In The Supreme Court of Bermuda

DIVORCE JURISDICTION
2019: No. 29

BETWEEN:

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Petitioner

-and-

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Respondent

Before:	**Hon. Alexandra Domingues, Assistant Justice**
Appearances:	**Mrs Georgia Marshall of Marshall Diel & Myers, for the Petitioner**
	Mr Cameron Hill of Spencer West, for the Respondent
Dates of Hearing:	**2 May 2022**
Date of Determination:	**2 May 2022**
Date of Written Reasons:	**5 May 2022**

JUDGMENT

Recusal; Risk of Appearance of Bias; Appeals from the Registrar

DOMINUGES, ASSISTANT JUSTICE

Introductory

1. The matter relates to a summons filed by the Respondent and returnable on 2 May 2022 applying for my recusal in this matter (**the Recusal Application**). The Respondent sought the following relief:

> "*1. The Learned Assistant Justice Alexandra Domingues be recused from participating in the trial of this matter on the grounds that her own rulings whilst sitting as Registrar of the Supreme Court will be the subject matter of review and she will, as a consequence, be called upon to review the validity of her own previous rulings, such a situation in the circumstances leading to a reasonable apprehension of bias, and;*
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> *2. Consequential direction for the further conduct of this matter, and;*
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> *3. The Costs of this application be provided for, and;*
>
> *4. Such further and other relief as appears appropriate.*"

2. After hearing the evidence and Counsel's submissions, I confirmed I would be providing written reasons for my decision. I informed Counsel I dismissed the Recusal Application as I was not satisfied there was any risk of the appearance of bias. I further granted costs to the Petitioner.

3. It is necessary for me to not only provide a comprehensive chronology of the orders I made in my capacity as the Registrar, as Mr Hill submitted the Recusal Application was based on all the orders I made as the Registrar, but also as it relates to the listing of the Recusal Application itself as the timing of the application was a factor I took into consideration in my determination.

Chronology of listing substantive hearing

4. These proceedings relate to the substantive application for ancillary relief in divorce proceedings, as well as the setting aside a Declaration of Trust and Reconveyance of 3 February 2020 under section 41 of the Matrimonial Causes Act 1974 (**the Section 41 Application and Substantive Hearing**).

5. The Notice of Hearing initially listing the Section 41 Application and Substantive Hearing was issued and distributed to both Counsel and the Respondent's personal email on 22 February 2022. This Notice of Hearing clearly indicated that I would have conduct of the Section 41 Application and Substantive Hearing. The matter was subsequently relisted on 3 March 2022 by way of the court issuing an Amended Notice of Hearing which set the Section 41 Application and Substantive Hearing for 25, 26, 27 and 29 April 2022. The Amended Notice of Hearing also clearly indicated that I would have conduct of this matter.

6. On 3 March 2022, Mr Hill wrote to the court with a complaint as to how this matter was listed and effectively asked the Section 41 Application and Substantive Hearing to be relisted. Mr Hill is well aware of the procedure for obtaining an adjournment where opposing counsel do not consent, but no application was made. In my capacity as Registrar, I wrote to Mr Hill on 19 April 2022 to address his complaint regarding the validity of how the matter was listed, but also reiterated the requirement for him to file a summons and affidavit if he wished to seek an adjournment of the Section 41 Application and Substantive Hearing. No response was provided by Mr Hill to this email correspondence and no application for an adjournment was made.

7. The Section 41 Application and Substantive Hearing commenced on 25 April 2022. At the outset of the hearing, Mr Hill made an application for an adjournment on the basis that certain documents had not been obtained from the Petitioner regarding the Omega Trust and that the trustees of the said Trust must been joined to the proceedings. Additionally, Mr Hill submitted he had not received the brokerage statements of the Petitioner until last week and alleged he had only been provided the Petitioner's bank statements when he was served with the hearing

bundles from Mrs Marshall. It should be noted that no proper application had been made for an adjournment by way of summons with the usual supporting affidavit and neither the Court nor Mrs Marshall had been advised in advance of the hearing by Mr Hill that he would be making this application. Mr Hill also submitted he wished to make an application for my recusal, although he had also not filed the necessary summons and supporting affidavit. Mrs Marshall objected to the hearing of these applications. Despite this, and as Mr Hill was raising an alleged issue of non-disclosure as the basis for his adjournment application, I accommodated Mr Hill and allowed him to make his application on his feet (**the Adjournment Application**).

8. At the end of Mr Hill's Adjournment Application submissions, he informed the court that he would also be making a recusal application. He submitted the grounds for the Adjournment Application were that I would be required to make rulings on the orders I made as the Registrar and as such, I would have a predisposition regarding issues of disclosure which would amount to an appearance of bias. Mr Hill further suggested the court cannot make finding of contempt on orders of the Registrar and as I am now sitting as an Assistant Justice I could not hear such an application. In any event, Mrs Marshall confirmed that she did not accept that any recusal application was properly before the Court and until such time there is one and all of the evidence is presented she will provide her response at that time. This position was accepted. Mr Hill made no further submissions regarding his verbal recusal application.

9. After hearing from both Mr Hill and Mrs Marshall, I refused to grant the Adjournment Application for the following reasons which were conveyed to Counsel: (i) that the Petitioner had filed her Affidavit evidence which made reference to the Omega Trust in June 2021 and this was the first occasion where Mr Hill had raised this purported issue of discovery when there had been numerous opportunities in the hearings before me as the Registrar to date, but he had not done so; (ii) Mr Hill was in fact provided the disclosure he indicated he had only received last week in both June and November 2021; (iii) Mr Hill and the Respondent failed to appear at the preliminary hearing listed on 13 January 2022 specifically to address any contested Rule 77(4) requests and responses; (iv) any questions Mr Hill has regarding the Omega Trust can be put to the Petitioner in cross-examination; and (v) Mr Hill can make any submissions he wishes as it relates to the Omega Trust after the evidence is heard.

10. Mr Hill subsequently made an application for leave for the Respondent to file further affidavit evidence. I denied this application on the grounds that the not only did the Respondent have numerous opportunities to make such an application appearing before me as the Registrar, but also due to his noncompliance with orders of the court which required him to file his affidavit evidence in a certain timeframe as well as his noncompliance with responding to financial disclosure requests which had been made in several orders.

11. After these preliminary issues had been raised, Mrs Marshall made additional preliminary submissions wherein the Court was being asked to, *inter alia*, have the Section 41 Application determined prior to the substantive hearing; a position which both Counsel agreed. I therefore, confirmed my decision to proceed with the Section 41 Application and Substantive Hearing by determining the Section 41 Application first, followed by the substantive applications for ancillary relief. For the purposes of this Judgment, I will not go into detail regarding these additional preliminary issues as it is not relevant to this application.

12. After all preliminary matters had been addressed, both parties provided examination in chief and were cross examined by the respective attorneys. The evidence was given for the remainder of the day on Monday, 25 April 2022, the full day of 26 April 2022 and until 12:45 p.m. on 27 April 2022. Mrs Marshall commenced her submissions for the Section 41 Application at 2 p.m. on 27 April 2022, with Mr Hill making submissions from 3:24 p.m. to approximately 4:46 p.m. Mr Hill indicated he had further submissions to make and was not feeling well, so he wished to finalize his submissions on Friday, 29 April 2022. I granted the adjournment and directed Mr Hill to send his written submissions by 12 p.m. on 28 April 2022 and also confirmed that Mr Hill would not be allowed to make any amendments to his submissions after they were sent. Mr Hill sent the submissions at 1:32 p.m. on 28 April 2022 attached to an email which stated as follows:

> "*Please find my slightly late submissions.*
>
> *I will be as quick as I can on Friday morning but I do have things that need to be said.*
>
> *Can I correct any typos.*"

13. Mr Hill completed his submissions on the morning of 29 April 2022, which were followed by Mrs Marshall's reply which were completed at 11:13 a.m. and I adjourned the matter until 11:30 a.m. Upon the recommencement of the hearing, I informed Counsel I had made a decision regarding the Section 41 Application; however, I indicated written reasons would follow. I advised that I was granting the Petitioner's Section 41 application as I was satisfied the Declaration of Trust and Reconveyance was a disposition which had been carried out in an attempt to defeat the Petitioner's claims for ancillary relief. I further granted costs on an indemnity basis from the date the application was made and gave further directions as to the specific terms of the order to give effect to my decision.

14. By agreement of Counsel, the matter was adjourned until 2 p.m. at which time Mrs Marshall would commence presenting the Petitioner's evidence for the substantive application for ancillary relief. At 2 p.m., the Petitioner gave her examination in chief and was subsequently cross-examined by Mr Hill. Mrs Marshall completed her re-examination at which time I indicated to Mr Hill that he could commence presenting the Respondent's evidence. At that time, 4:13 p.m., Mr Hill requested that the matter be adjourned to Monday, 2 May 2022 as a number of days had been allocated for the continuation of the hearing for that week. As it was already 4:14 p.m., I agreed to the adjournment request, albeit with some reluctance.

15. At the recommencement of the substantive hearing on Monday, 2 May 2022 at 9:30 a.m., Mr Hill advised he would be making the recusal application, but that he had not actually filed his summons and supporting affidavit (which it was subsequently revealed had yet to be sworn). Mr Hill indicated he had been having printing difficulties which was the reason for the delay in appearance in Court at the required time of 9:30 a.m. In order to accommodate Mr Hill, I granted a short adjournment in order for the summons to be properly listed before the Court. Additional assistance was provided to Mr Hill by providing two copies of the summons, affidavit and exhibit. Furthermore, I ensured that our Administrative Officer was available for the Respondent to swear his affidavit whilst the summons was being issued by the Acting Registrar. There had already been considerable delays in this matter moving forward and, in my view, further delay in hearing this late application would have prejudiced both parties.

Chronology leading up to hearing

16. This matter was initiated by the Petitioner filing a Notice of Application for Ancillary Relief which was filed on 28 September 2020 with a first return date of 27 October 2020. The Court was required to make a minimum of four orders between the first return date and 16 February 2021 for the Respondent to file his affidavit evidence. On that date, both the Respondent and Mr Hill failed to appear and the Court being satisfied the Respondent had the required notice to appear, an unless order was made for the Respondent to file his affidavit by 23 February 2021 otherwise the matter would be remitted for final hearing. The Respondent's Affidavit was filed on 23 February 2021. All of the orders made by the Court during this period and on 16 February 2021 (**the Unless Order**) were made by myself in the capacity of the Registrar of the Supreme Court under the Matrimonial Causes Rules 1974 (**the Rules**).

17. The matter was next before me as the Registrar on 9 March 2021 (**March 2021 Order**) wherein I ordered, *inter alia*, the Respondent to produce a copy of the Declaration of Trust and Reconveyance of 3 February 2020 (**the Declaration of Trust and Reconveyance**)[1]. Mr Hill's position at that time was that this had already been provided to Mrs Marshall. I accepted this document had not been received by Mrs Marshall and thus ordered the Respondent to produce the Declaration of Trust and Reconveyance by close of business 10 March 2021.

18. The March 2021 Order set the matter down for further mention on 6 April 2021 (**the April 2021 Order**). On that occasion, neither Mr Hill nor the Respondent appeared. In fact, this matter was stood down from 9:30 a.m. until 4:08 p.m. as I was hearing another application which coincidently both Mrs Marshall and Mr Hill were also attorneys of record. Mr Hill provided no indication to the Court or to Mrs Marshall on 6 April 2021 or prior that he was not in a position to attend. Indeed, both of these applications were heard remotely via Zoom where the relevant details were provided to both Counsel. On this date, Mrs Marshall submitted there were still outstanding issues regarding the valuations of the properties provided for in the March 2021 Order. Specifically, Mr Hill had not responded to Mrs Marshall's correspondence of 17 March 2021 wherein a draft, joint instructing letter to the valuers had been provided for his review and comment. Mrs Marshall also made submissions in relation to the Respondent being required to provide the details of who the executor(s) were of his deceased's mother's estate as well as the relevant contact details. I granted this and

[1] At this time the orders only reference the Reconveyance as it was not known the vehicle by which the property had been transferred.

required the Respondent to provide this information by close of business on 9 April 2021. The April 2021 Order further set this matter down for mention on 27 April 2021 at 9:30 a.m. Due to court contingencies, this mention was administratively delisted to 4 May 2021 at 9:30 a.m. and both Counsel were notified of the relisting date by the Court via email on 27 April 2021 at 10:04 a.m. At 10:16 a.m. on 4 May 2021, Counsel were advised the matter had to be moved to 3:00 p.m. and that it would be heard remotely, via Zoom. Zoom details were distributed to Counsel at 12:36 p.m. that day. Mrs Dismont from Marshall Diel & Myers Limited (holding for Mrs Marshall) appeared remotely, via Zoom and Mr Hill failed to appear. On this occasion Mrs Dismont simply requested an adjournment until 25 May 2021, but stated for the record that to date the Respondent had still not provided the information regarding the executor of his mother's estate in accordance with the April 2021 Order as well as had yet to provide his Rule 77(4) responses.

19. Both Counsel appeared on 25 May 2021 (**the May 2021 Order**) at which time I ordered, *inter alia*, that the Respondent be granted an extension of time to send his Rule 77(4) Requests to the Petitioner has he had still not made them in accordance with the Unless Order. The May 2021 Order set the matter down for mention on 8 June 2021 at 10:00 a.m.

20. Counsel did not appear before me on 8 June 2021, as they had reached an agreement regarding further directions. The matter was therefore delisted by consent and I executed the Consent Order for Directions on 8 June 2021 (**June 2021 Consent Order for Directions**). Paragraphs 2 and 3 of the June 2021 Consent Order for Directions states as follows:

> "*2. The Respondent having received the Petitioner's Rule 77(4) Requests on the 4th of June 2021 shall respond thereto by close of business on 18th June 2021.*
>
> *3. This matter shall be adjourned to the 29th of June 2021 at 10:00 a.m. when any outstanding Rule 77(4) requests shall be dealt with.*"

21. The next court appearance was for a mention as well as for Ms Angelita Dill to attend in accordance with the Writ of Subpoena issued on 15 June 2021 on 29 June 2021. At the outset, Mr Hill made submissions to the Court that leave was required prior to the issuing of a Writ of Subpoena which required Ms Dill to appear today and as such the Writ was invalid. Having heard Counsel, I determined that leave was not required for the Registrar to issue the same in accordance with Order 32, Rule 7 of the Rules of the Supreme Court 1985.

22. Subsequent to dealing with this preliminary issue, I heard from Ms Dill as well as both Counsel. Having being satisfied that Declaration of Trust and Reconveyance was in the Respondent's possession, I ordered the Respondent to produce the original Declaration of Trust and Reconveyance. It was ordered to be delivered to the Court for both the inspection of the same by the parties and the Court in accordance with Section 9 of the Stamp Duties Act 1976.

23. As it related to the mention to address outstanding matters regarding Rule 77(4) requests and responses, I heard further from both Mrs Marshall and Mr Hill. Mrs Marshall confirmed that the Respondent had yet to comply with providing his Rule 77(4) Responses in accordance with the June 2021 Consent Order. When Mr Hill was asked why the Respondent had not complied he said, "*I am not sure and would have to look into it*" and proposed for the responses to be provided by end of week. Given the insufficient explanation for the Respondent's noncompliance provided by Mr Hill, he was asked again to provide the same. Mr Hill's responses were: "*I will look into where they went*"; "*I don't know the answer, but they have been drawn up*". Therefore, I ordered for them to be produced by close of business on 29 June 2021 (**the June 2021 Order**).

24. Counsel next appeared before me on 27 July 2021 (**the July 2021 Order**) at which time Mrs Dismont (holding for Mrs Marshall) advised the Respondent had still not provided his Rule 77(4) Request responses and also had failed to produce the original of the Declaration of Trust and Reconveyance in accordance with the June 2021 Order. As a direct result of the Respondent's continual noncompliance of the orders to provide his responses to the Petitioner's Rule 77(4) Requests, Mrs Dismont submitted the best course of action was to list a preliminary hearing with the Respondent to attend for cross examination. Mr Hill confirmed he had no objection.

25. Additionally, at this appearance, Mr Hill alleged that he had actually provided the Respondent's Rule 77(4) Request Responses via hard copy to Marshall Diel & Myers Limited (**MDM**) on two occasions by his administrator. I asked Mr Hill if he had any correspondence or likewise to support this, but he was not able to do so. Mr Hill further contended that the original of Declaration of Trust and Reconveyance was with the Land Registry and not the

Respondent which is why it had not been produced. I reminded Mr Hill that the evidence provided by Ms Dill in her examination on 29 June 2021 was clear that she had provided the original of the Declaration of Trust and Reconveyance to the Respondent. Mrs Dismont also confirmed that other documents requested of the Respondent had not been provided (as set out in MDM's letter of 4 June 2021, a copy of which was provided to the Court and Mr Hill at this appearance). Mr Hill's response was "*I didn't know there were other documents*". Mrs Dismont proposed that such documents be provided three days prior to the preliminary hearing. Mr Hill made no objection to this provision and when asked if there was anything further to address no objection was provided by Mr Hill.

26. Paragraphs 1 and 3 of the July 2021 Order (**the July 2021 Order**) are as follows:

> "*1. This matter shall be listed for a preliminary hearing before the Registrar to deal with the Respondent's financial disclose pursuant to Rule 77(4) of the Matrimonial Causes Rules 1974 ("the Preliminary Hearing"). The estimated length of the hearing is one day and the Respondent shall be in attendance to be cross-examined.*
>
> *...*
>
> *3. The Respondent shall produce the documents requested by Marshall Diel & Myers Limited in their letter dated 4 June 2021, a copy of which is annexed hereto and marked "Exhibit A". Such documents shall be served upon counsel for the Petitioner, copying in the Supreme Court Registry, **3 days** prior to the Preliminary Hearing.*"

27. On 5 November 2021, a Notice of Hearing was issued listing the preliminary hearing for 23 November 2021 at 9:30 a.m. (**the Preliminary Hearing**). On 23 November 2021, Counsel for the parties appeared; however, the Respondent failed to attend despite his requirement to attend with in accordance with the July 2021 Order. On this occasion, Mr Hill submitted he had not been able to contact the Respondent so he did not have notice of the hearing. Mrs Marshall strongly opposed this position, not only because as attorney of record service upon Mr Hill is deemed to have been served on the Respondent, but also as she submitted it was unbelievable the Respondent, given his profession as an IT specialist, was unable to be contacted via email, text or telephone by Mr Hill. Given the Respondent's non-appearance, the Court was left with little choice by to adjourn the matter to 30 November 2021.

28. Due to my unexpected availability on 30 November 2021, the Preliminary Hearing had to be administratively delisted. Relisting dates were canvassed for 9 or 10 December 2022;

however, Mr Hill was unavailable. The matter was listed by the Acting Registrar, Mrs Cratonia Thompson, based on Counsel's availability on 13 January 2022 at 9:30 a.m. This listing date was communicated to Counsel via email correspondence from the Acting Registrar on 10 December 2021 at 11:16 a.m. Mr Hill subsequently sent emails to the court on both 30 December 2021 and 4 January 2022 wherein it appeared he was making an adjournment request in relation to the Preliminary Hearing listed for 13 January 2022. The Acting Registrar responded on 7 January 2022 at 9:53 a.m. as follows:

> "*Good day Mr Hill,*
>
> *We write in reference to your correspondence below.*
>
> *Please note that in the absence of an agreement from the opposing party to adjourn, you are required to make the necessary adjournment application (i.e. by summons with supporting affidavit).*
>
> *Kindly note the attached Circular.*"[2]

29. On 11 January 2022 at 3:24 p.m., Mr Hill wrote to the court "*with an update on my Covid status and that of my client*". The correspondence ended with:

> "*I am not making a formal application for an adjournment I am merely writing to inform the Court of the position and in particular seek guidance on my own personal status and my potential position as a* ***persona non grata*** *or as the Germans might put it* ***Wiedereintritt Verboten***. *They have such a way in telling you what you can't do.*
>
> *I await further guidance.*" [Emphasis added]

30. It is unclear what "*guidance*" Mr Hill was seeking and in my view, there was no need for any response to be provided to Mr Hill other than what he had already been advised of by the Acting Registrar on 7 January 2022.

31. It is accepted that there was some confusion on 13 January 2022 as to whether the hearing would be held remotely or in person at the Commercial Courts; however, Mr Hill was provided with the required Zoom details to participate in the said hearing, yet he failed to appear. Mr Hill suggested in the hearing of the Recusal Application that he was sitting in this "*very court*" (Court #1 of the Civil/Commercial Courts) and was waiting for the matter to

[2] Circular No. 7 of 2007 was the Circular attached to this correspondence.

proceed, but no one showed up. This is quite frankly beyond belief. I hosted the remote hearing via Zoom from my Chambers located in the Civil/Commercial Courts in the Government Administration Building. At no point was I advised Mr Hill attended Court in person and at no time did Mr Hill write to the Court after being provided with the remote hearing details that he had mistakenly appeared in person. Zero correspondence was sent by Mr Hill either by email or otherwise on 13 January 2022 or thereafter.

32. Having accepted both Mr Hill and the Respondent (who was served personally with the Notice of Motion which had been re-dated and was returnable on 13 January 2022 at 9:30 a.m. as evidenced by the Affidavit of Service of Evernell Davis filed on 6 January 2022) had notice of the Preliminary Hearing, I proceeded in their absence. On this occasion it should be noted that I was sitting as an Assistant Justice and not the Registrar as the Notice of Motion had also been listed this day.

The evidence and submissions the Recusal Hearing

33. The Respondent relied on his Second Affidavit sworn on 2 May 2022 in support of this application (**the Respondent's Second Affidavit**). As the Petitioner had no opportunity to file a responding affidavit given the lateness and lack of notice of the Recusal Application, Mrs Marshall was given the opportunity to cross-examine the Respondent (a position which was accepted by Mr Hill).

34. On cross examination, the Respondent summarized his grounds for the Recusal Application as follows:

> "*The Judge hearing this matter without hearing my side as we were not present to say why I could not give the documents.*"

35. The Respondent relied upon his understanding that in my capacity as Registrar that I made decisions without hearing from both Counsel and that whilst it was accepted there is right of appeal of orders made by the Registrar, he chose not to exercise this right (see paragraphs 4 and 5 of the Respondent's Second Affidavit). Effectively, the Respondent believes (such a position also being submitted by his Counsel) a Judge has the ability to review the validity an order of the Registrar

despite the appeal period expiring as this is the hearing of the substantive application. Paragraph 5 of the Respondent's Second Affidavit states as follows:

> "*5. Her decisions when making such rulings are all open to appeal without leave as of right. However, such a procedure is both time consuming and expensive. It is also possible to raise the matter before the trial judge when one or other of the Parties seeks to rely upon the failure of disclosure by raising as defence the fact that as a matter of law the document in question is not capable of being disclosed.*" [Emphasis added]

36. Furthermore, it was alleged that as the Registrar, I "*made three important decision concerning the disclosure of documents*" which the Respondent did not believe he can disclose. In the Respondent's Second Affidavit at paragraphs 8 and 9 as well as in the submissions made by Mr Hill, it is being alleged that Mr Hill raised the issue of the Court's jurisdiction to disclose certain documents (the original Declaration of Trust and Reconveyance, the Respondent's deceased's mother's Will, and business accounts) and that in the capacity as Registrar I made findings regarding this jurisdictional point. Paragraphs 8 and 9 state as follows:

> "8. *To be clear the Petitioner has sought disclosure of the three documents or classes of document referred to above in separate application. Upon the making of the application my Counsel has indicated that he objects to disclosure. He has attempted to make good that submission only to be interrupted and to have the order made against me without proper consideration on the true legal position.*
>
> *9. Since the making of the order I have elected not to disclose the documents that are the object of the Registrar's Orders. Accordingly, the Petitioner has served two separate applications for contempt of court and as a result of my failure to attend the contempt of court motions has sought and been granted leave to have me committed. The judge sitting and that granted such leave was the Registrar of the Supreme Court who made the disclosure orders complained of. Those two applications are to be heard simultaneous with the substantive applications by the same judge.*"

37. During Mr Hill's continued to strenuously aver that when he appeared before me sitting as Registrar, that he made objections and arguments as to why certain documents should not be disclosed. I advised Mr Hill that I was very clear of my recollection of the appearances before me and that on those occasions Mr Hill appeared, no such objections were made. This was not accepted by Mr Hill which necessitated excruciatingly arduous task of detailing the history of the appearances before me sitting as the Registrar.

38. Mr Hill also argued that in my capacity as an Assistant Justice I would be required to review the validity of my own orders I made sitting as the Registrar. Paragraphs 13 and 14 of the Respondent's Second Affidavit state as follows:

> "*13. However, the Judge is none other than the Registrar of the Supreme Court. The Registrar has been appointed an Assistant Justice for the period of the trial. In this capacity she has been named as the judge who will hear the substantive application. Accordingly, the individual who, by virtue of the Matrimonial Causes Rules has made a disclosure order (in the absence of meaningful argument) has been appointed as the judge who will determine whether those orders were properly made.*
>
> *14. Any independently minded individual with the requisite level of knowledge of the facts would conclude that there was a real and genuine risk of bias. It is extremely unlikely that the Learned Assistant Justice will rule, as my Counsel will ask her to do, that the decision she made as Registrar was incorrect and that there is no requirement that the documents be disclosed. This is particularly important as I have been ordered to produce commercially sensitive documents that belong to my employer. Thus the rights of their parties are implicated.*" [Emphasis added]

39. On cross-examination, the Respondent also suggested that after having been taken through the chronology of orders made by myself as Registrar, that I would be biased in making a determination in this matter effectively as Mrs Marshall put due to having a predisposition of his "*bad behaviour*" during the financial disclosure process. Mr Hill submitted that I would be biased both due to his (as Counsel) and the Respondent's "*bad behaviour*" as it related to the noncompliance of orders as well as the number of times they failed to appear before the Court; although, the Respondent did accept on cross-examination that any Judge hearing this matter would be apprised of the history of the orders made by the Registrar.

40. As it relates the Respondent's proposition that the Writ of Subpoena was incorrectly issued, he relied on the following in paragraphs 16 and 17 of the Respondent's Second Affidavit:

> "*16. In addition, as we have seen the rights of third parties are implicated in the rulings of the Registrar and those third parties have been no opportunity to be heard on the question of whether or not the documents should be disclosed. There rules provide that this it possible to issue a subpoena duces tecum, for which leave appears to be a precondition. It is at that point that the interested third party will have the opportunity to be heard.*
>
> *17. In the present case the Registrar made a ruling that leave was not requires (certainly no leave was sought) and the Registrar, wearing the hat of an Assistant Justice, will determine whether the information obtained by such a subpoena can be validly before the Court.*"

The law

41. There was no contention as to what the legal test I must apply in determining this application. Mr Hill relied upon the text of DeSmith on Judicial Review and Mrs Marshall cited the very recent (3 March 2022) Court of Appeal case of *The Queen v Rebecca Wallington* [2022] CA (Bda) Crim 3. The Learned President of the Court of Appeal, Sir Christopher Clarke confirmed the test at paragraphs 33 and 34:

> "***The test***
>
> *33. It is undoubtedly the case that the test for recusal is the one set out in Porter v Magill [2001] UKHL 67, namely "whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias". Guidance as to the characteristics of this notional observer is to be found in Helow v Home Secretary [2008] UKHL 62 where Lord Hope of Craighead pointed out [2] that the fair-minded observer:*
>
> > *"is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious… Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment."*
>
> *And [3]*
>
> > *"Then there is the attribute that the observer is informed. It makes the point they, before she takes a balanced approach to any information she is given she will take the trouble to inform herself on all matters that are relevant,"*
>
> *34. Further in Saxmere Company Limited et al v Wool Board Disestablishemnt Company Limited [2009] NZSC 72 Blanchard J, speaking for the New Zealand Supreme Court, observed:*
>
> > *"The observer must also be taken to understand three matters relating to the conduct of judges. The first is that a judge is expected to be independent in decision-making and has taken the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated… Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel.""* [Emphasis added]

42. Both Counsel therefore accepted the legal test for the consideration as to whether there would be an apparent risk of bias is as set out in *The Queen v Rebecca Wallington* and is summarized as follows:

(a) whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias;

(b) The fair-minded observed having the two characteristics of being (i) the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument; and (ii) she is given she will take the trouble to inform herself on all matters that are relevant; and

(c) The observer must also take into consider the conduct of Judges being bound by the following 3 principles: (i) a judge is expected to be independent in decision-making and has taken the judicial oath; (ii) a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist and do not pick their cases; and (iii) judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel.

43. Mrs Marshall also placed emphasis on the principles confirmed by the Learned President which were set out in leading case of *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 45 at paragraph 39 of the *The Queen v Rebecca Wallington*:

> "*39.* *The position is clarified with his characteristic lucidity by Lord Bingham in Locabail where he said:*
>
> *"It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided. We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in text books, lectures, speeches, articles, interviews, reports or responses to consultation papers); or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (KFTCIC v. Icori Estero SpA (Court of Appeal of Paris, 28 June 1991,*

International Arbitration Report. Vol. 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; or if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see Vakauta v. Kelly (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a 12 party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. <u>The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.</u>" [Emphasis added]

44. The excerpts from DeSmith on Judicial Review Mr Hill relied on were at pages 553 and 554:

"***Participation in subsequent decisions***

Normally a decision will be invalid for bias if the decision-maker takes part in a determination or appeal against one of his own decisions, or one in which he has participated…In general, a decision-maker must not participate or indeed give the impression of participating in such an appeal.

Illustrations

…

- *Similarly, a lay representative who served on a disciplinary panel conducting a hearing into a disciplinary matter concerning a barrister, was held to be disqualified by reason of fact that she had attended a meeting of the Professional Conduct Committee which had decided to prosecute the barrister.*"

45. I also referred Mr Hill to the last "Illustration" in this same section of DeSmith on Judicial Review which states:

> "*Illustrations*
> *...*
> - *The making of an error of law or wrong decision on the facts by a decision-maker in a previous determination in the same case will not, without more, give rise to apparent bias.*"

I indicated my view was that both the references provided a clear distinction between the determination of appeals and that of preliminary or previous judicial determinations within the same case. Mr Hill contended that this was merely an "illustration" which means it was not applicable to a general class of cases.

46. As it relates to the provision set out in the Matrimonial Causes Rules 1974 regarding the appeals of decision of the Registrar, Rule 131 provides as follows:

> "*131 A party may appeal from an order or decision of the Registrar to a judge in chambers <u>by summons to be issued within five days of the order or decision complained</u> of and returnable on the first day on which summonses are heard after that period has elapsed but such appeal shall not, unless otherwise ordered, act as a stay of the order or decision complained of.*" [Emphasis added]

47. Mr Hill was requested to provide legal authority to support his assertion that a Pusine Judge (Acting, Assistant or otherwise) has jurisdiction to review orders made by a Registrar in circumstances where no appeals had been lodged and further if he could provide any authority that an appeal could be heard outside of the statutory timeframe. Mr Hill was unable to do so, but declared that it was trite law and not needed because this was not an appeal and that the validity of such orders could be raised as the Respondent's defence to his noncompliance. Again, Mr Hill was requested to take the court to his legal authority supporting this, but was unable to do so.

Analysis

48. As indicated from the outset of this judgment, the chronology which resulted in the bringing of the Recusal Application is a significant factor which must be taken into consideration. The Learned President in the case of *The Queen v Rebecca Wallington* was clear in upholding the principle of the weakening of an application for apparent bias (see out in *Locabail (UK) Ltd v Bayfield*

Properties Ltd) through the passage of time. Notably, Mr Hill was aware of his requirement to ensure a proper application seeking my recusal was put before the court on the first day the Section 41 and Substantive Hearing was listed. Despite completing the evidence and submissions for the Section 41 Application and me making my determination on 29 April 2022, at no time did Mr Hill indicate he would be proceeding with the filing of a recusal application. The detailed chronology set out in paragraphs 7 to 15 above is emphasized.

49. When Mr Hill was asked to speak to the delay of the making of the Recusal Application, he asserted that he assumed the Court and Mrs Marshall were already aware this application was being made as he mentioned he was making such an application on 25 April 2022 (see paragraphs 7 to 15 above). Mr Hill alleged he had been busy with the trial as well as feeling unwell, he had no time to make the application prior to 2 May 2022. This is not accepted, not only due to the fact that there were significant periods of time where Mr Hill could have prepared the application during the course of this matter, but indeed he had the entirety of 28 April 2022 when the parties did not appear before the Court. Mr Hill suggested that he was not well; however, his email of 28 April 2022 referred to in paragraph 12 above makes no suggestion that he was unwell. I reject any suggestion that Mr Hill did not have the adequate time and capacity to do what was necessary to put the Respondent's Recusal Application properly before the court.

50. It is unfathomable that a party would make an application for recusal after numerous appearances over the course of a week where decisions have reached by a Registrar or a Judge, and Counsel's excuse for the delay is ultimately he did not have time. Any allegation of bias should be raised at the first opportunity and prior to the hearing of any applications; not following numerous appearances before the Court. It is easy to infer the lateness of Mr Hill's application, conveniently filed after I determined the Section 41 application, can be considered nothing less than of an abuse of process. As Mrs Marshall quite convincingly submitted, "*Mr Hill was hedging his bets.*".

51. Moreover, I asked Mr Hill to take me to the specific orders where he says I made the determinations regarding the disclosure of documents and he was unable to do so. He ultimately said the application was in relation to <u>all</u> orders I made as the Registrar. I reiterated when Mr Hill's raised this point in his submissions, that at no time during any of the preliminary appearances before me as the Registrar did he ask me to make a determination as to ability of the Court to order that the Respondent disclose those documents. Having completed the arduous task of thoroughly reviewing all of my hearing notes as well as listening to excerpts of the CourtSmart recordings, I was even

more confident that my recollection was in fact correct. I particularly refer to paragraphs 23, 24 and 25 above which need no further explanation; as is the case with the entirety of my detailed chronologies. I made no determination that Mr Hill relies on that I should now be reviewing in my capacity as an Assistant Justice.

52. A matter of great significance, is that at no time has the Respondent filed an appeal against any of my decisions sitting as the Registrar. I reject any proposition that a Judge has the authority to go behind the order of the Registrar on the hearing of a substantive application where no appeals have ever been made at any point (even outside of the statutory timeframe). I reiterate that Mr Hill was specifically asked to provide authorities which he says support his position, but was unable to do so. Mr Hill's response was merely there are "*hundreds of authorities*" and he could not produce one at that time as he did not believe he would have to address this point.

53. When I exercised my judicial capacity given to me as the Registrar under the Rules, on occasions where neither the Respondent nor Mr Hill appeared, I satisfied myself that they had notice of the same. The Section 41 Application and Substantive Application cannot be used as a conduit to effectively appeal orders which have been made many months and up to almost twelve months ago. This is not an opportunity for Mr Hill to litigate issues which are *res judicata*.

54. In relation to Mr Hill's assertion that there would be an apparent risk of bias based on his and the Respondent's "*bad behaviour*", I need not say more than there is absolutely no principle in law to support this position. Such a notion would mean that any time where a Registrar or Judge made an order unfavourably to one party that the aggrieved party would be entitled to have a new Registrar or Judge determine any subsequent applications in the same case. There cannot be a more farfetched principle in law. Indeed, Mrs Marshall rightly pointed out that the Registrar has the power under the Rules to hear substantive applications so this argument would fail on this basis alone.

Conclusion

55. The Respondent has provided no evidence to support the notion there would be any appearance of bias for me sitting as an Assistant Justice to hear the Section 41 and Substantive Application or any contempt applications upon the application of the legal test (see paragraph 42 above).

56. I fully accept that if an appeal was made against any of my orders as sitting as the Registrar that I would not be able to hear those applications as an Assistant Justice; however, there is no appeal of such orders before me and I have no jurisdiction to "*review the validity*" of any orders I made sitting as the Registrar (such issues are *res judicata*) and neither does any Puisne Judge for that matter.

57. One cannot be left with any doubt in concluding that the Respondent's true motivation for making the Recusal Application given the chronology of events, was solely due to the Respondent's dislike of the findings and orders made in this matter. There is a procedure clearly set out in Rule 131 of the Rules for the appeal of an order made by the Registrar which was not utilized. It would also be remiss of me to not strongly encourage the Respondent to obtain the CourtSmart recordings of all the appearances before me in this matter where he was not present, as it is clear based on the evidence he has provided, that inaccurate information is being passed to him.

Dated this 5th day of May 2022

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ASSISTANT JUSTICE ALEXANDRA DOMINGUES