised by this application for judicial review were "*technical and complex"*. Mr Davis' basic complaint was that the Commission had wrongly held that his two claims did not fall within its terms of reference but were commercial disputes, which were best handled in the courts.

31. In essence, the judge decided that the word *"irregular*" in the wording of the Commission should be given a technical meaning so as to mean cases where there was a power imbalance in the past that had caused a loss of land. He held that there was no implied power in the Commission to exclude cases that would otherwise come within paragraph 1 of the Terms of Reference on some basis such as a finding that any irregularity was not significant: see paragraph [118] (i). He also held [120] that the Commission had erred insofar as:

    (i) it concluded that it had an implied power to determine which cases it would consider, although that would not be material if the Commission in fact considered all claims that it was required to consider; and

    (ii) it focused on whether cases demonstrated a "*systemic failure*", which approach was used to rule out one-off cases; and

    (iii) it concluded that Mr Davis' cases were outside the scope of the reference on the basis that they amounted to a "*commercial dispute*".

32. The misdirection, the judge held, applied in Mr Davis' cases[5] because the Commission's findings that his claims were not systemic and were historic influenced the decision that his case was outside scope [123]. The judge felt unable to conclude that the outcome would inevitably have been the same had there been no error of law. But those misdirections were immaterial in the case of Mr Piper. The Commission was willing to consider his case and the dispute that followed was about procedure [126]. It is not clear to me whether or not that is so.

33. The judge expressed the hope that the parties would agree an order that specified the relief to be granted Mr Davis; but said that, if necessary, he would hear argument on the form of relief.

34. On **22 August 2022** Mr Davis filed a document, dated **18 August 2022**, in which he is described as an applicant and Justice Southey as the respondent, relating to the judgment of 5 August 2022, in which, in summary, he contended that it was an error to think that only he was affected by the Commission's misdirection and identified three other persons, one of whom was Mr Piper who, he said, were also affected. If that can be treated as a Notice of Appeal, it was in time. This appeal has been given the number 41 A.

35. This document is, itself, discursive and, in part, difficult to follow.

36. On **14 September 2022** the Commission filed with the Court of Appeal a Notice of Appeal against the whole of the judgment of 5 August 2022. The grounds of its appeal are that the judge erred:

    (i) by finding that the Commission had misdirected itself when it decided that Mr Davis' claims were outside the Terms of Reference because they were commercial disputes;

    (ii) by interpreting the word "*irregular*" in the Terms of Reference to mean a power imbalance rather than particular mechanism used to deprive people of property;

[5] His first claim related to what he said were irregular lending practices in a General Improvement Area (GIA) combined with retaliation based on his political affiliation by officers of the Bermuda Housing Corporation. This caused him to have to sell his properties and suffer a financial loss. The second claim related to the denial by the banks of credit to 87 black businessmen to which I refer in [7] above.

(iii) by finding that there was no discretion or implied power on the part of the Commission in relation to whether or not cases involved land loss that was irregular;

(iv) by determining that the Commission misdirected itself when it applied the notion of "*systemic*" to its consideration of Mr Davis' claims;

(v) by hearing the case and delivering the judgment in circumstances where there was apparent bias.

37. On **15 September 2022** Mr Davis filed with the Court of Appeal an application to extend the 6 week period for appealing from the decision of 5 August 2022 on the grounds that he had been hospitalized since July 26 2022 with an expected release date of 6 October 2022. This application has never been addressed.

38. On **16 September 2022** the time for appealing from the judgment of 5 August 2022 expired.

39. On **20 September 2022** Mr Piper filed with the Court of Appeal a Notice of Appeal (Appeal No 41 of 2022) from the judgment of 5 August on the grounds that the judge:

(a) did not allow the applicants to provide evidence on conflicts of interest in respect of members of the Commission;

(b) did not allow the applicants the opportunity to present evidence at the hearing in July 2022;

(c) failed to make any form of protective costs order;

(d) held that any misdirection was immaterial in the case of Mr Piper.

The relief sought was (i) a declaration that the Commission was *ultra vires* Section 1 (1) or Section 6 of the Act and (ii) to be granted the right to proceed on the issue of conflicts of interest and the right to provide further evidence; and (iii) a protective costs order. This Notice was filed out of time and no leave to do so has ever been sought.

40. In **October 2022** the judge gave a judgment following a hearing on 2**1 October 2022** in relation to matters consequential to his judgment of 5 August 2022. The judgment is dated

22 October 2022 on the first page and **24 October 2022** on the signature page. The Registrar has informed us that a final draft was distributed on **27 October 2022.** He decided to make the following declaration:

> *"The Commission of Inquiry into Historic Losses of Land in Bermuda unlawfully excluded Mr Davis' Bermuda Housing and Bank of Bermuda claims from the Terms of Reference in the Official Gazette date 1 November 2019 by requiring the loss of land to be the result of some "systemic " issue and by excluding them as being "commercial disputes".*

41. He also determined that there was no basis for making any damages award. As to costs, he ordered that the Commission should pay the costs of the Premier resulting from his defence of the judicial review, to be taxed on the standard basis, but otherwise made no order as to costs in relation to Mr Davis. In relation to Mr Piper, he ordered that Mr Piper should pay the additional costs caused by his participation.

42. On **7 December 2022** Mr Davis filed with the Registry of the Court of Appeal a notice of partial appeal against the decision of **October 2022**, which had been distributed on 26 October 2022. The notice contends, *inter alia*, that:

(a) the Commission should have considered his Case No 51 as well as No 39;
(b) the appointment of the Commission by the Premier should be regarded as *ultra vires*:
(c) he should have been awarded costs and damages.

That, at any rate, is what I understand Mr Davis to be saying. The notice is, however, lengthy, discursive (and therefore not always easy to follow) and does not conclude by specifying with clarity the relief sought. This appeal has not been given a separate case number.

Appeal No 40

Ms Junos

43. On **5 August 2022** the judge also handed down judgment in Case No 179 of 2022 in relation to Ms Junos' application for leave to apply for judicial review of the report of the Commission, which was said by her to be *ultra vires*. In his judgment, the judge observed [5] that the grounds of her application were not adequately particularised and that he had struggled to clarify the grounds by reference to the evidence filed. He concluded that the application was out of time because it was not brought promptly, having been lodged at the very end of the six-month period; and that he should decline to extend time. He held that Ms Junos lacked standing to bring many of the challenges that she sought to bring.

44. The judge identified three matters, which appeared to him to be issues where Ms Junos had standing. The first was the suggestion that the Commission had acted unlawfully when providing for Mr Perinchief to fulfil the function of Chairman when the Chairman was unavailable. The judge held this ground to be unarguable [36]. The second was the suggestion, which the judge held to be unfounded [39], that the Commission had acted unlawfully by including a passage in its report which could be taken as critical of Ms Junos. The third matter was that the Commission had wrongly approached its terms of reference. The judge observed that he had dealt with the third matter in his judgment in the Davis/Piper case and the Ms Junos' application added nothing; and said that his finding in the Davis/Piper case implied that she had no standing to challenge a misdirection in a particular case. In the light of his conclusions, he refused to grant Ms Junos leave to apply for judicial review.

45. On **16 September 2022**, Ms Junos filed with the Court of Appeal a notice of appeal from the judgments of 5 August 2022. In that notice she expressed dissatisfaction with the decisions of that date in Case 29 of 2021 (Davis/Piper) and Case 179 of 2022 (Junos); contended that the appointment of the Commission was *ultra vires* section 1 (1) of the Act; and said that, in relation to the Davis/Piper judgment the judge had erred in law when failing to find that the appointment of the Commission was *ultra vires* section 1 (1) of the Act, and that the Commission had misdirected itself in relation to the interpretation of the Terms of Reference and erred in finding that any misdirection with regard to the Terms of Reference applied to Mr Davis alone.

Appeal No 36

Mr Moulder

46. The third judgment given by the judge on **5 August 2022**, in Case 2022/178, addressed the application by Mr Moulder for leave to apply for judicial review, the proceedings seeking that relief having been issued on **13 June 2022**. This judgment followed a hearing on **15 July 2022**. Mr Moulder's complaint was that he had been dispossessed of a plot of land by a false adverse possession claim. The land was later returned to him following an order of this Court. Subsequent proceedings claiming damages were ultimately dismissed by this Court. In the light of those proceedings, the Commission made no recommendations in his case. In his Form 86 A Mr Moulder stated that the decisions in relation to which he sought relief were (a) the final decision of the Commission, published on 11 December 2021, to make no recommendations in respect of him; and (b) the decisions of the Commission to suppress from public view details of his claim.

47. The judge indicated at the leave hearing on **15 July 2022** that the grounds were insufficiently particularised. But, by reference to the affidavit evidence, the judge discerned three grounds of challenge viz:

(i) the Commission erred by failing to hold his case in public (it held *in camera* hearings on 26 January, 4 February and 23 March 2021) and in failing to disclose the Commission's records regarding his case;

(ii) the Commission's reasons for making no recommendation in his case were flawed, in particular because there was no basis for refusing to consider (i) matters that followed the order of this Court returning Mr Moulder's land and (ii) criminality;

(iii) the work of the Commission was undermined by bias.

48. In his judgment of 5 August 2022, the judge said that he regarded the first two of those issues as suitable for the grant of leave but adjourned the case for a rolled up hearing in order to address the question as to whether relief should be refused on the ground of delay or the existence of an alternative remedy. He refused leave in relation to other grounds.

49. On **10 October 2022** Mr Moulder filed an originating summons seeking (i) a stay of his matter until an appeal in the linked matters had been determined and (ii) disclosure of certain transcripts, videos and minutes of meeting.

50. The rolled-up hearing was originally scheduled for **17 October 2022** but did not take place then because the judge did not think that he was in a position to determine whether Mr Moulder was correct to argue that there was good reason for a stay. In a judgment dated **21 October 2022** the judge determined that there was no good reason to grant a stay or order the disclosure requested. He also awarded indemnity costs against the applicant on the grounds summarised at [24] of the 31 May 2023 Ruling on account of a number of failures by Mr Moulder to comply with orders of the Court. The judge also issued directions intended to facilitate the hearing of the matter on 28 and 29 March 2023.

51. In a judgment delivered orally on **13 February 2023**, and amplified in writing on **8 March 2023,** the judge concluded that Mr Moulder had again failed to comply with directions from the Court and prohibited him from filing any further pleadings in relation to the substantive hearing listed for 28-29 March 2023 and from participating in that hearing.

52. The rolled-up hearing took place on **28** & **29 March 2023** and was followed by a judgment dated **31 May 2023**. In that judgment the judge decided that the application for judicial review was, in respect of ground 1, *so far as that ground related to a failure to consider disclosure of the details of Mr Moulder's claim*, either in time or time should be extended; and that, in relation to ground 2, the application was out of time and he would not extend it: see para [45]. In relation to ground 1, he was willing to declare that the Commission erred in its approach to the continuing confidentiality of the records of the hearings at which the applicant gave evidence.

53. On **19 July 2023** Mr Moulder filed with the Court of Appeal a Notice of Appeal which seeks the following relief (i) that he should be granted full leave to apply for judicial review; (ii) that any orders penalising him with indemnity or general costs should be vacated; and (iii) that this Court should consider a waiver of any fees and/or security for costs for the forwarding of the appeal and make a no costs order for potential costs against the appellant.

Discussion

54. The question whether or not the Commission acted beyond its powers, and, in particular whether it, or what it did, was *ultra vires* Section 1 or Section 6 of the Act is a matter of considerable public importance. The Commission was established by order of the Premier, acting under the Act, and following debate in the House of Assembly. It was designed to address matters of considerable concern both to the House of Assembly and the wider public, and on the basis that an inquiry would be for the public welfare. The parties to this litigation have advanced a range of contentions on the subject. The Commission contends that the judge was wrong to find that any part of what the Commission did was *ultra vires*. The judge has held that part of it was, and the appellants contend that the Commissioners acted *ultra vires* in another respect.

Technicalities

55. It is necessary to consider whether or not the appeals before us were filed in time and with the requisite leave (if needed) and whether Ms Junos has any standing to bring her application for judicial review.

56. The Commission's appeal was filed in time and will be heard in due course. In relation to the other appeals, the position appears to me to be as follows:

(i) if, but only if, the document dated **18 August 2022** is to be treated as a notice of appeal, the **Davis** appeal from the judgment of 5 August 2022 was in time; the appeal of 7 December 2022 from the judgment of October 2022 was within time, assuming that its date is taken as 27 October 2022 as I would do;

(ii) the **Piper** appeal filed on 20 September 2022 is four days out of time;

(iv) the **Junos** appeal filed on 16 September 2022 needs, but does not have, the necessary leave from the Supreme Court;

(v) the **Moulder** appeal filed on 19 July 2023 also needs, but does not have, the necessary leave.

57. In the unusual circumstances of this case, in particular the fact that the Court will be considering the Commission's appeal and Mr Davis' appeal from the judgment of 22 October 2022 in any event, it seems to me undesirable, if it can be avoided, both to decline to treat Mr Davis' document of 18 August 2022 as a Notice of Appeal and to require Mr Davis to apply to the Supreme Court for an extension of time; and to require Mr Piper to make a similar application. I am not minded to treat that document as a Notice of Appeal (and neither did Mr Davis – hence his application for an extension of time of 15 September 2022). What I propose is that we should exercise our discretion under Rule 1.5 of the Rules of the Court of Appeal and order as follows:

    (a) **Mr Davis** shall have leave to file within 28 days a Notice of Appeal from the judgment of the Supreme Court of 5 August 2022 in Case No 29 of 2021;

    (b) **Mr Piper** shall have an enlargement of time until 20 September 2022 for the filing of his Notice of Appeal (already filed) from the same judgment insofar as that Notice seeks the relief sought in paragraph 4 (1) – namely that the Commission was or acted *ultra vires*, but not otherwise.

58. The Notice of Appeal from the judgment of 5 August 2022 by Mr Davis needs to be in proper form; to state clearly the matters set out in Order 2 Rule 2 (2) which include the following requirements namely:

    (a) set forth the grounds of appeal;

    (b) state whether the whole or part only of the decision if the Supreme Court is complained of (in the latter case specifying such part);

    (c) state the exact nature of the relief sought and to comply with the other requirements of Order 2. The Court reserves the right to disallow or strike out any Notice of Appeal or part thereof which does not comply with these provisions. I should also make clear that the Notice of Appeal should address only those matters for which leave to apply for judicial review was granted by the judge.

59. In relation to **Ms Junos** a question arises as to whether her appeal was one for which leave was required - on the basis that the decision of 5 August 2022 in her case (Case No 179 of 2022) was interlocutory. She contends that it was not.

60. Whether a judgment or order is final or interlocutory has been described as "*a notoriously difficult question*". In my judgment we should, in a case such as this, apply what has been described as *"the application approach*" - applied by this Court in *Consolidated Contractors International Company SAL v Masri* [2009] CA (Bda) 11 Civ and earlier cases - which asks whether the judgment or order, whatever the outcome of the application on which it is made, is finally determinative of the entire cause or matter[6]. The application for leave, which the judge declined to grant, was not an application which, whatever its outcome, would have been finally determinative of the claim for judicial review.

61. Ms Junos relied on certain English cases – in particular *Dale v British Coal Corporation (No 1)* [1992] 1 WLR 964 and *White v Brunton* [1984] QB 570. In the latter case, a judgment upon a trial of a preliminary issue on limitation was held to be a final judgment for the purpose of determining whether leave to appeal was requited on the ground that it could be treated as the first part of a final hearing. The reason given by Sir John Donaldson MR for that conclusion was as follows:

> "*It is plainly in the interests of the more efficient administration of justice that there should be split trials in appropriate cases, as even where the decision on the first part of a split trial is such that there will have to be a second part, it may be desirable that the decision shall be appealed before incurring the possibly unnecessary expense of the second part. If we were to hold that the division of a final hearing into parts deprived the parties of an unfettered right of appeal, we should be placing an indirect fetter upon the ability of the court to order split trials."*

62. That line of reasoning was followed by Bingham LJ (as he then was) in *Holmes v Bangladeshi Biman* [1988] 2 Lloyd's Rep 120 where he said:

[6] See *Salaman v Warner* [1891] 1 QB 734 where the English Court of Appeal first formulated the application approach.

"Order 33, rule 3 gives the Court a wide discretion to order the separate trial of different issues in appropriate cases and a decision is not to be regarded as interlocutory simply because it will not be finally determinative of the action whichever way it goes. Instead, a broad common sense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airlines' favour, have ended the action".

63. The position was expressed thus by Lord Millett in *Hip Hing Timber Co Ltd v Tang Man Kit & Another* [2004] 7 HKCFAR 52:

"*37 In the exercise of its civil jurisdiction the Court of Appeal must consist of an uneven number of judges not less than three save in the circumstances specified in s.34B(4) of the High Court Ordinance. The only circumstance which was arguably present is that specified in s.34B (4) (a), which provides that a Court consisting of two Justices of Appeal shall be duly constituted to hear and determine an appeal against an interlocutory order or judgment. Accordingly, the validity of the order of the Court of Appeal depends on whether Yuen J's order was an interlocutory or final order.*

38 This is a notoriously difficult question and an unsatisfactory basis upon which to found the jurisdiction of an appellate court. For present purposes, however, it is sufficient to say that an order is a final order if, whatever the outcome of the application on which it is made, it is finally determinative of the entire cause or matter. An order is also regarded as a final order if, although not finally determinative of the entire cause or matter, it is finally determinative of a crucial or substantial issue in the cause or matter: see Shell Hong Kong Ltd v. Yeung Wai Man Kiu Yip Co. Ltd (2003) 6 HKCFAR 222 and the cases there cited."

64. I do not regard the *White v Brunton* line of authority as applicable to present circumstances. The decision whether or not to extend time and grant leave to apply for judicial review was not an issue that would ever have formed a substantive part of the final trial of the judicial review application. Nor would it be finally determinative of a crucial or substantial issue in

the cause. It was a preliminary decision as to whether the application for judicial review should be entertained at all, which, if decided in the applicant's favour would have led to a final hearing and determination of the application for judicial review, pursuant to leave given for that purpose.

65. Accordingly, Ms Junos, having failed to obtain leave to bring judicial review, required leave to appeal that decision, and needed to apply to the Registrar of the Supreme Court for such leave within 14 days of the decision of 5 August 2022: *Court of Appeal Act 1964* 12 (2); Order 2/3 (1) (a); 2.36. She did not do so.

66. That notwithstanding, I would give Ms Junos leave to appeal the decision of 5 August 2022 in Case No 179 of 2022, but only in respect of her application for leave to seek judicial review on the grounds that the appointment of the Commission was *ultra vires* section 1 or that the Commission acted *ultra vires* section 6 of the Act. I would do so because it seems to me that Ms Junos, being a representative of the body which the Premier cited in the House of Assembly as a body whose call was being answered when the Commission was established, has standing as an appropriate public interest litigant to bring a judicial review on the points which appear to me to merit her having leave to appeal; and that it would be helpful to the Court if she were to do so.

67. But it seems to me that Ms Junos has no right or entitlement to appeal the Davis/Piper cases to which she was not a party. The fact that the two cases overlap to some extent and that the judge said that the judgment in 179/2022 should be read with that in 29/2021 because the judgment in 29/2021 *"sets some of the factual background*" does not change the position.

68. I raised the question at the hearing before us as to whether, if this Court allowed Ms Junos' appeal against the refusal of leave to apply for judicial review it could then, itself, determine whether judicial review should be granted or whether the matter would have to be remitted to the Supreme Court. As to that, it seems to me that, if this Court grants leave to Ms Junos (or Mr Moulder) it would be open to it either to determine the application for which it had given leave or to remit it to the Supreme Court for that purpose. I note that in *R v Doland & Ors* [2020] EWCA Civ 1605, to which Ms Junos directed our attention, the Court of Appeal in England gave permission to appeal the refusal of leave and granted leave on what it described as the "*vires issue*", determined the judicial review application, and dismissed it.

Further, in the recent case of *Junos v The Governor of Bermuda*, [2024] CA (Bda) 4 Civ, this Court contemplated that it might both grant leave to apply for judicial review and, if it did so, determine the review.

69. As to **Mr Moulder**, insofar as the Notice of Appeal complained that the judge had not granted leave to challenge the failure of the Commission to hear his case in public it was out of time. The same i to the judge's decision not to grant leave in respect of the bias complaints made against the Commission. And it applies *a fortiori* to the claim to vacate the orders made for costs. The relevant order seems to be the one made on 21 October 2022 (but there may also have been an order as to costs in March 2023). No leave to appeal has ever been sought in relation to these costs orders and any appeal against these orders would be out of time even if the orders were not interlocutory and the six-week time limit applied. In those circumstances, it is, in my view, inappropriate for us to make any order in relation to the costs orders.

70. I would, however, give Mr Moulder leave to appeal the decision of 31 May 2023 in Case No 178 of 2022, but only in respect of his application for leave to seek judicial review on the grounds that the Commission's reasons for making no recommendation in his case were flawed because there was no basis for refusing to consider (i) matters that followed the order of this Court returning Mr Moulder's land and (ii) criminality and, thus, making no recommendation in his case; and not insofar as he seeks to challenge the decision of the Commission to hear his evidence *in camera* or the vacation of all orders of the judge "*penalizing [Mr Moulder] with indemnity costs or general costs'*. The effect of this limited leave will be that there will remain no extant appeal in relation to the challenge to the decision taken by the Commission to hear his case *in camera* or in relation to the costs orders made against him. But there will be an appeal in relation to the second ground which the judge identified as meriting consideration, and which was a ground which he found arguable and the strongest factor against refusing leave on the ground of delay: see his judgment at 52 (d).

71. The next question is whether we should, as the individual appellants request, waive the requirement to provide security for costs and the obligation to make payment of Court Fees and whether we should make a Protective Costs Order.

Security for costs and Court Fees

72. Ms Junos in her submissions pointed out that the Commission has retained a top-notch law firm to appeal the judge's judgment. The Attorney General, appearing on behalf of the Premier, is exempt from paying court fees. It is not, she submits, right, and is inconsistent with the overriding objective to require self-represented litigants, the majority of whom are senior citizens and not independently wealthy, to be burdened with court fees and the provision of security for costs in order to progress their appeals.

73. Security for the "*estimated expense of making up and forwarding the record of appeal calculated at the full cost of one copy for the appellant and one-fifth cost for each of the five copies for use by the Court*", and for the "*due prosecution of the appeal and for the payment of any costs which may be ordered to be paid by the appellant*" are *prima facie* requited by Order 2 Rules 9 and 10.

74. The fees in question are the fees prescribed in the Third Schedule: Order 2 Rule 32. These fees include a fee for filing the Notice of Appeal and for settling the record. The Court of Appeal has power to dispense with the payment of those fees "*on account of the poverty of any party or for other sufficient reason"*: Order 2 Rule 32 (3).

Appeals in forma pauperis

75. Order 2 Rule 33 provides that a party may apply to the Court for leave to prosecute or defend an appeal as a poor person for which purpose he must satisfy the Court that he has a reasonable probability of success. Such an application is to be made by notice of motion supported by an affidavit. If he is permitted so to proceed, he shall not be liable to pay any of the Court fees prescribed by the Rules and shall not be required to make the deposit or give the security provide for by Rules 9 and 10.

76. In its written submission of 14 November 2023, the Commission submitted that the appellants' application for a waiver of fees should be refused for the following reasons:

(i) no formal application (and no evidence) has been filed by any of these appellants to appeal these matters *in forma pauperis*, despite communication between the Clerk to the Court of Appeal and Mr Piper and Ms Junos as to what was required to make such an application;

(ii) no written submissions had been filed on the question of security or a PCO to which the Commission could respond, despite directions from the Assistant Registrar and the Registrar, which had not been complied with;

(iii) the mere fact that the litigants were litigants in person should be disregarded.

Protective Costs Order ("PCO")

77. Mr Davis' and Mr Piper's applications for a PCO at first instance were refused by the judge on 3 March 2022. In Ms Junos' case her application for a PCO was not considered because leave to apply for judicial review was refused. In Mr Moulder's case the judge considered whether to make a PCO in his judgment of 5 August 2022. In it he said the following:

> *"45 The approach to an application for a protective costs order was considered by Hellman J in Human Rights Commission v Attorney General [2018] SC (Bda)14 Civ as follows:*
>
> > *"3. The principles governing the making of a protective costs order were stated and discussed in the context of the English Civil Procedure Rules by Lord Phillips MR (as he then was), giving the judgment of the Court of Appeal of England and Wales in R (Corner House) v Trade and Industry Secretary [2005] 1 WLR 2600 at paras 72 – 80. They were applied in a Bermudian context by Kawaley CJ in Bermuda Environmental Sustainability Taskforce v Minister of Home Affairs (Protective Costs) [2014] Bda LR 68 SC at paras 5 – 9. The principles must be applied flexibly: see Morgan and Baker v Hinton Organics (Wessex) Ltd [2009] CP Rep 26 per Carnwath LJ (as he then was), giving the judgment of the Court of Appeal of England and Wales, at para 40 and the Bermuda Environmental Sustainability Taskforce case per Kawaley CJ at paras 8*

– 9. The jurisdiction should be exercised only in the most exceptional circumstances. See Corner House per Lord Phillips MR at para 72.

4. *As stated by Lord Phillips MR in Corner House at para 74:*

> *"(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*
>
> *(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO. (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."*

5. *The Court must be satisfied that the applicant has a real (as opposed to fanciful) prospect of success, ie that its case is properly arguable. See Corner House per Lord Phillips MR at para 73. When assessing that prospect in the present case, the Court must bear in mind the test for granting a declaratory judgment. As stated by Lord Dunedin in Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438 HL at 448:*

> *"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."*

6. *This formulation, although not adopted by the other members of the House in that case, has stood the test of time, being cited with approval in, for*

example, the legal textbook Wade and Forsyth on Administrative Law, 11th edition, and the recent case of R (on the application of The Freedom and Justice Party) v Secretary of State [2016] EWHC 2010 (Admin).”

46. Applying the approach described above, it appears to me that I should not make a protective costs order:

a. The making of a protective costs order is exceptional.

b. Mr Moulder plainly has an interest in the outcome of these proceedings. While that is not necessarily determinative, a matter weighs against the making of a protective costs order.

c Further, although the Commission of Inquiry is plainly a matter of public importance, the outcome of the specific investigation into Mr Moulder’s case is of greater importance to him than it is to the public.

d. I have no reason to believe that these proceedings will not continue without a protective costs order”.

78. The appellants all now seek a PCO: see Mr Davis’ submissions entitled “*Appeal Case Against Adverse Cost*” of 6 November 2023; and the Notices of Appeal of Mr Piper, Mr Moulder and Ms Junos.

79. Ms Junos submitted that she satisfied four out of the five guidelines in that (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) she has no private interest in the outcome of the case; (iv) having regard to the financial resources of her and the respondents and to the amount of costs that were likely to be involved it was fair and just to make the order; (v) if the order was not made the appellants will probably continue the proceedings because they are self-represented but will be putting themselves at risk on a matter of public interest where they should not be that risk. Item (v) is a qualification by Ms Junos of what Lord Phillips said. It reflects what Mr Davis told us namely that, when he was asked whether he would continue with the appeal if there was no PCO, he said that he would – but that was not because he

had the money to do it but because he felt the obligation to his family, including but not limited to 17 grandchildren, and others to do so.

80. In my judgment we should, in relation to the appeals of Messrs Davis, Piper, Junos and Moulder:

(a) waive the requirement for them to make a deposit under Order 2, Rule 9, to make a deposit or give security by bond under Order 2 Rule 10, or to pay the fees for settling the Record or a hearing fee; and

(b) make a PCO in the terms set out at paragraph 85 below.

81. I regard that approach as appropriate, and necessary in the interests of justice, in view of the extraordinary nature of the inquiry and the public nature of the current disputes. There is a public interest in the Court of Appeal determining whether the Commission was, in effect, unlawful or acted unlawfully on one or more of the grounds relied on by the appellants. That is particularly so where the Commission says that there was no illegality, the judge has held that there was illegality on one basis and the appellants say that there was illegality on two.

82. These appellants fall within Lord Philips' guidelines (i) – (ii) and (iv) above; and (v) in the formulation thereof by Ms Junos. Mr Davis has a personal interest in the outcome of the appeal as, so it seems to me, do Mr Piper and Mr Moulder. But, in my judgment, the fact that they do so should not, in this case, be a ground not to make a PCO, particularly when the public inquiry was established by the Premier to determine, whether the lands of private individuals had been wrongfully taken, and to do so without burden of costs on such individuals. The public good, which the Commission was designed to achieve, was to remedy the historic land losses which had arisen from wrongful or irregular behaviour and which had affected succeeding generations. As Kawaley CJ (as he then was) said in *Bermuda Environmental Sustainability Taskforce (BEST) v The Ministry of Home Affairs* the *Corner House* guidelines are not to be applied in a rigid and inflexible way.

83. The Commission contends that to take this approach is to confuse the public importance of the Commission with the very limited scope and relevance to the public of the judicial

review of Mr Davis, and, *a fortiori*, of the other appellants. I disagree. In my judgment, the essential points of the judicial reviews are to assert that the Commission was or acted *ultra vires*. That question, itself, is of very considerable public interest and its outcome potentially affects a far wider cohort than that of the individual appellants. In one sense the particulars of individual cases are of lesser importance than the question of the Commission's *vires*. However, the latter question cannot sensibly be addressed without reference to cases in which the error of its ways is said to be demonstrated.

84. I would, therefore order that, in the event that any of the appeals in Appeals 40, 41, 41A of 2022, or in the appeal by Mr Davis against the decision of October 22 2022, or in Appeal No 36 of 2023 is dismissed, no order for costs shall be made against the unsuccessful appellant, save in relation to any costs that have been incurred because of a failure by the relevant appellant to act reasonably or to comply with orders of the Court. In addition, the Court reserves the right, in the case of any of the appellants, to revoke or vary the Protective Costs Order in relation to all future costs in the event that, in the judgment of the Court, the behaviour of the relevant appellant justifies the making of such an order.

What needs to be done now?

Records of Appeal

85. These five interrelated appeals are complicated and require careful case management. The first thing that is required is the compilation of Records of Appeal in each appeal. It is regrettable that the efforts of the Registrar to procure compilation of those Records have not so far borne fruit. The Registrar appears to me to have been given very limited assistance by the parties, and we have found the absence of a Record of Appeal unhelpful, since it may mean that not all matters of relevance have been drawn to our attention.

86. In accordance with paragraph 2 of the Practice Direction of 28 August 2023, Counsel for the Commission should assume responsibility for settling the Records in these appeals. That should be begun by the provision as soon as possible of a draft index of each Record for further consideration by the Registrar and the parties. It is imperative that the individual appellants co-operate in a timely fashion with the Commission and the Registrar and make known what additional material they seek to have inserted in the Records. The one thing that must not happen is that the cases lapse into some form of limbo. A hearing for the

settling of the Records is likely to be necessary and the Registrar will have to make any directions that are needed in order to expedite the production of the Records.

87. At the risk of stating the obvious it is important to ensure that the Records of Appeal contain all relevant documents, which will, subject to the qualification that I make in the next sentence, include the pleadings, the evidence filed (together with any relevant attachments), any written submissions made at first instance, the judgments and rulings and the orders made, and the Notices of Appeal. The qualification is that the Records of Appeal should contain only that which is relevant to the matters which I have indicated in this judgment should be the subject of a hearing before us. Where possible those documents should be double sided. The guidelines set out in the August 2023 Practice Direction should be followed. Consideration needs to be given as to the production of one or more Core Bundles and a chronology. It seems to me almost certain that both will be needed, since there seems to be a large quantity of documents filed in these applications only portions of which are likely to be of significance in relation to the appeals which are going forward.

Time estimates

88. The next matter for consideration is the length of time needed for hearings and which cases should be heard together and when. There is no prospect of any of these cases being held in the March session. I very much hope that they may be considered in June. As to that, the appeals that need to be heard together are the Davis/Piper appeals and the Commission's appeal. I would add the Junos appeal to that list because it does not seem to me that it raises additional considerations to those that are in issue in the other three appeals. They all concern the basic question of whether the Commission was *ultra vires* or the Commissioners acted in an ultra vires manner. I would anticipate that those appeals could be determined in 2-3 days. If the parties regard that estimate as wrong, or later come to do so, they must inform the Registrar promptly so that a different estimate can be taken into consideration.

89. The Moulder appeal raises somewhat separate questions, and I would propose that it be listed so as to come on for hearing after the other appeals at what may be either day 3 or 4. The most sensible time for the hearing of these appeals would appear to me to be in the last week of the June session.

Skeleton arguments

90. A timetable needs to be agreed, or determined, for the supply of skeleton arguments. The Court will need these in good time before the hearing, by which I mean by the beginning of May 2024.

91. It is of the greatest importance that the parties cooperate to the highest degree with the Court and each other in order to enable the Court to determine as soon as can be done the essential issues as to the validity of the Commission or its approach. They should avoid, as far as possible, raising ancillary or tangential issues or crawling over old history, insofar as that distracts from the core issues. The Court needs to have the relevant material assembled in proper order and provided to it in sufficient time to allow for proper consideration. The submissions need to be as clear, concise and structured as is possible. In this field, the likelihood of success is not measured by the size of submissions but by their quality. Nothing is worse that the intermittent provision of materials, disregard of timetables, last minute production of documents previously available and submissions that are opaque, meandering or difficult to follow.

92. In order to keep these appeals on track, it is necessary (a) that the Registrar should monitor the process of preparation, holding whatever case management conferences are necessary; and (b) that the parties should comply with directions given by the Court and communicate with it where necessary. In the latter respect, there appears to have been a noticeable failure by some of the appellants, which is unhelpful to the Court and to the advancement of the appellants' cases. If such failure persists, the relevant appellant may find that he or she is held liable for the costs attributable to it or that the PCO is revoked for future costs, or that his appeals are stood out of the list.

BELL JA

93. I agree with the President's rulings and the reasons for them that he has given.

94. In my short concurring judgment in *Wallington v R,* I referred to an increasing tendency on the part of counsel in this jurisdiction to call for the recusal of a judge when the underlying circumstances did not justify such a course. Regrettably, that tendency has now spread to litigants in person.

95. In *Wallington*, the President referred to the judgment of Lord Bingham in *Locabail*. Although Lord Bingham had said that it would be dangerous and futile to attempt to define or list the factors which might or might not give rise to a real possibility of bias (the more modern test set down after *Locabail*), he did give a number of examples of matters which would not properly give rise to an appearance of bias. He expressed himself in relatively strong terms - "*We cannot conceive of circumstances in which an objection could be soundly based"* - on a number of grounds which he then set out. Included in these was "*previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him*".

96. To base a complaint of bias on my having acted for the Bank of Bermuda ("the Bank") more than thirty years ago in its case against Arnold Todd (something I confirmed at the time of the hearing) seems to me to be particularly unrealistic, when the Bank is not even a party to the proceedings in question, but merely the subject of complaint. It only has to be considered more carefully to show that the complaint does not begin to fall within the ambit of those matters where complaint can properly be made. While the Bank is of course a legal person, it necessarily gives its instructions through real people. It should come as no surprise to those who make the complaint in this case that the senior officer who gave me instructions in relation to the Todd matter left the Bank more than twenty years ago. How in those circumstances it can sensibly be suggested that, acting in my judicial capacity, I would ignore my judicial oath so as to give preference to a body which now has entirely different personnel in its management, is quite beyond me.

97. Ms Junos also relied upon the affidavit of Dilton Robinson dated 7 May 2009, in which he referred to the fact that I had acted for his employer (LP Gutteridge Ltd) in relation to his dismissal. Mr Robinson is not a party to these proceedings, and his affidavit was filed in the proceedings he took against the Bank. So again, I do not know how a real possibility of bias can arise. Mr Robinson also made a complaint that at the material time I was a director of the Bank of Butterfield ("Butterfield"), saying, without providing any evidence, that Butterfield had passed confidential information to the Bank. For the avoidance of doubt, I would just place on record that the subject of the Bank and its dispute with Mr Todd never arose for discussion at Butterfield director level, and my instructions from the Bank did not ever make reference to Butterfield. And the fact that I sat on the Bench in a matter where

counsel from my former firm appeared before me is not a matter which can properly give rise to a complaint of bias.

98. Lastly, there are Mr Piper's complaints that I was the trustee of Jai Pachai's family trust and Mr Pachai had acted for a client against Mr Piper in the case he had brought through the Kwannza Trust. I have no recollection of ever having any conversation with Mr Pachai about his family trust since I went on the bench, and until I saw a document, which Mr Piper produced, I had forgotten about it. I knew nothing about the proceedings taken by Mr Pachai on behalf of his client and, even if I did, it would be irrelevant. I do not accept that my role as trustee of his trust could conceivably give rise to any real possibility of bias in the mind of the objective fully informed observer.

99. Mr Piper also complained that I ruled on costs in litigation with which he was concerned. The President has explained that Mr Piper's recollection is faulty, and that while I was a member of the panel, which ruled on costs in 2015, Baker P, who was of course the judge who had sat in the case to which Mr Piper was referring, gave the ruling of the Court. In addition, as the President pointed out, even if Mr Piper's recollection had been correct, and I had delivered the costs ruling, that would not have given any grounds for a complaint of bias.

100. It is regrettable that the Appellants in this case should make allegations of bias without any sensible basis for so doing.

KAWALEY JA

101. I, also agree with the President's rulings, the supporting reasoning and the Orders he proposes in relation to the various issues addressed. As regards the issue of my recusal, I would add a very few words of my own.

102. Ms. Junos drew to the attention of the Court the fact that Mr Dilton Robinson was involved as a Commission of Inquiry witness in the present appeals. She stated her understanding that I had previously told my good friend Mr Robinson that I would always recuse myself from any matters in which he was involved. To my mind, this was an invitation to me to consider whether I wished to recuse myself rather than a formal application for recusal.

103. As I indicated in the course of the hearing, Ms. Junos was entirely correct that I had told Mr Robinson, as I recall shortly after I was appointed to the Supreme Court Bench over 20 years ago, that I would recuse myself from any cases in which he was involved. What I meant was that I would not feel able impartially to adjudicate any matters which directly involved Mr Robinson's personal and financial interests.

104. The present appeals have no material connection whatsoever with the legal or financial interests of Mr Robinson. It is obvious that there is not even the hint of grounds for recusal on the grounds of apparent bias. Assuming that a formal application for recusal was in fact made, I find no grounds for my recusal exist.