



Neutral Citation Number: [2022] CA (Bda) Civ 2

Case No: Civ/2022/3

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
THE HON. MR. JUSTICE MUSSENDEN
CASE NUMBER 2019: No. 379
CASE NUMBER 2018: No. 315**

Sessions House
Hamilton, Bermuda HM 12

Date: 25 February 2022

Before:

JUSTICE OF APPEAL GEOFFREY BELL

Between:

DENISE PRISCILLA TREW

Applicant

- v -

HSBC BANK BERMUDA LIMITED

Respondent

-and-

DENISE PRISCILLA TREW

Applicant

- v -

**(1) MOLLY WHITE
(2) STEPHEN WHITE**

Respondents

Mr Michael Scott (Browne Scott) for the Intended Appellant
Mr Dantae Williams (Marshall Diel & Myers Limited) for the Respondent Bank
Mr. Kim White (Cox Hallet Wilkerson Limited) for the 1st and 2nd Respondent

Hearing date: 24 February 2022

REASONS

BELL JA:

1. On 24 December 2021 Mussenden J delivered a ruling in relation to the above two matters, which he defines as “the HSBC matter” and “the White matter.” The ruling was issued in response to applications made on behalf of Mrs. Trew that the judge recuse himself on the grounds of judicial bias. The applications also included an application in the HSBC matter to file additional evidence, but that matter was not the subject of appeal, and this ruling is considered only with the issue of recusal.
2. There was originally an issue as to whether an enlargement of time was needed, there being some doubt as to whether the application had been made within the prescribed time limit. Since the ruling by Mussenden J was interlocutory, such that leave was required in any event, I suggested to counsel that the issue of enlargement of time be “parked” so that a determination of the leave application could be made on the merits, and counsel agreed with this course.
3. As the judge noted at paragraph 1 of his ruling, the basis of the recusal application was that Mrs Trew felt vulnerable because of bias, including unconscious bias, directed not towards her, but towards her counsel Mr Scott.
4. The judge set out in paragraph 11 of his ruling the factual background which was said to give rise to an apprehension of bias as against Mr Scott. The starting point was the establishment of a Joint Investigation and Prosecution Team (the “JIPT”), set up for the purpose of an investigation of public corruption. It was the operation and membership of the JIPT which formed Mr Scott’s main complaint, since (according to an extract from a ruling of Subair Williams J dated 10 September 2021, on which Mr Scott relied, in proceedings taken by Dr Ewart Brown against the Director of Public Prosecutions, the Attorney-General and the Deputy Governor) it comprised the Commissioner of Police, the Department of Public Prosecution, the Deputy Governor and the UK Overseas Territories Law Advisor. It is to be noted that the Director of Public Prosecution was not said to be a member of the JIPT.
5. In paragraph 12 of the ruling, the judge referenced a letter dated 31 January 2018 sent to Mr Scott by the judge in his capacity as Director of Public Prosecutions. The letter referred to the fact that Mr Scott had been asked to make himself available for formal interviews with the Bermuda Police Service in October 2015, that the Bermuda Police Service and the Department had conducted a thorough review, and had advised Mr Scott that as a result “of determining that no criminality or charges of corruption or like offences against you arise out of our review”, the investigation was closed.
6. One might have thought that it would have been the end of matters, but Mr Scott maintained that the membership of the JIPT and its operation, which he said was within the Department, led to an appearance of bias on the part of the judge, which remained, even though the judge, as Director, had decided that no further action was to be taken.

7. I will not go through the cases in any detail. They are well known to practitioners. Mr Scott relied particularly on the *Pinochet* case [1999] 2 WCR 272 and *Locabail* [1999] EWAC Civ 3004. Despite Mr Scott's characterisation of those two cases, he was unable to point to any part of those judgments which might suggest that the facts of his case should cause the judge to recuse himself.
8. For my part, I asked Mr Scott how that January 2018 letter could have been said to reflect badly on him, such that the judge could never thereafter hear a case in which he was counsel. His response was that the outcome of the investigation was not the substratum of the appeal, and he continued to make complaint of the makeup of the JIPT. I referred him to what the judge had said at the end of paragraph 38 of his ruling, where he disclosed that during his tenure as DPP, he was not a member of an oversight group comprising the named officials (or any other officials) called JIPT (or called anything else). Finally, the judge recorded that he had made his decision in respect of Mr Scott as an independent DPP, and not as part of any other body.
9. In response to my question at the outset, Mr Scott advised that he had never seen the affidavit sworn by SIO Briggs, to which he referred extensively in his affidavit of 30 December 2021. So the high point of his complaint comes in one paragraph of Subair Williams J's ruling in Dr Brown's case, which is not in any event evidence before me.
10. I am quite unable to see the force of Mr Scott's complaints regarding the operation of the JIPT. I recognise, as I did during argument, that Mr Scott's experience as one of the targets of a corruption probe which ran for some time must have been very unpleasant for him. But the outcome if the investigation is not irrelevant, and I have seen nothing in the authorities or elsewhere in the record which would cause me to conclude that the judge should have recused himself on the basis that a reasonable objective and informed person with knowledge of the relevant facts would reasonably apprehend that the judge would not bring an impartial mind to bear on the adjudication of any case in which Mr Scott appeared as counsel before him from that point forward.
11. I have not dealt with the fact that Mr Scott's complaints (and those of his client) concern his role as counsel, and do not relate to a litigant, as is usually the case. I note what the Registrar, Ms Wheatley, said at paragraph 25 of her ruling of 25 April 2021, in the case of *JS -v- AS*, where the distinction between actual or apparent bias against a litigant as opposed to his counsel was reinforced. But for the purpose of this ruling, the point is moot.
12. Accordingly, I refused leave to appeal the judge's ruling of 24 December 2021 and ordered Mrs Trew to pay the costs of counsel for HSBC and the Whites. Mr Williams then made an application for a wasted costs order against Mr Scott, and I directed that that should be dealt with on the papers. Mr Williams' submissions are to be filed within 7 days, and Mr Scott is to file his submissions within 7 days thereafter.