In The Supreme Court of Bermuda

CIVIL JURISDICTION
(COMMERCIAL COURT)

2018: No. 315

BETWEEN:

MOLLY WHITE
STEPHEN WHITE

Plaintiffs

- and -

DENISE PRISCILLA TREW

Defendant

CIVIL JURISDICTION
(COMMERCIAL COURT)

2019: No. 379

BETWEEN:

DENISE PRISCILLA TREW

Plaintiff

- and -

HSBC BANK BERMUDA LIMITED

First Defendant

-and –

DENNIS WILLIAM DWYER

(as Executor of the Estate of Robert Allen Trew)

Second Defendant

RULING

Date of Hearing: **15, 19 October 2021**
Date of Ruling: **24 December 2021**

Appearances: **Michael Scott, Browne Scott, for Denise Priscilla Trew**

John Hindess, Marshall Diel & Myers Limited, for HSBC Bank of Bermuda Limited

Kim White, Cox Hallett Wilkinson Limited, for Molly White and Stephen White

RULING of Mussenden J

Introduction – Recusal

1. These two matters are only consolidated for the purposes of an application by Denise Trew ("**Mrs. Trew**") that I recuse myself from hearing any further proceedings in these two cases for the reasons as set out below. Once a determination has been made on the recusal application then the matters will resume as individual cases. All counsel had previously agreed this course of action.

2. This application arises by Summons in respect of each matter as follows:

    a. In the matter 2019: No. 379 Denise Trew v HSBC Bank Bermuda Limited and Dennis Dwyer (as Executor of the Estate of Robert Allen Trew) (the "**HSBC Matter**"):
        i. Mrs. Trew's Summons dated 28 September 2021 for an application that I recuse myself from the matter on the grounds of judicial bias.
        ii. Mrs. Trew's Summons dated 1 October 2021 for an application to file the additional affidavit evidence of Mrs. Trew sworn 1 October 2021.

b. In the matter 2018: No. 315 Molly White and Stephen White v Denise Trew (the "**White Matter**") - Mrs. Trew's Summons dated 15 September 2021 for an application that I recuse myself from the matter on the grounds of judicial bias.

3. Mrs. Trew filed an affidavit sworn 1 October 2021 ("**Trew1**") in support of both recusal applications.

Preliminary Point - The Notices of Motion for Leave to Appeal were filed out of time

4. Mrs. Trew had filed a Notice of Motion for Leave to Appeal in respect of both the HSBC Matter and the White Matter. Mr. White and Mr. Hindess raised a preliminary point that the Notices of Motion were filed late and are time barred pursuant to the Rules of the Court of Appeal (the "**Rules**"). They submitted that if I determined that preliminary point first in their favour then I would not have to deal with the recusal applications. Mr. Scott requested that I, as a single Judge of the Court of Appeal, grant leave for an enlargement of time to file the Notices of Motion. I heard submissions on the preliminary point during the hearing for the recusal applications. I informed the parties that I would first address the recusal applications and if I did not recuse myself from these proceedings then I would address the preliminary point. I deal with the preliminary point at the end of this Ruling.

Background

5. Mrs. Trew is represented by her counsel Mr. Michael Scott in both these matters.

6. In earlier proceedings in both the HSBC Matter and the White Matter, I issued Rulings that were not in favour of Mrs. Trew but in favour of the opposing parties (the "**Rulings**"). Mrs. Trew then filed a Notice of Motion for Leave to Appeal in each matter. Before the Notice of Motion applications could be heard, Mrs. Trew filed these recusal applications.

7. Mrs. Trew contends that as a result of information that she has learned since I issued my Rulings in her two matters, that she felt vulnerable and continues to feel vulnerable that I, as

the judge in her cases, have bias including unconscious bias, against her counsel Mr. Scott. She did not assert that I have any bias against her.

8. As a result of the position of Mrs. Trew, in respect of the White Matter, Mr. Scott filed a letter in the Court dated 15 September 2021 addressed to me. The letter stood as an informal request to me to recuse myself from these proceedings and it set out a factual matrix and legal basis for recusal. I did not answer the letter but proceeded to hear the applications for recusal.

The Evidence in Support of the Applications for Recusal

9. Mrs. Trew set out in Trew1 a number of wide-ranging matters including:
    a. Law, in particular the Bangalore Principles and other case authorities;
    b. Some references to the exhibited Official Hansard Report of the Bermuda House of Assembly session dated 17 February 2017 (the "**Hansard**");
    c. Some references to watching the YouTube hearing of court proceedings in Bermuda on 26 August 2021, namely an unrelated matter 2020: No. 474 *Brown v the Director of Public Prosecutions, the Attorney General and the Deputy Governor* and another unrelated matter 2021: No. 09 *R v Brown*, and some references to the Ruling dated 10 September 2021 of Subair Williams J in respect of that YouTube hearing (for simplicity "***R v Brown***");
    d. Some information and assertions about a Joint Investigation and Prosecution Team (the "**JIPT**") set up for investigations of public corruption along with some assertions about my purported membership on the "oversight team" of the JIPT when I served as the Director of Pubic Prosecutions[1] (the "**DPP**"); and
    e. References to an exhibited letter dated 31 January 2018 to Mr. Michael Scott from me in my capacity as the then DPP (the "**DPP Letter**").

10. Counsel for the opposing parties, Mr. White and Mr. Hindess, made early applications on 6 October 2021 to exclude parts of Trew1 on various grounds including that some of the content

[1] I served as the Director Public Prosecutions for the period April 2016 to December 2020.

was hearsay and some was legal argument. I issued a Ruling that same day that some parts of Trew1 were inadmissible as they were indeed legal submissions and substantial hearsay.

Submissions on behalf of Mrs. Trew

11. Mr. Scott submitted that I should recuse myself for a number of reasons based on the factual matrix and the applicable law. First, for factual evidence in these proceedings, he sought to rely on the Trew1 references to the *R v Brown* hearing and to the *R v Brown* Ruling itself for the submissions of counsel in that case and references to other affidavit evidence to support his assertions. For example, he was referring to some affidavit evidence of Dr. Brown and of a Mr. Briggs about the establishment of the JIPT in 2013 and its alleged continued existence into the time when I was the DPP. Also, about my purported membership of and involvement in the oversight group of JIPT which according to Mr. Briggs also consisted of the Deputy Governor, the Commissioner of Police and the UK Overseas Territories Law Enforcement Officer. On several occasions I canvassed Mr. Scott as to whether he was using *R v Brown* to seek to establish facts in these proceedings or whether he was relying on it for legal principles. He submitted that he was using *R v Brown* for legal principles and to distinguish the facts in it from the present proceedings but added that the DPP's membership of the oversight group of JIPT was a matter of public record. However, in my view, Mr. Scott was also seeking to set out a factual basis in these present applications by relying on the contents of *R v Brown*.

12. Second, for factual evidence, Mr. Scott relied on the DPP Letter which set out that the Bermuda Police had conducted investigations in respect of corruption and/or fraudulent conduct involving public officials, including Mr. Scott, who at all material times was a Member of Parliament for the Progressive Labour Party (the "**PLP**") political party and was sometimes a Minister of Cabinet. The investigation was focused on a period of time 2006 to 2012 before and during the time when Mr. Scott was a Minister. The DPP Letter informed Mr. Scott that after a thorough review of materials including witness statements, documents and other exhibits that it was determined that no criminality or charges of corruption arose out of the review in his respect and therefore no further action would be taken against him and the

investigations against him had been closed. The DPP letter closed by thanking him for his cooperation and patience. I had signed the DPP Letter.

13. Third, for factual evidence, Mr. Scott sought to rely on the Trew1 exhibited Hansard of questions and comments by himself as the Shadow Attorney General to the Deputy Speaker of the House of Assembly and the answers by the then Attorney General Mr. Moniz, a member of Parliament for the One Bermuda Alliance (the "**OBA**") political party when he was in office. The Hansard records that the question and supplementaries were about the "*Attorney General's Civil Action against Lahey Clinic*" which was about Mr. Moniz's conduct of civil litigation in Boston, USA in respect of the Lahey Clinic based in or about Boston (the "**Lahey Litigation**") and about Mutual Legal Assistance Treaties ("**MLATS**"). Mr. Scott also sought to rely on Trew1 where Mrs. Trew was told by Mr. Scott that he had seen Mr. Moniz and me, when I was the DPP, talking in the precincts of the House of Assembly and again in the office of the DPP when he was present and overheard a conversation between us about MLATS.

14. Fourth, Mr. Scott submitted that the Bermuda Constitution set out the duties for the Deputy Governor at sections 18 and 19 and set out the duties for the Director of Public Prosecutions at section 71A specifically stating that the DPP shall not be subject to the direction or control of any other person or authority. Mr. Scott submitted that my membership on the oversight group of the JIPT was politically charged and was a breach of the DPP's constitutional mandate of independence as the Deputy Governor was a ranking member of the Executive. Further, the JIPT was established during the time when the OBA was in Government and when Mr. Moniz conducted the Lahey Litigation. Mr. Scott submitted that during my tenure as DPP, the PLP in opposition, had made allegations that Mr. Moniz had breached Bermuda's MLAT Treaty with the USA. The thrust of Mr. Scott's submissions was that as a member of the oversight group of JIPT, a fair-minded observer would be concerned that my independence as DPP was in doubt. Further, even though I declined to prefer any criminal charges against him, a fair-minded observer would remain in doubt about my independence. Mr. Scott submitted therefore, that although some judges have been appointed as judges after holding high public legal office, my appointment brought with me a risk of bias against him.

15. Fifth, Mr. Scott submitted that in the case of *O'Driscoll (a minor) v Hurley and Health Service Executive*[2] Dunne J cited *Goode Concrete v CRH Plc & Ors*[3] where Denham C.J. described the reasonable person test relating to the issue of bias as *"…whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trial from an impartial judge. As it is an objective test, it does not invoke the apprehension of a judge, or any party; it invokes the reasonable apprehension of a reasonable person, who is in possession of all the relevant facts."* I shall add here that Denham C.J. then set out the test for perceived bias as "*the test to be applied when considering the issues of perceived bias is important in protecting the administration of justice, and necessary to preserve public confidence in the judiciary. Thus, the issue is not simply a matter as between parties, but it is an issue for consideration in relation to the manifest impartial administration of justice in the State, and the confidence which the people rest in the judiciary.*"

16. Sixth, Mr. Scott submitted that due to my knowledge of the investigation against him and the possibility of that investigation being a part of the JIPT process, I should recuse myself. This was because on the objective standard of a reasonably informed person with knowledge of the facts, there would reasonably be apprehension of the possibility of bias in the circumstances. He also submitted the same for apparent bias on my part.

17. Seventh, Mr. Scott relied on *O'Driscoll (a minor) v Hurley* where reference was made to *Goode Concrete v CRH Plc & Ors* where Denham C.J. referred to the Bangalore Principles of Judicial Conduct 2002 and to commentary on the principles[4] as they encapsulated at an international level norms of universal application in relation to such issues as bias. She stated as follows:

> *"47. The tradition of recusal in the Irish Courts is reflected in the Bangalore Principles of Judicial Conduct 2002, at paragraph 2.5; -*

[2] [2016] IESC 32
[3] [2015] 2 I.L.R.M. 289
[4] As found in Gass, Kiener & Stadelmann (eds), "Standards of Judicial Independence" (Bern, 2012)

'A judge shall disqualify himself or herself if from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where:

2.5.1 The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

2.5.2 The judge previously served as a lawyer or was a material witness in the matter in controversy; or

2.5.3 The judge, or a member of the judge's family, as an economic interest in the outcome of the matter in controversy;

provided the disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to serious miscarriage of justice.'"

18. Eighth, Mr. Scott invited me to make disclosure about my alleged involved in the oversight group of the JIPT. He again relied on *Goode Concrete v CRH Plc & Ors* where Denham C.J. made reference to the commentary which made suggestions as to when a judge should make disclosure as follows:

"51. A judge should make disclosure on the record and invite submissions from the parties in two situations. First, if the judge has any doubt about whether there are arguable grounds for disqualification. Second, if an unexpected issue arises shortly before or during a proceeding. The judge's request for submissions should emphasize that it is not the consent of the parties or their advocates that is being sought, but assistance on the question whether arguable grounds exist for disqualification and whether, for example, in the circumstances, the doctrine of necessity applies. If there is a real ground for doubt, that doubt should ordinarily be resolved in favor of recusal."

19. Ninth, Mr. Scott submitted that very often judges resist recusing themselves as many factors play into their resistance. He relied on the case of *Howell & Ors v Lee Millais & Ors*[5] where Mr. Justice Peter Smith was roundly criticized by the Court of Appeal for refusing to recuse himself from a *Beddoe* application, where several weeks previously, he had dealt with members of the claimant law firm in a personal capacity. The Court of Appeal allowed the appeal and there is commentary that this case illustrates the danger of judges being asked to recuse themselves, will not always be able to view such an application objectively.

20. He also relied on the case of *Davidson v Scottish Ministers*[6] where Lord Bingham of Cornhill said *"The rule of law requires that judicial tribunals established to resolve issues arising between citizen and citizen, or between the citizen and the state, should be independent and impartial. This means that such tribunals should be in a position to decide such issues on their legal and factual merits as they appear to the tribunal, uninfluenced by any interest, association or pressure extraneous to the case. Thus a judge will be disqualified from hearing a case (whether sitting alone, or as a member of a multiple tribunal) if he or she has a personal interest which is not negligible in the outcome, or is a friend or relation of a party or a witness, or is disabled by personal experience from bringing an objective judgment to bear on the case in question. Where a feature of this kind is present, the case is usually categorised as one of actual bias. But the expression is not a happy one, since bias suggests malignity or overt partiality, which is rarely present. What disqualifies the judge is the presence of some factor which could prevent the bringing of an objective judgment to bear, which could distort the judge's judgment."*

21. Mr. Scott also relied on an article entitled "*The problems of proving actual or apparent bias: an analysis of contemporary developments in South Africa*[7]" which stated in Section 3 "*Actual or apparent bias*" that "*The jurisprudence that has developed out of the principle of impartiality or the rule against bias is such that the courts do not insist on the proof of actual bias on the part of the judge, since the appearance or a reasonable apprehension of bias, if*

[5] [2007] EWCA Civ 720

[6] 2004 UKHL 34 paras 5 and 7

[7] PER vol.14 n.7 Potchefstroom Jan. 2011

proved, is enough to vitiate the proceedings. As Lord Nolan said in Pinochet [No2], "where the impartiality of a judge is in question the appearance of the matter is just as important as the reality.[8]" Thus, "it is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is impartial. If there are grounds sufficient to create in the mind of the reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand."

Submissions on behalf of Stephen White and Molly White

22. Mr. White submitted that the application for recusal should be dismissed for several reasons as Mrs. Trew has failed in her burden of setting out the grounds for apparent bias that an objective person with a fair mind and all the facts would conclude that I, as the Judge in these proceedings, was anything other than being open minded, independent and impartial.

23. First, Mr. White submitted that Mrs. Trew in Trew1 is not clear about what her personal knowledge is or what is from third persons. He assailed her evidence about the JIPT as being hearsay, about the UK Overseas Law Enforcement Officer being gratuitous and undefined, about the submissions about the Deputy Governor and the DPP, stating that there was no evidence that I as DPP had any dealings with Mrs. Trew. Mr. White submitted that the affidavit evidence fails to show a link between any apparent bias in respect of Mr. Scott as a bias against Mrs. Trew as she had also said in her affidavit that "*I discount emphatically any lack of integrity on the part of the learned judge*". He submitted that there was no real evidence that the Court could rely on for the recusal application except the fact of the DPP Letter.

24. Second, Mr. White submitted that Mr. Scott had known for some time, in 2017 or certainly when he received the DPP Letter in January 2018, that there was an investigation against him but that in these matters in 2021, he failed to make an application for my recusal. Further, he

[8] *Pinochet [No 2]* 1999 1 All ER 577 592h

questioned how could there be "enmity" or "apparent bias" by me in the face of the reasons that the investigation was closed as there was no conduct by Mr. Scott giving rise to criminality or charges of corruption. He relied on the case of *Athene Holding Limited v Siddiqui et al*[9] where Hargun CJ stated "*In considering what a fair-minded and informed observer may conclude, it is worth noting that no objection whatsoever was taken to my acting as the judge in this matter when I gave directions in July 2018. Mr Potts was fully aware of my past relationship with the firm and the connections of the parties to the same firm. I refer to this fact not in aid of any waiver by Mr Potts' clients but as confirming the view that the factual situation does not support apparent bias. If a fair-minded and informed observer had considered the possibility of real bias in the circumstances, surely this point would have been taken by the Defendants at that time.*"

25. Third, Mr. White submitted that Mrs. Trew, failed to state any external influences which would have affected my beliefs and legal opinions. He further stated, that there was no evidence whatsoever that the JIPT influenced any decision of mine in relation to the investigation of Mr. Scott. Further, Mr. White fired that there was not a scintilla or scrap of evidence to support a contention that my membership of the oversight group of JIPT or my knowledge about the investigation of Mr. Scott remained as an external influence in these matters.

26. Fourth, Mr. White flanked that although Mrs. Trew in her affidavit recognised that a DPP was independent and not under the direction or control by any other person, she did not take the bold step of accusing me of failing to perform my constitutional duty in making the decision that no criminality of corruption charges arose as clearly she had no evidence to support such a contention.

27. Fifth, Mr. White cited the case of *R v Brown* (at paras 91 – 93) where Subair Williams J addressed the issues of a small jurisdiction like Bermuda citing her earlier Judgment in *Kenneth Hurf Williams v The Queen*[10] where she observed the nuances of the law on bias.

[9] [2019] SC Bda (20) Comm (15 March 2019)
[10] [2020] Bda LR 49 - This decision was overturned on appeal on grounds unrelated to the complaint of bias

Submissions on behalf of HSBC

28. Mr. Hindess submitted that the application for recusal should be rejected for several reasons as the fair-minded and informed observer would find there is no appearance of bias in these circumstances.

29. First, Mr. Hindess submitted that the applicable law in Bermuda as it relates to recusal applications was most thoroughly and recently set out by Subair Williams J in *R v Brown* where she cited the case of *Porter v Magill*[11] which stated "*It is well-established law that an appearance of judicial bias is proven where it can be shown that a fair-minded and informed observer would conclude that there is a real possibility of bias.*" Mr. Hindess also referred to two other cases adopting the same test, *JS v AS*[12] as well as *Athene Holding Limited v Siddiqui et al* where in both cases an extract was cited from the case of *Helow v Secretary of State for the Home Department and another*[13] in relation to the "fair-minded observer" (paras 2 – 3 of *Helow* as cited in para 72 in *R v Brown*) and the cautious approach a Judge should take when considering recusal applications (para 22 in *Helow* as cited in para 75 in *R v Brown*):

> *"72. Lord Hope of Craighead in the judgment of the House of Lords in Helow v Secretary of State for the Home Department and another [2008] UKHL 62 also considered the meaning of the fair-minded and informed observer in the opening paragraphs of the judgment [1-3]:*
>
> > *"2. The observer who is fair-minded 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, as Kirby J observed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53. Her approach must not be confused with that of the person who has brought the complaint. The "real possibility" test*

[11] [2002] 2 AC 357
[12] 2021 SC Bda 40 Div
[13] [2008] UKHL 62

ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. But she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before them impartially.

3. Then there is the attribute that the observer is "informed". It makes the point that, 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. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fairminded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

…

75. Helow v Secretary of State for the Home Department and another was previously cited by Turner J in Charles Thomas Miley v Friends Life Limited [2017] EWHC 1583 as observed in this jurisdiction of Court by the Hon. Chief Justice Mr. Narinder Hargun in Athene Holding Limited v Siddiqui and Ors [2019] Bda LR 21. Hargun CJ quoted the below passage from the judgment of Turner J [22]:

"22. At the risk of stating the obvious, any judge who is invited to recuse himself on the ground of apparent bias must be very careful not to allow any personal considerations whatsoever to contaminate his conclusions. Nevertheless, this should not preclude such a judge from acting with the same level of robustness and proportionate scepticism, where this is necessary, as he would approach any other application. To proceed otherwise would be unfairly to prejudice the other side out of an undue sensitivity to the perception that such robustness may be wrongly

attributed to the personal feelings of the judge as opposed to the legitimate demands of firm management with the aim of applying the overriding objective.""

30. Second, Mr. Hindess submitted that the only evidence put forth in relation to the appearance of bias is the revelation that I was a member of the oversight group of JIPT at the time that Mr. Scott was being investigated. Thus, Mrs. Trew contends that this alleged fact means that a fair-minded observer would determine that there is a possibility of bias. However, he submitted that there was no actual evidence of the existence of the JIPT or that the DPP was a member. Further, the only undisputed evidence is in the DPP Letter that there was an investigation of Mr. Scott which closed without any finding of criminality or corruption arising against Mr. Scott. Thus, the only issue that the informed and fair-minded observer must decide is whether the fact that I was in charge of an investigation into Mr. Scott several years ago means that there is the appearance of bias.

31. Third, Mr. Hindess submitted that the evidence does not support that a fair-minded observer would find a possibility of bias against Mr. Scott. On the contrary, he submitted that as the investigation concluded with the reasons as it did, it is likely that the bias would be in favour of Mr. Scott.

32. Fourth, Mr. Hindess submitted that any finding of bias or apparent bias would only be against Mr. Scott, not his client Mrs. Trew. He relied on the case of *J.S. v A.S.* where the Learned Registrar stated *"The Respondent has provided no evidence to support the notion there would be any appearance of bias I would have as it relates to the Respondent/Applicant. All of the case law is clear in providing precedent for instances where the judge has an actual or apparent bias against the applicant rather than against actual or apparent bias against Counsel. Rather, it appears Counsel for the Respondent is attempting to use this application due to the dislike of the findings and orders made in this matter."*

33. Fifth, Mr. Hindess submitted that Mrs. Trew states that she only became aware of the JIPT in August 2021. However, it was clear that Mr. Scott knew of the investigation as early as 2015, therefore, if he thought that there was the possibility of bias, then he should have brought it to

the Court's attention when the case first came before me. Further, he submits that Mrs. Trew has not requested that another judge hear the recusal application.

34. Sixth, Mr. Hindess submitted that in *R v Brown* Subair Williams J addressed the danger of granting a meritless application (at paras 174 – 180) pointing out that a person's right to a fair trial is absolute but it must be based on a real ground for doubt. He submitted that the present case is groundless and therefore Mrs. Trew has failed in her burden to show that I am biased against her.

Analysis on Recusal Application

35. In my view, the application for my recusal fails for several reasons. First, the state of substantial parts of the evidence does not support Mrs. Trew's application or the submissions by Mr. Scott. Mr. Scott relies on Trew1 which contained substantial inadmissible hearsay for these proceedings, for example, Mrs. Trew appeared to be saying or repeating circumstances that Mr. Scott had told her. To this point, the events where Mr. Scott saw Mr. Moniz and me in the House of Assembly discussing something or where he saw Mr. Moniz and me in the DPP's office where he had overheard our discussions was, without any dates, context or accuracy, a desperate scraping of the barrel for evidence. I had ruled earlier that that evidence was not admissible and as such Mr. Scott could not rely on it. Mr. Scott also sought to rely on submissions and references to affidavit evidence in *R v Brown* as evidence in these proceedings despite my cautions to him that that was not proper evidence in these proceedings. I drew the parallel that he was not at liberty to select any judgment of the Court and then rely on the facts therein as evidence in these proceedings. After ruling substantial parts of Trew1 as admissible, the facts were minimal.

36. Mr. Scott sought to rely on the exhibited Hansard about the Lahey Litigation as combined with the assertions in Trew1 which doused that evidence in political fuel by relying on events that Mrs. Trew had been told by others and which seemed to be her opinion or possibly Mr. Scott's opinion of the Lahey Litigation. Again, I ruled parts of that affidavit as inadmissible in these proceedings or found that whilst admissible it was not relevant. In respect of the Hansard, I

found no relevance whatsoever of the Lahey Litigation to my role as DPP. Further, although Mr. Scott sought to make a connection between the Lahey Litigation and the Hansard to my role as DPP and to these proceedings, in my view, it was akin to the last throw of the dice in the Last Chance Saloon. That effort failed as I found no relevance of those matters to these proceedings. In real terms, it was difficult to separate fact from inadmissible or hearsay assertions although when the smoke was clear, there was not much credible evidence to support the applications.

37. Second, the DPP's Letter dated 31 January 2018 did stand as evidence as set out in its contents. Mr. Scott was investigated by the Bermuda Police in respect of a period of time before and when he was a Minister in relation to allegations of corruption by public officials. That letter with my signature informed Mr. Scott that the investigation was closed against him as it did not give rise to criminality by him or charges for corruption. It is notable that the letter makes reference to the Bermuda Police Service and the DPP's Department having conducted a thorough review of an array of materials.

38. Third, based on the evidence, in my view, there is no factual basis to submit that I at any point compromised my constitutional duties as the DPP to the oversight group of the JIPT or anyone else. Mr. Scott during the course of his submissions invited me to make disclosure about my involvement with the JIPT. I declined to do so then. The *Goode Concrete v CRH Plc & Ors* reference to the Bangalore Principles commentary address this point stating when a judge should make disclosure. The first step was that a judge should make disclosure if the judge has any doubt about whether there are arguable grounds for disqualification. In my view, I have never had any doubt on this point. Despite not having any obligation to make any disclosure because I had no doubt, I will disclose that during my tenure as DPP, I was not a member of an oversight group comprising the named officials (or any other officials) called the JIPT (or called anything else). Further, I made my decision in respect of Mr. Scott as an independent DPP, not as part of any other body.

39. On that basis, Mr. Scott's submissions lacked any merit that I had allowed external factors to influence my decisions as DPP, in his case or other cases. In considering the reasoning of

Subair Williams J in *R v Brown* about meritless applications and that there must be real grounds for doubting that a person could have a fair hearing, in my view the JIPT issue and all its phalanges are meritless and are not real grounds for doubt.

40. Fourth, in respect of the test for bias or apparent bias, in my view, the reasons for recusing myself as set out in *O'Driscoll (a minor) v Hurley* and the references to the Bangalore Principles do not arise as (a) I never had actual bias or prejudice concerning Mrs. Trew or personal knowledge of disputed matters in these proceedings; (b) I never previously served as a lawyer or was a witness in these proceedings; and (c) I, or any of my family members, never had an economic interest in the outcome of the matter in controversy.

41. Fifth, I recognise that I should have an open mind to the applications for recusal as set out in the case of *Howell & Ors v Lee Millais & Ors*. With that open mind, I have given consideration to what I consider the only credible evidence in these applications which is the DPP Letter. In my view there is some significant merit to the submissions of Mr. White and Mr. Hindess that the reasons for closing the investigation against Mr. Scott because there was no conduct by him of criminality or corruption would more likely not result in a bias against him and certainly not his client.

42. Sixth, in applying the principle of *J.S. v A.S.*, in my view, any finding of bias would be against Mr. Scott, not Mrs. Trew. This point further solidifies the view that the applications for my recusal should fail.

43. Seventh, Mrs. Trew seems to place significant reliance on the timing of the *R v Brown* Ruling which contained the information about the JIPT as the basis for her concern. However, it is clear from the DPP Letter that Mr. Scott knew about the investigations in October 2015 and that he knew the investigation against him was closed in January 2018. In my view, the JIPT issue and the DPP Letter can be considered as separate issues. The DPP Letter armed Mr. Scott with the knowledge to raise any concerns about appearing before me with all of his clients before any such appearances. However, Mr. Scott has waited after several hearings and Rulings in these matters to action these applications, which is clearly rather late in the day. In my view, it would be proper to draw an inference that Mr. Scott himself did not hold any

concerns about a bias by me against him. It applies here equally, as Hargun CJ stated in *Athene Holding Limited v Siddiqui et al,* that "*the factual situation does not support apparent bias*".

44. Eight, having set out these issues, the question is whether Mrs. Trew has discharged her burden to satisfy me that I should recuse myself in these proceedings. I bear in mind the cautious approach that I should take when considering the applications as set out in *Helow v Secretary of State for the Home Department and another*. I remind myself about the approach that the fair-minded observer should take and what should be considered as relevant in the assessment. I also take guidance from Hargun CJ in *Athene Holding Limited v Siddiqui and Ors* to not allow any personal considerations whatsoever to contaminate my conclusions, but to still act with robustness and proportionate sceptism as I would with any other application. In light of all the issues that I have set out, I am not satisfied that a fair-minded and informed observer would conclude that there is a real possibility of bias by me against Mr. Scott or Mrs. Trew.

45. In light of the above, I dismiss both applications for recusal.

Preliminary Point in respect of the late filing of the Notice of Motion for Leave to Appeal

46. As stated earlier, in respect of both matters, Mrs. Trew filed a Notice of Motion for Leave to Appeal.

47. Both Mr. White and Mr. Hindess took a preliminary point that the filing of the Notices of Motion for Leave to Appeal was out of time.

Submissions of Molly White and Stephen White

48. Mr. White submitted that in the White matter in these proceedings, that the Ruling was dated 23 July 2021 and that the Notice of Motion for Leave to Appeal was filed on 23 August 2021. Mr. White submitted that Order 2 Rule 3 of the Rules provide that an application for leave to appeal shall be made not later than 14 days after the date of the decision of the Supreme Court.

Therefore the application should have been filed by 6 August 2021. Therefore, the application was time barred as the application was filed 31 days after the Ruling was issued.

Submissions of HSBC

49. Mr. Hindess submitted that in the HSBC matter in these proceedings, the Ruling was dated 23 July 2021 and the Notice of Motion for Leave to Appeal was filed on 23 August 2021. He submitted that the application should be denied on the basis that it is out of time as prescribed by the Rules which state that an application for leave to appeal must be filed within 14 days of the judgment.

Submissions of Mrs. Trew

50. Mr. Scott initially submitted that he was of the view that he had six weeks to file the Notice of Motion for Leave to Appeal. However, he accepted that Order 2 Rule 3 of the Rules set the guidelines for Leave to Appeal and that it mandated that a Notice of Motion shall be filed not later than 14 days after the date of the Ruling of the Supreme Court. Therefore he accepted that both Notices of Motion were filed out of time.

51. Mr. Scott invited the Court to exercise its discretion sitting as a single Judge of the Court of Appeal to enlarge the time pursuant to Order 2 Rule 4(2) of the Rules:

> *2/4 Time*
> *(1) An appeal shall be deemed to have been brought when the notice of appeal has been filed in the Registry of the Supreme Court.*
>
> *(2) Every application for an enlargement of time within which to appeal shall be supported by an affidavit setting forth good and substantial reasons for the failure to appeal within the prescribed period, and by grounds of appeal which prima facie show good cause why the appeal should be heard. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal.*
>
> *(3) An application for enlargement of time within which to appeal may be heard and determined by a single Judge; but, if the Judge refuses an application made under this*

provision, the party aggrieved by such refusal shall be entitled to have the application heard and determined by the Court.

Replies by Mr. White and Mr. Hindess

52. Mr. Hindess countered that Order 2 Rule 4 of the Rules was in respect of Notices of Appeal that were out of time, not in respect of Notices of Motion that were out of time.

53. Mr. White countered that Order 1 rule 5 of the Rules provided the Court of Appeal with the discretion to enlarge the time provided for in the Rules.

1/5 Enlargement of time and departure from Rules
The Court may enlarge the time provided by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interests of justice.

54. Mr. White also submitted that Order 5 rule 1 of the Rules provided the Court of Appeal with the discretion to waive non-compliance with the Rules.

5/1 Waiver of non-compliance with rules
Non-compliance on the part of an appellant with these Rules or with any Rule of practice for the time being in force shall not prevent the further prosecution of his appeal if the Court consider that such non-compliance was not wilful, and that it is in the interests of justice that non-compliance be waived. The Court may in such manner as they think right, direct the appellant to remedy such non-compliance, and thereupon the appeal shall proceed. The Registrar shall forthwith notify the appellant of any directions given by the Court under this Rule, where the appellant was not present at the time when such directions were given.

55. However, both Counsel maintained the position that the Rules do not provide a Judge of the Supreme Court with a power or discretion to enlarge the time for filing a Notice of Motion for Leave to Appeal.

Analysis on the Preliminary Point

56. In my view the preliminary point that the Notices of Motion for Leave to Appeal were filed out of time in the Supreme Court is correct.

57. The Interpretation Section, Order 1 rule 2 of the Rules provides that an "appeal" includes an application for leave to appeal. Pursuant to Order 2 rule 4(2) an applicant can make an application for enlargement of time to file the Notices of Motion for Leave to Appeal. Pursuant to Order 2 rule 4(3) of the Rules I have the discretion to consider an application for an enlargement of time within which to file a Notice of Motion for Leave to Appeal.

Costs

58. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of HSBC Bank Bermuda Limited in the HSBC Matter and in favour of Molly White and Stephen White in the White Matter on a standard basis, to be taxed by the Registrar if not agreed.

Dated 24 December 2021

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT