In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: 474

EWART FREDERICK WINSLOW BROWN

Applicant

-v-

THE DIRECTOR OF PUBLIC PROSECUTIONS

1st Respondent

THE ATTORNEY GENERAL

2nd Respondent

THE DEPUTY GOVERNOR

3rd Respondent

AND

CRIMINAL JURISDICTION
2021: 09

THE QUEEN

-v-

EWART FREDERICK WINSLOW BROWN

RULING

(Redacted)

Application for Recusal of Trial Judge on grounds of an Appearance of Bias
Relevant Legal Principles on Judicial Bias

Date of Hearing:	03 August 2021
Date of Circulation of Draft Ruling:	07 September 2021
Date of Delivery of Ruling:	10 September 2021

Appearances in the Civil Proceedings:

The Applicant	Mr. Delroy Duncan QC, Trott & Duncan Limited
	Mr. Ryan Hawthorne, Trott & Duncan Limited
	(Mr. Elliott Mottley QC observing)
1st Respondent	Ms. Elizabeth Christopher, Christopher's
2nd Respondent	Mr. Brian Moodie, Crown Counsel for the Attorney General
	Ms. Lauren Sadler-Best, Crown Counsel for the Attorney General
3rd Respondent	Mr. Mark Diel, Marshall Diel & Meyers Limited

Appearances in the Criminal Proceedings:

The Crown	Mr. Alan Richards for the Director of Public Prosecutions
The Accused	Mr. Jerome Lynch QC, Trott & Duncan Limited
	(Mr. Loof observing)

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ANALYSIS AND FINDINGS

RULING delivered by Shade Subair Williams J

INTRODUCTION

1. The subject of the application before this Court holds prominent the most vintage and sacred assurance any Constitution can offer as a safeguard to a fair trial: the right to be tried by an independent and impartial Court established by law. This necessarily endorses the latin maxim *nemo judex in sua causa* (no man shall be a judge in his own cause). In this case, Dr. Ewart F. Brown, a former Government Minister and Premier of Bermuda, ("the Applicant" / "Dr. Brown") seeks my recusal on the grounds that my assignment to his Court proceedings gives rise to an appearance of judicial bias.

2. This is not a case wherein it is suggested that there is any issue of actual bias on my part. In the opening paragraph of the Applicant's written submissions, Mr. Jerome Lynch QC submits:

> "*This is an application that the Hon Mrs Justice Subair Williams (the "Judge") recuse herself from presiding over these proceedings on the basis that the Court would not be seen to be "impartial" were she to preside. There are no grounds to suggest, and nothing herein should be taken to suggest, that the Judge is actually biased or has a personal interest in these proceedings. The basis for the present application is* ***apparent bias*** *resulting from a lingering conflict between the Judge's father and the Defendant, and the continuing relationship between the judge and the former DPP Larry Mussenden (as he then was).*"

3. In March 2021 Dr. Brown was indicted on 13 counts of Official Corruption contrary to section 111(a) of the Criminal Code. Broadly speaking, the offences charged on Indictment No. 9 of 2021 ("the Indictment") allege that Dr. Brown corruptly obtained a benefit while occupying the role of a public officer as a Government Minister. I shall refer to the Court proceedings stemming from the Indictment as the "criminal proceedings".

4. On 22 December 2020, prior to the preferment of the Indictment, the Applicant filed an Originating Summons ("the Originating Summons") in challenge of the lawfulness of the criminal proceedings. Various declarations from the Court, in exercise of its civil jurisdiction, are sought on an Amended Originating Summons. The Applicant claims that a Joint Investigation & Prosecution Team ("JIPT") (comprising an investigation team and an unspecified number of Crown Counsel on behalf of the Director of Public Prosecutions ("the DPP")) was unlawfully and unconstitutionally assembled at the behest of an oversight group (comprising the Commissioner of Police, the DPP, the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor ("UKOTLEA")). These claims form the bedrock of the Applicant's pursuit for declaratory relief to confirm the alleged breaches of

the Bermuda Constitution Order 1968 ("the Constitution"), the Human Rights Act 1981 ("the HRA") and to the common law. A claim is also sought for a declaration of the unlawfulness of any decision by the DPP to institute and undertake criminal proceedings against the Applicant and a permanent stay and/or injunction prohibiting or restraining the DPP from commencing or bringing criminal proceedings against the Applicant following the investigation by the JIPT. I shall refer to the Court proceedings commenced by the Originating Summons as the "civil proceedings".

5. I am presently concerned with the Applicant's plea for me to recuse myself as the trial judge of both the criminal and civil proceedings ("the recusal applications"). By letter dated 10 May 2021 Mr. Lynch QC informed the Court of Dr. Brown's intention to make a recusal application in the criminal proceedings. In the civil proceedings a summons seeking my recusal was subsequently filed on 29 June 2021. Affidavit evidence sworn by Dr. Brown on 28 May 2021 and by Dr. Wilbert Warner on 21 May 2021 was filed in support of the recusal applications.

6. On Tuesday 3 August 2021, Counsel in both the criminal and civil proceedings appeared before me remotely, via a Zoom hearing (commencing at 10:05am and concluding at 5:04pm with the standard Court hearing breaks) on their respective written and oral submissions. Crown Counsel in the criminal proceedings and each of the Respondents' Counsel in the civil proceedings opposed the recusal applications. In the form of preliminary points, both Mr. Lynch QC and Mr. Delroy Duncan QC invited me to (i) employ a precautionary approach by recusing myself from the recusal application itself to allow for it to be determined by another judge and (ii) to provide a statement of the relevant facts, insofar as I personally understand them to be, so that the parties could have the opportunity to make further submissions on that statement in a subsequent hearing.

7. At the close of the hearing of the recusal applications I reserved my decision on all of the matters raised. For the avoidance of any doubt, this is my written Ruling on both the preliminary matters put before the Court and on the substantive applications for my recusal.

THE BACKGROUND TO THE CRIMINAL AND CIVIL PROCEEDINGS

The Civil Proceedings

8. On 22 December 2020 the Applicant's Counsel filed an Originating Summons which was amended without leave on 17 February 2021 pursuant to Order 20/1 and 20/3. The Amended Originating Summons (which I may intermittently refer to as the "Originating Summons) states, in its material parts:

"*By this **amended** Summons, the Applicant claims against the First and Second Respondents:*

1. *A Declaration that the criminal investigation into the activities and affairs of the Applicant by the Joint Investigation & Prosecution Team **(the "JIPT"), under the direction and control of** ~~comprising~~ the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor **(the "UKOTLEA")** is unconstitutional and/or unlawful in that the criminal investigation contravenes certain fundamental rights and freedoms guaranteed under the Bermuda Constitution 1968 namely section 1, **as read with sections 71(6) and 71A.***

2. ***A Declaration that the involvement of the Deputy Governor in the criminal investigation into the activities and affairs of the Applicant is unconstitutional and/or unlawful in that such involvement by the Deputy Governor contravenes certain fundamental rights and freedoms guaranteed under the Bermuda Constitution 1968, namely section 1, as read with sections 19A, 71(6) and 71A.***

   ~~*A Declaration that the criminal investigation into the activities and affairs of the Applicant by the Joint Investigation & Prosecution Team comprising the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor is unconstitutional and/or unlawful in that the criminal investigation contravenes certain fundamental rights and freedoms guaranteed under the Bermuda Constitution 1968 namely section 71(6) as read with section 71A.*~~

3. *A Declaration that the criminal investigation into the activities and affairs of the Applicant by the J**IPT, under the direction and control of** ~~oint Investigation & Prosecution Team comprising~~ the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UK**OTLEA** ~~Overseas Territory Law Enforcement Advisor~~ is unlawful in that the criminal investigation unlawfully contravenes certain fundamental rights and freedoms guaranteed under the Bermuda Constitution 1968 namely sections 1 and 12(3), and the Human Rights Act 1981 namely those rights provided for by section 2(2)(a)(iv) of the Human Rights Act 1981.*

4. *A Declaration that the criminal investigation into the activities and affairs of the Applicant by the J**IPT, under the direction and control of** ~~oint Investigation & Prosecution Team comprising~~ the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UK**OTLEA** ~~Overseas Territory Law Enforcement Advisor~~ is unlawful in that the criminal investigation contravenes and or*

is repugnant to certain fundamental rights at common law, including equality of treatment and the rule of law.

5. *A Declaration that consequent upon the criminal investigation into the activities and affairs of the Applicant by the J**IPT, under the direction and control of*** ~~*oint Investigation & Prosecution Team comprising*~~ *the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UK**OTLEA*** ~~*Overseas Territory Law Enforcement Advisor*~~ *any decision by the Director of Public Prosecutions to institute and undertake criminal proceedings against the Applicant in respect of any offence against any law in force in Bermuda would be unlawful.*

6. *A permanent stay and or injunction prohibiting or restraining the Director of Public Prosecutions from exercising her powers under section 71(6) as read with section 71 A of the Bermuda Constitution 1968 to institute, undertake or take any steps to commence or bring criminal proceedings against the Applicant in respect of any offence against any law in force in Bermuda*."

9. A statement of facts is provided in the Amended Originating Summons under the grounds on which relief is sought:

"***GROUNDS ON WHICH RELIEF IS SOUGHT***

Statement of facts

1. *The facts relied upon are those set out in the Applicant's first affidavit and summarised herein.*

2. *The Applicant was a Member of Parliament for the Progressive Labour Party 1993-2010, a government minister from 1998, and Premier 2006-2010. Since retiring from politics in 2010, the Applicant has served as Executive Chairman of Bermuda HealthCare Services ("BHCS") and the Brown Darrell Clinic ("BDC") both of which he founded, in the case of BDC with his wife, Mrs. Wenda Henton Brown.*

3. *On 8 June 2011, whilst giving evidence at his trial defendant David Bolden claimed that he had been asked to make a corrupt payment to the Applicant. David Bolden was subsequently convicted of misleading the Bermuda Monetary Authority. Shortly afterwards, the police confirmed the opening of an investigation into Mr. Bolden's allegations. Then- Governor Richard Gozney again commented on the investigation into the Applicant in a January 2012 press statement which described evidence of Bolden as against Dr Brown as "clear signs of suspected criminality".*

4. *The investigation into the Applicant became public and aggressive with, first, the arrest of the Chief Medical Officer of BHCS and BDC* [Dr. Sanapareddy] *and search of his home in May 2016, and police raids on both BHCS and BDC in February 2017. The former was held unlawful by both the Supreme Court and the Court of Appeal. Also the police raids were challenged in judicial review proceedings. In the context of these latter proceedings, in April 2019 an affidavit was submitted by Special Investigator John Briggs where he explained that a "Joint Investigation & Prosecution Team" ("JIPT")* ***comprising an investigation team and DPP lawyers*** *had been set up by 2013* ***to carry out*** ~~*oversee*~~ *the investigation into the Applicant and individuals associated with him. This JIPT* ***was assembled at the behest of an oversight group that*** *comprised the "Commissioner of Police, the [Department of Public Prosecutions], the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor".* ***That oversight group met monthly and was updated by*** ~~*At least at that time (April 2019), the JIPT met monthly and received updates from*~~ *"the DPP lawyer and Senior Investigating Officer".*

5. *The Governor of Bermuda is appointed by Her Majesty (Section 17 of the Constitution), which means in practice that it is a UK Government appointment. The holder is usually an experienced FCO career diplomat.*

6. *The Constitution reserves to the Governor conduct of Government business with respect to the police (Section 62(1)(d)). Per Section 87: "Power to make appointments to, the offices of Commissioner of Police and Deputy Commissioner of Police and to remove or exercise disciplinary control over persons holding or acting in those officers is vested in the Governor acting after consultation with the Public Service Commission."*

7. *The office of Deputy Governor is governed by Section 19 of the Constitution: she / he assists the Governor and may also exercise the powers of the Governor under Section 62 under delegation.*

8. *It is understood that the "UK Overseas Territory Law Enforcement Advisor" (the "UKOTLEA") is an experienced British police officer appointed by the FCO for a fixed five-year term, and tasked with "[providing] comprehensive advice and support to Governors and the OT Commissioners of Police in the Caribbean Overseas Territories and Bermuda, working with them to implement the most effective and responsive law enforcement policies, practices, procedures and initiatives.*

9. *On 9 December 2020, the very recently appointed DPP, Ms. Cindy Clarke informed those acting for the Applicant that she had determined to lay 11 charges against the*

Applicant. The DPP specified that no charges would be laid in relation to allegations of overtesting at BHCS and BDC which had been aggressively and overbearingly pursued by the JIPTS, often employing unlawful means.

10. *DPP Clarke's decision, made at most a mere five days after she had acceded to her role cannot have been the result of an independent assessment of all the evidence gathered during the decade long JIPT Investigation.*

11. *It is understood that the JIPT has had ~~had~~ oversight over the investigation into the Applicant throughout. It is established that the costs of this investigation are extraordinary, and most likely never before seen on the islands of Bermuda*.

12. *...*

13. *...*

14. *...*

15. *In breach of the protection of the law or due process clause in section 1~~,~~ of the Constitution**,** read together with sections 71A (b) and 71(6) of the Constitution, the investigation into the activities and affairs of the Applicant by the JIPT ~~Joint Investigation & Prosecution Team comprising~~ **under the direction and control of** the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UKOTLEA ~~Overseas Territory Law Enforcement Advisor~~ contravened the doctrine of separation of executive powers that exists between the legislature acting through the representative of the head of state, the Deputy Governor, and the Director of Public Prosecutions who is not subject to the direction or control of any other person or authority. The Applicant will contend that it is unlawful and unconstitutional for the Director of Public Prosecutions to exercise his function to consider and determine the prosecution of any person including the Applicant by taking that decision in any part with a person or body exercising the function of head of state and or exercising the legislative function.*

16. *In breach of the protection of the law or due process clause in section 1~~,~~ of the Constitution**,** read together with sections 71A (b) and 71(6) of the Constitution, the investigation into the activities and affairs of the Applicant by the JIPT ~~Joint Investigation & Prosecution Team comprising~~ **under the direction and control of** the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UKOTLEA ~~Overseas Territory Law Enforcement Advisor~~ contravened sections 71A (b) and 71(6) of the Constitution by meeting innumerable times and at least*

monthly to jointly consider the investigation and prosecution of the Applicant thereby compromising the Director of Public Prosecution's independent discretion to consider and/or make a determination whether to undertake a prosecution ***and /or*** *placed the Director of Public Prosecutions in a position where his de facto independence is in doubt or would cause a fair-minded observer to be concerned the Director of Public Prosecution****s'*~~*s*~~ *independence is in doubt.*

17. …

18. In breach of sections 1 and 12(3) of the Bermuda Constitution and section 2(2)(a)(iv) of the Human Rights Act 1981 the criminal investigation into the activities and affairs of the Applicant by the ***JIPT*** ~~*Joint Investigation & Prosecution Team comprising*~~ ***under the direction and control*** *of the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UKOTLEA* ~~*Overseas Territory Law Enforcement Advisor*~~ *has been carried out because of the political opinions held by the Applicant and the policies he pursued whilst holding political office.*

Repugnancy to the common law

19. *Further or alternatively, the criminal investigation into the activities and affairs of the Applicant Ewart F. Brown by the JIPT* ~~*Joint Investigation & Prosecution Team comprising*~~ ***under the direction and control*** *of the Commissioner of Police, the Director of Public Prosecutions, the Deputy Governor and the UKOTLEA* ~~*Overseas Territory Law Enforcement Advisor*~~ *was carried out by an extraordinary and uniquely created investigation and prosecution team never utilised before in the Islands of Bermuda for offences of a similar or greater magnitude at great cost to the Bermudian taxpayer. The separate and distinct investigation and prosecution regime created to determine whether to commence a prosecution against the Applicant is repugnant to certain fundamental rights of individuals at common law including rights of equality of treatment and the rule of law*."

10. The Originating Summons is supported by an affidavit sworn by Dr. Brown stating the following, *inter alia*:

"…

1. …
2. I founded Bermuda HealthCare Services Limited ("BHCS") in 1990 and returned to Bermuda permanently in 1993, becoming a Member of Parliament with the then opposition Progressive Labour Party in 1993. In 1998, I was appointed Minister of

Transport in the Progressive Labour Party government. I married [redacted] on 31 May 2003. In 2004, I was appointed Minister of Tourism and Minister of Transport. In October 2006, I became Premier of Bermuda. With my wife, I founded Brown Darrell Clinic ("BDC") in January 2008. I completed my four year term as leader of the Progressive Labour Party in October 2010 and decided not to run again. I resigned as a Member of Parliament in October 2010. Following my resignation as a Member of Parliament, I returned to BHCS and BDC as Executive Chairman, positions I currently hold.

3. *I make this affidavit in support of my application for redress pursuant to section 15(1) of the Schedule to the Constitution of Bermuda and to set out the factual background to my claim that the organisation and supervision of the criminal investigation which has now led to charges being laid against me, as well as the decision-making process which led to the charging decision, represent an infringement of the Respondent's constitutionality mandated independence. There is now produced and show to me a paginated bundle of documents marked "EFB1" consisting of what I believe to be true copies of the documents to which I refer in this affidavit. Any references to page numbers are references to the documents contained in Exhibit "EFB1".*

4. *Matters to which I depose that are within my knowledge are true. To the extent that information has been provided to me by others, I verily believe such information to be true and accurate to the best of my knowledge, information and belief.*

5. *This application is directly concerned with my personal situation. However, as someone who has for much of my life fought for the dignity and right to equal treatment of all Bermudians, as a physician, campaigner, MP, minister, and Premier, it is my fervent wish that it will serve to vindicate the constitutional rights and protections for all Bermudians. The Respondent's independence is one of the fundamental safeguards for anyone subject to a criminal investigation by the Bermudian authorities, and is intended to guarantee that criminal proceedings are not brought for discriminatory or other constitutionally impermissible reasons. The Respondent, rightly, wields enormous power on behalf of, and for the protection of, Bermudians. That power cannot be allowed to be instrumentalised to serve ends other than justice, lest we all, but in particular those most vulnerable, see our constitutionally protected freedoms diminished.*

II. The Respondent's inclusion in the Joint Investigation & Prosecution Team compromised the Respondent's constitutionally mandated independence

6. *The Respondent's is a "public office" to be filled whenever the Attorney General is a member of either House (Section 71A(a) of the Bermudian Constitution; hereafter "the Constitution"), i.e. whenever the Attorney General is not politically independent. When appointed, the constitutional powers of the Attorney General with respect to criminal proceedings set out in Article 72 of the Constitution vest in the DPP (Section 71A(b)).*

7. *For the duration of the investigation into me which started in 2011 which I attach and exhibit at pages 1-2 of "EFB-1", the Attorney General has been a member of the House of Assembly and there has therefore been a DPP in office. During this period, that have been three holders of the office of DPP: Rory Field QC until the end of February 2016, Larry Mussenden until 1 December 2020, and now Cindy Clarke.*

8. *During the long years of this public and degrading investigation, I have drawn comfort from section 71(6) of the Constitution: "In the exercise of the powers conferred on him by this section, the [DPP] shall not be subject to the direction or control of any other person or authority." These powers include instituting and undertaking criminal proceedings (Section 71(2)(a)). I felt reassured in as much as a constitutionally independent DPP would not let him- or herself be influenced by political considerations, and only consider the evidence.*

9. *However, my faith in the Respondent's independence was severely shaken when my legal team received an affidavit of Special Investigator John Briggs sworn on 4 April 2019, filed in judicial review proceedings challenging the legality of police raids against BHCS and BDC. At paragraph 15 of his affidavit which I attach and exhibit at page 12 of "EFB-1", SI Briggs recounts that a "Joint Investigation & Prosecution Team" (JIPT" had been set up by 2013 to oversee this investigation into me and individuals associated with me. This JIPT comprised the "Commissioner of Police, the [Department of Public Prosecutions], the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor". At least at that time, the JIPT met monthly and received updates from "the DPP lawyer and Senior Investigating Officer*

10. *The Governor of Bermuda is appointed by Her Majesty (Section 17 of the Constitution), which means in practice that it is a UK Government appointment. The holder is usually an experienced UK FCO career diplomat, which has been the case of all governors in post during the investigation into me: Richard Gozney (2007-2012), George Ferguson (2012-2016), Ginny Ferson (2016), John Rankin (December 2016 – December 2020). The current Governor Rena Lalgie (appointed on 14 December 2020 was a UK career civil servant, albeit not at the UK FCO.*

11. *The Constitution reserves to the Governor conduct of Government business with respect to the police (Section 62(1)(d). Per Section 87: "Power to make appointments to, the offices of Commissioner of Police and Deputy Commissioner of Police and to remove or exercise disciplinary control over persons holding or acting in those officers is vested in the Governor acting after consultation with the Public Service Commission." The office of Deputy Governor acting after consultation with the Public Service Commission." The office of Deputy Governor is governed by section 19 of the Constitution: she/he assists the Governor may also exercise the powers of the Governor under Section 62 under delegation.*

12. *Although by virtue of section 71A(3) of the Constitution, the Governor does not have direct disciplinary authority over the Respondent, that does not preclude the Governor from being able to advance or hinder the career of holders of the office of DPP. This is clearly demonstrated by then-Governor Rankin's appointment of former DPP Larry Mussenden as Puisne Judge in March 2019 which I attach and exhibit at pages 36-37 of "EFB-1" an appointment which was then suspended until 3 December 2020 which I attach and exhibit at pages 66-67 of EFB-1"*

13. *I understand that the "UK Overseas Territory Law Enforcement Advisor" (the "UKOTLEA") is an experienced British police officer appointed by the FCO for a fixed five-year term, and tasked with "[providing] comprehensive advice and support to Governors and the OT Commissioners of Police in the Caribbean Overseas Territories and Bermuda, working with them to implement the most effective and responsive law enforcement policies, practices, procedures and initiatives", which I attach and exhibit at pages 38-39 of "EFB-1".*

14. *I was and remain very concerned that by subjecting itself to the supervision of the JIPT, and agreeing to provide monthly updates and accounts to both the Governor's Office and the UKOTLEA, a representative of the UK FCO, the Respondent opened itself up to improper pressure from the Bermudian executive and the UK FCO. The Respondent clearly put itself in a position where its de facto independence to make decisions in relation to the investigation into me is in doubt.*

15. *In addition, I was and remain concerned that by submitting to the JIPT, the Respondent compromised its independence also vis-à-vis the Bermuda Police Service to whom the Respondent should be in a position to give frank and independent advice on the evidence gathered during an investigation. It seems obvious to me that in order for the Respondent to be able to retain this independence and authority vis-à-vis the police, the Respondent cannot be subsumed into the same structural hierarchy. However, through the JIPT, the Respondent gave account of the progress of the investigation*

jointly with the police, to the police's supervisory authority (the Governor's Office). This caused and continues to cause me great concern that the Respondent's independence and authority vis-à-vis the police was compromised in relation to this investigation into me.

16. *I wish to emphasise that my concerns in relation to the compromising of the Respondent's constitutionality mandated independence are not theoretical. I have particular grounds to be concerned that the Bermudian government of the day as well as the UK FCO used the JIPT in order to put pressure on the Respondent to lay charges against me for political reasons. These concerns are based principally on the following factors:*

    (a) *In 2009, I acted upon my continuing conviction that my government had a constitutionally indisputable responsibility for immigration, and therefore, the constitutional and legal right to admit four Uighur detainees from the US detention camp at the infamous Guantanomo Bay on the island of Cuba. I subsequently learned that the UK FCO was incensed at my actions, and that the UK FCO has carried an institutional animus towards me ever since.*

    (b) *As early as June 2011, then-Governor Gozney made clear that he had taken a personal interest in the investigation into me, and that he had put "London" on notice of it which I attach and exhibit at pages 40-41 of "EFB-1". Governor Gozney again commented on the investigation into me in a press statement in January 2012, where he described it as being based on "clear signs of suspected criminality" which I attach an exhibit at page 42 of "EFB-1". There had therefore been several declarations of interest in this investigation by the representative of the Monarch in Bermuda, to whom the DPP owes her/his appointment, and the body in practice responsible for the Governor of Police's appointment and tenure.*

    (c) *The party in government at the relevant time was the One Bermuda Alliance ("OBA"), historically protective of the interests of the white minority, and vociferously opposed to me and the policies I had pursued in government seeking to empower the black, under-privileged majority. This is clear from a 2007 internal post-election analysis produced on behalf of the OBA's predecessor the United Bermuda Party which I attach and exhibit at pages 43-61 of "EFB-1". The pursuit of criminal investigations into me clearly had value to OBA campaigning against the PLP.*

    (d) *The intensification of the investigation into me (and individuals associated with me) in early 2017, notably with very public raids on BHCS and BDC on 11 February*

2017, coincides with the slender OBA majority in the House of Assembly disintegrating, leading to elections in July that year. Again, discrediting me at a time when the OBA government knew elections were imminent clearly presented electoral advantages for the OBA.

17. *Further evidence that the JIPT's investigation into me has been conducted for political reasons are the extraordinary costs of the same. In July 2012, my legal team made a request to the BPS under the Public Access to Information (PATI), among other things for information in this regard. The response was that as at 5 June 2019, those costs stood at nearly $4,000,000 which I attach and exhibit at page 65 of "EFB-1". In July 2019 the then Minister of National Security put the figure at $6,096,437.03 in a statement made in the House of Assembly which I attach at pages 68-69 of the "EFB-1". The costs to date will be significantly higher. To my knowledge, no previous single criminal investigation on these islands has been allowed to tax the public purse to such an extent.*

III. The Respondent's decision to lay charges against me was not an independent, and therefor unconstitutional, exercise of her powers

18. *On 9 December 2020 I was informed by my counsel Jerome Lynch QC who had had a conversation with the current holder of the office of DPP, Ms. Clarke, that she had determined to lay 11 charges against me. My counsel was also informed by Ms. Clarke that no charges would be laid against me or anyone else with respect to the allegations of overtesting at BHCS and BDC.*

19. *The investigation into overtesting has been aggressively and overbearingly pursued by the BPS, often employing unlawful means. The unlawfulness of the arrest of Dr. Sannapareddy and the search of his home on 19 May 2016 was ruled by both the Supreme Court and the Court of Appeal, and the BPS had to pay significant damages to Dr. Reddy. In addition, a pending judicial review of the raids on BHCS and BDC on 11 February 2017, which compromised the confidentiality of the medical files of hundreds of patients, is now moot.*

20. *This decision by Ms. Clarke, made a mere five days after she had acceded to her roe, cannot have been the result of an independent assessment of the evidence against me. It would have been impossible for Ms. Clarke to become acquainted with and draw appropriate conclusions from evidence gathered over a decade-long investigation which was described on behalf of the BPS in 20116 as an investigation into "complex fraud involving expensive medical procedures going back a number of years and allegations of corruption", which I attach and exhibit at pages 70-72 of "EFB-1".*

Indeed a Public Inquiry ordered by the previous administration's Premier The Hon. Michael Dunkley MP took 15 months to conclude its inquiries into many of the issues the subject of the overseen by the JIPT.

21. In the exercise of its constitutionality most significant power, namely that of laying charges against individuals, the Respondent must independently and personally be of the view that the evidence justifies it, and that the public interest is best served by it. In the circumstances I have outlined, neither I nor anyone else can have any confidence that the Respondent has acted in conformity with its constitutional obligations."

11. The Originating Summons was listed to be heard for directions on 1 April 2021. However, on 31 March 2021 the directions hearing was relisted to Thursday 8 April 2021 due to precautionary measures taken by the Court in response to a sharp increase of reported positive cases for COVID-19. Given those circumstances, the parties were encouraged to agree directions.

12. On 7 April 2021 a Court Administrator emailed to the parties to the civil proceedings enquiring whether directions had been agreed. Ms. Elizabeth Christopher on behalf of the DPP replied stating that directions had not been agreed and that a summons to strike-out the Originating Summons had been filed on behalf of her client. That strike-out summons seeks an Order in the following terms:

"…

1. The Applicant's Originating Summons be allowed and struck out accordingly as the Applicant seeks to judicially review the decision of the Director of Public Prosecutions to institute and undertake criminal proceedings against him. The First Respondent having not participated in any leave application, it is our position that either it was not sought, or if granted that decision should be re-visited

2. The Applicant's Originating Summons be disallowed and struck out accordingly as the Applicant also seeks a permanent stay of proceedings of criminal charges brought against him, based on Constitutional and/or common law grounds, such relief being within the jurisdiction and discretion of the criminal trial judge to assess and determine whether it would be unfair as a result of the alleged breaches; and

3. The Applicant's Originating Summons be disallowed and struck out accordingly as the Applicant is also inter alia making a complaint pursuant to human rights legislation, but has not first applied to the Human Rights Commission for relief; and

4. *And in the alternative, and in addition to the above grounds, pursuant to the inherent jurisdiction of this Honourable Court on the grounds that:*

   (a) It is scandalous, frivolous or vexatious; and/or
   (b) It is otherwise an abuse of the process of the Court.

5. *Costs.*

6. *Further and other relief*"

13. By a Consent Order dated 9 April 2021 and signed by the Registrar under my direction the following terms were ordered:

"*1. There is an abridgement of time for the service of the First Respondent's summons dated 6th April, 2021*

2. The Applicant's summons for directions dated 24th February, 2021 be adjourned sine die with liberty to restore.

3. All Respondents file and serve submissions on or before 19th April, 2021

4. The Applicant file and serve submissions with 7 days thereafter

5. The parties shall agree dates for a one day hearing within 3 days of this order for the first available date in May and submit the dates to the Registry.

6. The First Respondent file and serve a hearing bundle on the court 7 days before the hearing of the application and electronically upon the Applicant and other Respondents

7. Costs in the Application

8. Liberty to apply"

14. Written submissions on the strike-out application were filed by the 1st and the 2nd Respondents on 19 April 2021 with a view to the strike-out application being heard on 7 May 2021. Due to COVID-19 related reasons, a significant number of Civil Court matters were delisted during the week of 3 May and the 7 May listing for the strike-out application was not confirmed but was subsequently listed to be heard before me on Tuesday 3 August 2021. (That fixture was over-taken by the recusal applications with which I am presently concerned.)

15. On 25 June 2021 the parties appeared before me together with Counsel in the criminal proceedings when directions were made in respect of the recusal applications. In my Order of 25 June 2021, I directed, *inter alia*, that Mr. Duncan QC formalise the Applicant's request for my recusal by filing a summons application within a 7 day period. Further below I shall detail the verbal exchanges between the parties and the Court during the 25 June 2021 hearing which was the final Court appearance, preceding the substantive hearing of the recusal applications on 3 August 2021.

The Criminal Proceedings

The April 2021 Arraignment Session

16. On 1 April 2021, Dr. Brown and his Counsel, Mr. Lynch QC, made the first appearance in the Supreme Court before Acting Justice, Mr. Juan Wolffe. Dr. Brown attended remotely via video screen. The DPP, Ms. Cindy Clarke, confirmed that the prosecution had filed and served the Indictment, the Record and Case Management Form 1 ("Form 1").

17. Ms. Clarke informed the Court that she had received notice from the Defence that an application under section 31 of the Criminal Jurisdiction and Procedure Act 2015 (seeking a pre-arraignment dismissal of the charges on the grounds of insufficiency of evidence) would be made in addition to other pre-trial applications. Accordingly, Dr. Brown was not arraigned (and to date, has not been arraigned).

18. Ms. Clarke requested for directions to be made in preparation for the hearing of the preliminary applications to be made by the Defence. However, Mr. Lynch QC, having informed Wolffe AJ that there were a number of issues for resolution at an early stage of the criminal proceedings, highlighted and focused on the urgent need for an appropriate conflict-free trial judge to be identified out of the limited number of judges who would be able to preside over criminal proceedings. Mr. Lynch QC contended that the trial judge should be the same judge to determine the preliminary issues arising.

19. Wolffe AJ, without deciding any of the points raised, adjourned the matter to the following arraignment session of 3 May 202.

The May 2021 Arraignment Session

20. On 3 May 2021, Mr. Lynch QC appeared before Mrs. Justice Charles-Etta Simmons in the Supreme Court's second monthly arraignment session in respect of this matter. Dr. Brown made a virtual appearance. DPP Clarke appeared for the Crown.

21. At the 3 May hearing, Mr. Lynch QC reiterated that Case Management Form 1 had been completed by the Crown and served on the Defence on 1 April 2021 and the DPP confirmed

that a Statement of Facts had also been filed. Mr. Lynch QC added that his firm had been served with various materials by email on 30 March and that on 1 April he was further served with a large number of USB sticks. He described the disclosure as a substantial body of material requiring a considerable level of assimilation and preparation.

22. Addressing Simmons J on the status of the civil proceedings, Mr. Lynch QC disclosed his understanding that I was seized of the strike-out application in the civil proceedings and stated that it was his hope that the strike out application would be heard during the same month of May. He openly opined that the progress of the criminal proceedings would depend on the outcome of the strike-out application and that the preparation of the criminal proceedings would have to be actioned if the strike-out application were to succeed before me.

23. Simmons J informed the parties that I would be presiding over the criminal proceedings. The judge remarked, as an aside, that she could not have been assigned to preside over the trial in any event as her husband is a friend and colleague of Dr. Brown. Having been told that I would be taking over the criminal proceedings, Mr. Lynch QC complained that I should not sit as the trial judge in the criminal proceedings for as long as the civil proceedings remained pending before me. This sparked a swift retort from the DPP that the question as to whether I should sit as both the judge in the criminal and civil proceedings is a matter for my own judicial determination and not that of Counsel.

24. Mr. Lynch QC requested for the question as to whether I could deal with both the civil and criminal proceedings be stayed and reiterated that no action ought to be taken to progress the criminal proceedings until after my final determination of the legal submissions on the strike-out application. Mr. Lynch QC further informed the Court that after the delivery of a Ruling from me on the strike-out application, he would then propose that submissions be made on which judge might be conflicted from sitting as the trial judge in the criminal proceedings. He robustly submitted that since I had been assigned to deal with the constitutional motion it may be inappropriate for me to sit as the trial judge in the criminal proceedings. On 3 May 2021 that was the basis of the objection to my adjudication of the criminal proceedings.

25. Notwithstanding her declaration of a personal nexus and conflict, Simmons J granted Mr. Lynch QC's application for a stay and the matter was accordingly adjourned from 3 May 2021 to 15 June 2021. The judge further directed that Dr. Brown would be permitted to reappear before the Court remotely via video screen. However, on Tuesday 4 May 2021, a Court administrator, acting under my direction as the assigned trial judge, informed the DPP and Mr. Lynch QC that I required an appearance on 14 May 2021 for the matter to be mentioned before me.

THE RECUSAL APPLICATIONS

The 14 May 2021 Directions Order for the Recusal Application

26. On 14 May 2021, Crown Counsel Mr. Alan Richards and Mr. Lynch QC appeared before me as I directed. Without providing any details of the grounds to be relied on, Mr. Lynch QC confirmed that an application for my recusal as the trial judge would be made on the basis of apparent bias.

27. Mr. Lynch QC proposed that he file an informal written submission disclosing the asserted facts and legal arguments which would be made in support of the application for my recusal. He submitted that in accordance with a best practice approach, I should privately and discreetly review the informal application to enable me to decide whether I would recuse myself without the need for an open Court proceeding. The Crown, having received an outline of the expected grounds, did not oppose the proposed course and the Court confirmed its approval of the suggested approach in a directions order made by me on 14 May 2021.

28. A sample of the dialogue at the 14 May hearing is as follows:

Lynch QC: "[Apology for IT difficulties in joining Zoom call]…..*Ah right well, ah we are here at your behest.*

SSW J: *Right so you may be aware, I have been assigned to deal with this matter in terms of a trial assignment and I would like to manage this as it runs concurrently with the constitutional application which is also underway. I am made to understand through your correspondence that there is going to be the likelihood of some sort of a recusal application.*

Lynch QC: *Yes*

SSW J *So that's obviously something I would want to deal with quite quickly.*

Lynch QC: *Yes, ah well, can I put it this way? I indicated that there was- right from the outset- that there was obviously a number of issues affecting a number of resident judges on the island- that were- some are obvious and some are less obvious, if I can put it like that. Um and so, ah following our last hearing in front of ah your sister judge, uh Charles Etta* [Simmons J], *she made - made a number of orders and I explained to her that we were concerned… should it be that you were to be appointed that I had to take some further instructions- ah the position at the moment is this: I have*

spoken to uh my client and he ah has given certain information which leads me to believe that there is a proper application to make for recusal of yourself as the judge in the case. What I thought to do and I am- shall I say three quarters of the way through it is preparing a written- a full written submission which we would like for you to consider privately and ah if you thought there was merit in it…. If not to hear us briefly ah in Court and ah I, as I say, I have drafted that in large measure, it's nearly complete. I would ask that 7 days for that to be served…."

29. At the 14 May hearing before, Mr. Lynch QC agreed that it was known to Counsel in the constitutional civil proceedings that I was the assigned judge.

Lynch QC: "*… And I anticipate that whatever the position is, uh the constitutional argument which clearly needs to happen first is something which um, the Court, as I understand it, has yet to set a date in any event.*

SSW J: *I am seized of that constitutional application, when I say seized of it, let me be more accurate, the lawyers in that matter are aware of that fact*

Lynch QC: *Yes, they are- and they are aware of my application too. And had you had that constitutional matter been listed before having had this matter listed today, they would have been making the application, not me...*"

30. In considering the directions to be made on the recusal application I voiced the need for the lawyers appearing in the civil proceedings to be served with a copy of the documents which would be relied on for the purpose of the recusal application. I said:

"*I think it is important in relation to the constitutional proceedings. I do think that whatever document you are going to be filing by next week Friday, that you propose- also has to be served on Counsel in the constitutional proceedings. I would want the recusal to be dealt with by joining – just on the recusal application- and so, it seems to me that I should start as early as an invitation for me to consider, um, whatever the factual basis is for me to consider which may lead me to voluntarily recuse myself- ah I think that should be served on Counsel, ah for the DPP's Office and for the Attorney General's Chambers in the 474/2020 constitutional matter in addition to it being served on Mr. Richards for the DPP in this matter; because if it is the case, as you said, that the application would have been made in one matter or the other, then I would like to hear Counsel and the parties in all…together. Because if I do decide, having considered the material which is before the Court that I should hear the application formally, then in all likelihood, I would want to*

bring those two matters together so that all parties can address me on the recusal application…"

31. Mr. Lynch maintained that the best practice approach called for me to privately consider the document setting out the grounds of recusal and to first determine whether it would be necessary for a hearing to be listed for the issue of recusal to be argued and decided. I was persuaded to adopt this proposed approach and made the following directions at the close of the hearing:

"*1. The Defence file and serve with the Court and upon the DPP a document setting out the basis for inviting Mrs. Justice Subair Williams' recusal by close of business Friday, 21 May, 2021.*

2. Upon consideration of the matter, the Judge will either recuse herself or order the application to be heard in open court.

3. If the matter is to be heard in open court, the Defence will file affidavit evidence within 7 days in support of the facts upon which the application for recusal is to be made and serve that and the submissions on all parties, including those engaged in the Constitutional Motion 2020 No. 474.

4. The Crown are at liberty to file any affidavit evidence and/or skeleton arguments within 7 days thereafter.

5. If the court orders a hearing on the recusal application, it is fixed for Friday, 25 June, 2021 at 10:00 a.m. (non-attending parties today at liberty to apply to fix an alternative date).

6. Bundle of authorities and arguments to be filed no later than 4 days before the hearing.

7. The hearing to be remote by agreement."

32. On Friday 21 May 2021 I received a document entitled "Brief Informal Submissions Recusal of Subair Williams J" for my private consideration. On Monday 24 May 2021 I corresponded directly with Counsel for both sides confirming my decision that the recusal application would have to be argued in an open Court proceeding fixed for 25 June and that the 14 May directions applied. The Crown's written submissions on the recusal application were served by email to Mr. Lynch QC on 7 June 2021 and on 9 June 2021 Mr. Lynch QC electronically served Counsel in both the criminal and civil proceedings with his written submissions and authorities for the recusal application.

33. However, on the eve of the 25 June hearing, Mr. Duncan QC, on behalf of Dr. Brown in the civil proceedings, filed the following letter with the Court:

"*We write on behalf of Dr. Ewart F. Brown ("Dr. Brown") as attorney for Dr. Brown in the above captioned civil proceedings (the "Civil Proceedings"). We refer to the Notice of Hearing dated 7 June 2021 ("the Hearing Notice") in the Civil Proceedings and the Order dated 14 May 2021 ("the Criminal Order") for directions for an application to recuse Subair Williams J ("the Judge") by Dr. Brown in the criminal proceedings (the "Recusal Application") captioned Criminal Jurisdiction 2021 No. 9 (the "Criminal Proceedings"). The Hearing Notice and Criminal Order are enclosed for you* [your] *reference.*

As you are aware Dr. Brown is the defendant in the Criminal Proceedings and the applicant in the Civil Proceedings, which are separate and distinct proceedings with separate and distinct rights, including but not limited to rights of appeal.

We note that paragraph 3 and 5 of the Criminal Order require, at least implicitly, the attention and attendance of the attorneys in the Civil Proceedings in relation to the recusal application in the Criminal Proceedings. However, we note the following:

1. *The Director of Public Prosecutions (the "DPP") has filed a summons to strike out the Civil Proceedings (the "Strike-out Application"), which has been listed for 7 August 2021;*
2. *The Hearing Notice is for a mention in the Civil Proceedings despite there being an Order dated 9 April 2021 for directions in the Strike-Out Application;*
3. *It is not clear that the attorneys in the Civil Proceedings are properly before the Court for the Recusal Application in the Criminal Proceedings;*
4. *The Criminal Order makes no mention of the right of the attorneys in the Civil Proceedings to file and serve evidence and make submissions in respect of the Recusal Application; and*
5. *We understand the Judge is to preside over the Criminal Proceedings and the Civil Proceedings. It is clear that if the Judge is to recuse herself, it would apply equally to both sets of proceedings. It is therefore a matter of considerable concern that the Strike-out Application has in fact been listed for 7 August 2021 before the Recusal Application has even been heard let alone ruled upon.*

We write to clarify that we would likely adopt the evidence filed and submissions made by Mr. Lynch Q.C. on behalf of Dr. Brown in the Criminal Proceedings. However, in order to preserve all of Dr. Brown's rights in the Civil Proceedings, we ask that the Recusal Application be listed in the Civil Proceedings as well as the Criminal Proceedings so that the attorneys for Dr. Brown (as well as those for the DPP, the Attorney General, and the Deputy Governor) in the Civil Proceedings are properly before the Court for the Recusal Application. This will also ensure that the Ruling by the Judge on the Recusal Application will be made in both the Criminal and Civil Proceedings.

We ask that you confirm: (a) whether or not the attorneys for the parties in the Civil Proceedings are properly before the Court in the Recusal Application; (b) that any Ruling and Order in the Recusal Application will apply to the Civil Proceedings; and (c) the Ruling and Order in the Recusal Application will in fact be made in the Civil Proceedings such that all of Dr. Brown's rights, including his right to appeal under the rules in the civil jurisdiction, will be preserved."

34. In a same day reply to Mr. Duncan QC's letter the Registrar wrote:

"*Dear Counsel,*

I refer to your letter of even date.

I can confirm that is has always been expressly contemplated by the Court that the recusal application will be relation to both the Civil and Criminal proceedings. Therefore, in response to the last questions posed in the last paragraph of your letter, the answer is in the affirmative to <u>all</u> questions.

In this regard, all Counsel are expected to appear at the hearing tomorrow and shall be permitted to be heard on the Recusal Application.

As it relates to the Strike-Out Application being listed on 3 August 2021, this matter was set down at the request of Counsel and the date set accordingly. If the Recusal Ruling is still pending on the date of the Strike-Out Application, the listing can be vacated or adjourned. This issue can be addressed at that time.

Please be advised that Dr. Brown is required to attend the hearing as is the norm for applications in criminal proceedings whether an Accused is on bail or is remanded in custody. If there is a basis upon which Dr. Brown wishes to be excused, an application should be made to the Court…"

35. This was met with the following response from Mr. Duncan QC:

"*Dear Registrar,*

Thank you for your email of 24 June 2021, which addresses the concerns in the last paragraph of our letter of the same date.

Your email fails to address the most critical request we made in the penultimate paragraph of the letter seeking a formal listing of the Recusal Application in the Civil Proceedings:

"We write to clarify that we would likely adopt the evidence filed and submissions made by Mr. Lynch Q.C. on behalf of Dr. Brown in the Criminal Proceedings. However, in order to preserve all of Dr. Brown's rights in the Civil Proceedings, we ask that the Recusal

Application be listed in the Civil Proceedings as well as the Criminal Proceedings so that the attorneys for Dr. Brown (as well as those for the DPP, the Attorney General, and the Deputy Governor) in the Civil Proceedings are properly before the Court for the Recusal Application. This will also ensure that the Ruling by the Judge on the Recusal Application will be made in both the Criminal and the Civil Proceedings. "

Our request is not frivolous and cannot be cured by addressing the concerns in the last paragraph of our letter. If the Recusal Application is not formally listed in the Civil Proceedings, any appeal against the court's decision would have to be commenced in the Criminal Proceedings since those are the only proceedings listing that application. No doubt, the court and all parties to these proceedings are aware of the impact of section 17 of the Court of Appeal Act 1964 upon the Defendant's right of appeal against a decision in Criminal Proceedings.

For the above reasons, we reiterate it is imperative that the Recusal Application is formally listed in the Civil Proceedings failing which we will commence the hearing this morning by seeking to adjourn the Recusal Application in respect of the Civil Proceedings to preserve our client's rights of appeal."

36. At the 25 June hearing, Mr. Duncan QC reiterated his concerns that the civil matter had not been formally listed for the 25 June appearance and he highlighted the significance of Dr. Brown's more liberal rights of appeal against a ruling on recusal in the civil proceedings in contrast to the limitations imposed by section 17 of the Court of Appeal Act 1964 in respect of criminal proceedings.

37. Ultimately, it was for Mr. Duncan QC to file a summons application for my recusal in the civil proceedings and it was always open to him to seek for the hearing of any such summons to be held at the same time as the recusal application in the criminal proceedings. To do so would have been a fulfilment of Counsel's duty to assist the Court in carrying out its case management duties under the Overriding Objective. It follows that the Applicant's omission to file a recusal summons at any point during the month of May through to 25 June undermined Mr. Duncan QC's complaint that a recusal application had not been formally listed in the civil proceedings. That being said, it was envisaged under my Order of 14 May that Counsel in the civil proceedings, having been put on notice of the pending recusal application in the criminal proceedings, would also have the opportunity to address me at the same hearing. Notwithstanding, Counsel for the Respondents in the civil proceedings presented a compelling case for an adjournment.

38. Ms. Christopher for the DPP complained that she had not been previously served with the 14 May directions Order and that she had the burden of having to telephone the other Counsel in order to obtain clarity on the position in the civil proceedings in respect of a

recusal application. Mr. Diel shared Ms. Christopher's concerns and stated that he had understood the 25 June hearing to be a listing for directions, notwithstanding the absence of a summons application before the Court.

39. In what appeared to be veiled resistance to the Respondents' request for directions and a later hearing date, Mr. Lynch QC pointed out that Mr. Duncan QC would be able to proceed since he [Mr. Lynch QC] and Mr. Duncan QC had been working closely together and had discussed the matter. He said; "*We* [Mr. Lynch QC and Mr. Duncan QC] *have an office right next to each other so we talk about it- can I say this, I sent all of the materials including the skeleton argument to everybody involved in the case*…".

40. At the 25 June hearing the question as to when Counsel first became aware of my assignment to preside over the civil proceedings arose. The exchanges between the Court and Mr. Duncan QC unfolded as follows:

"…

SSWJ: *…there was a summons for directions in the Constitutional matter and the subject of recusal was not raised- and in fact if I recall the directions, I think that there was a strike-out application filed by Ms. Christopher seeking for that application to be heard within a definitive time-frame- something like that- 4 weeks if I remember correctly.*

Duncan QC: *But at that stage My Lady, the Court wasn't, on my understanding, you weren't the assigned judge in the matter*

SSWJ: *Well there are only two judges that sit on this side- there are only two full-time appointed judges that sit on this side- it would either be myself or the Chief Justice*

Duncan QC: *I don't know how the Court was going to proceed- My Lady, if we're going to start-*

SSWJ: *No, no… no, no Mr. Duncan I don't want to be misunderstood. My point is that the constitutional matter had taken some flight, and with the strike-out application and there were directions and those directions were set out by Consent Order, correct me if I am wrong.*

Duncan QC: *That's correct*

SSW J: *Okay. And* – … [inaudible]

Duncan QC: *My understanding* ... [inaudible]…*by a judge by then*

SSW J: *Sorry?*

Duncan QC: *My understanding is that- had you- had you um, given directions as we all know, the judge that gives directions isn't necessarily the judge that actually tries a matter- giving directions, doesn't in any way impact on the issue of whether or not there's a recusal application at a later stage- now if, in those directions it had been said- that the directions included the direction that um you, My Lady, were the assigned judge for the matter- now that would be a different issue. But I don't recall anywhere where it was stated who would be the assigned judge, had I- I stand to be corrected, but that's my understanding*."

41. I thereafter issued directions to Counsel in the civil proceedings which were preparatory to the hearing of the recusal applications which proceeded on 3 August 2021. The 25 June 2021 Order was thus made in the following terms:

"…

1. *The Applicant to file a summons in these proceedings for the recusal application ("the Recusal Summons") to be filed within 7 days;*

2. *The evidence filed by the Applicant in support of the recusal application in Criminal Jurisdiction 2021 No. 9 (the "Criminal Recusal Application") to stand as evidence in support of that Recusal Summons in these proceedings;*

3. *The Respondents have leave to file evidence in response to the Recusal Summons within 7 days;*

4. *The written submissions filed by Mr. Lynch Q.C. in the Criminal Recusal Application shall be adopted by the Applicant in support of the Recusal Summons;*

5. *The Respondents to file and serve any written submissions within 14 days;*

6. *The Recusal Summons is listed for a 1 day hearing on 3 August 2021 (the "Hearing");*

7. *The Hearing shall be remote; and*

8. *Costs reserved*."

The Evidence filed in Support of the Recusal Applications

42. In support of the application for my recusal, the Applicant filed affidavit evidence in his own name and from Dr. Wilbert Warner.

43. Dr. Brown swore to the following facts:

"…
3. I make this affidavit in support of my for the judge Mrs. Justice Subair-Williams to rescue herself and to set out the factual background as to why I say she should do so.

The Facts

4. A good many years ago Dr.'s Wilbert Warner, RW, and myself [the "Doctors] and Dr. Henry Subair, the Judge's father, came together to purchase property to set-up a practice and recruit an Ear, Nose and Throat specialist for Bermuda. We had collectively identified the location on Middle Road in Devonshire and began telephonic negotiations with Dr. WM…, an expert in the field.

5. Much time and commitment was expended on identifying the right property but just as we the Doctors and Dr. Subair were about to put the property under contract, we discovered that unbeknownst to us Dr. Subair had engaged in independent conversations with Dr. WM and out business plans collapsed.

6. We, the Doctors experienced a real sense of betrayal by Dr. Subair whom we had trusted, but who had sought to undermine our joint venture. A great deal of bitterness surrounded the collapse of this plan and to this day the relationship between all of us individually and Dr. Subair remain strained. In fact, one doctor, WW [Wilbert Warner], has not spoken to him since.

7. Since the collapse of our business plans, to the best of my knowledge, Dr. Subair has not referred any patients to either of my clinics (BHCS and Brown-Darrell) for any scanning services even when the hospital has been closed to referrals and I had the only alternative facility on the Island. The sense of animosity lingers to the point that the judge's father and I have not had an amicable, social or business relationship since.

8. Additionally, and also giving rise to concern over the appearance of bias, there is the relationship between the learned judge and the former DPP, Larry Mussenden, now also a puisne judge. It is a widely held belief in Bermuda by myself and others that the two are very close friends having been in partnership together in their former legal practice.

9. Mr. Mussenden, as he then was, was deliberately not re-appointed as the Attorney General when I was elected to office as Premier. I genuinely believe that there has been a degree of animosity between us ever since.

10. The learned judge will be aware that there is an extant Constitutional claim in which criticism is made of the former DPP and the manner in which he conducted his role as DPP in relation to his independence in the decision-making process.

11. Mr. Mussenden, presided over many years of the investigation into my alleged criminal past, specifically delaying taking-up his appointment to the Supreme Court Bench, so as to conclude it. It was within a few days of his taking up his appointment that the incoming DPP indicated through my counsel that I was to be charged.

12. It will readily be understood that here again, the appearance of bias is strong, based on the not unreasonable assumption that close friends, particularly those in the same profession, discuss their work and allow their opinions to flow freely."

44. Dr. Warner deposed [3]-[10]:

"…
3. I make this affidavit in support of an application by the applicant The Hon. Dr. Ewart Brown for the judge Mrs. Justice Subair-Williams to rescue herself and to set out the facts as I understand them to be.

4. I have known Dr. Ewart Brown for twenty-eight (28) years and we are both friends and professional colleaugues.

The Facts

5. In 1996, Dr. Ewart Brown, [RW], *Henry Subair and myself entered into an agreement to purchase a property on Middle Road in Devonshire to set-up a specialist practice which we called the Medical Specialist Group. We recruited an Ear, Nose and Throat specialist Dr.* [WM]*…and a Vascualar Surgeon, Dr* [JB].

6. We regarded this enterprise as good for Bermuda and good for us doctors. It quickly became apparent that Dr. Henry Subair was undermining our collective effort by apparently separately negotiating with Dr. [WM]. *We were shocked and surprised by this turn of events as he had completely undermined our negotiating position. The entire enterprise collapsed following considerable acrimony especially as it cost us circa $30,000 loss each. To this day I do not understand why Dr. Subair would have behaved in that way.*

7. The relationship between the other partners and Dr. Henry Subair became very strained, to the point where on one occasion I had to step in between Dr.'s [RW] *and Subair to prevent a physical altercation between the two. Happily, I did.*

8. This became all the harder to bear for me, as Dr. Subair and I were friends, at least I thought so. Up until that time we had socialised together, enjoying each other's company and had a mutual respect for our professional relationship.

9. When trust is broken in the way that it was, there is no coming back from it. We all felt that he had betrayed us in the most callous fashion, for reasons unknown to this date by constantly undermining our negotiating position with Dr. [WM].

10. I frankly find it hard to speak to him whenever our paths cross. We all felt such a very deep sense of betrayal when he undermined our collective efforts to build a new specialist practice here in Bermuda. These events are of some antiquity, yet that we all remain so resentful about what he did, speaks volumes about the depth of feeling and sense of permanency of the breakdown in any relationship we had."

Matters which were within my Personal Knowledge and/or Understanding

45. Counsel for the Applicant requested that I provide a factual background aligning with my personal knowledge and/or understanding, with a view to a subsequent hearing being listed for further submissions to be made on my statement. In the exercise of my discretion, I consider it fair and appropriate that I disclose the general scope of factual matters within my personal knowledge and/or broad understanding. That being said, in my judgment the recusal applications should ultimately and only be decided on the deposed facts underlying the recusal applications as that evidence is effectively unchallenged.

<u>The 1996 business arrangement</u>

46. Prior to these proceedings, it was my understanding that very many years ago my father had some form of a partnership with a number of other resident doctors for the purpose of establishing and operating a medical practice whereby non-resident medical specialists (including Dr. WM) would be employed. I was aware that Dr. Brown was one of the doctors in partnership with my father. I was not aware, however, (or at least have no memory of ever having been aware) of who the other doctors were. I also understood that it was intended that Dr. WM would be employed by my father, Dr. Brown and the other doctors.

47. While I do not recall ever having had any conversation with my father or any other person about this business venture (which in 1996 would have been of minimal interest to me as I was a young student living overseas), in so far as I understood, Dr. WM unexpectedly withdrew from the pending arrangement. It was always my impression that a common grievance was shared amongst the partnered doctors against Dr. WM and that each of the locally resident doctors had suffered some degree of financial loss as a result of the actions of Dr. WM. At no point have I ever had any reason to personally suspect or believe that my father was considered by Dr. Brown or any of the other doctors to be the cause of the failed partnership. Put more plainly, it was always my impression and/or understanding that Dr. WM was regarded by my father and the other doctors as the malefactor.

The Relationship between Dr. Warner and Dr. Subair

48. Prior to these proceedings, I was personally aware of a friendship between my parents and Dr. Warner and his wife. I recall this friendship from many years ago when I was but a child or a young teenager and Dr. & Mrs. Warner would visit my parents' homestead. I was never aware, however, that Dr. Warner was involved in the business project with my father and the other doctors. I was equally unaware that the relationship between Dr. Warner and my father had come to a bitter end as I have never heard my father speak ill of Dr. Warner. So, prior to these proceedings, I would have been surprised to witness any appearance of tension or bitterness between my father and Dr. Warner. I would also add that on the odd occasion that I cross paths with Dr. Warner, I always greet him with sincere warmth and have on each occasion understood that to be reciprocated.

The Relationship between Dr. RW and Dr. Subair

49. Turning to Dr. RW, I should state that I do not know him personally and have never known him to have any business or personal relationship of any kind with my father. Further, I have never before heard my father speak about Dr. RW in any memorable way. For the avoidance of any doubt, I never had any personal knowledge or understanding of a hostile confrontation between my father and Dr. RW.

The Relationship between Dr. Brown and Dr. Subair

50. I have no personal knowledge, understanding or impression of any existence or history of hostility, bitterness or animosity between Dr. Brown and Dr. Subair. Prior to the making of this application for my recusal, I understood my father and Dr. Brown to be friendly colleagues of the medical profession, such that they once engaged in a business partnership with other doctors some 25 years ago. I never understood the failed business venture to have been caused by or to have resulted in any strained relationship or rapport between Dr.

Brown and my father and I certainly do not know or understand my father to have ever had any personal feelings of any kind in respect of Dr. Brown.

51. To be clear, I do not know my father to have ever had any form of a personal friendship with Dr. Brown. For example, I have no personal recollection of ever having witnessed Dr. Brown visit my parents' residence nor do I ever recall ever having intercepted a telephone call from Dr. Brown to their house when I was regularly living with my parents nearly 30 years ago and beyond. Fair to say, I have never made any observation which might lead me to reasonably conclude that Dr. Brown and Dr. Subair are anything other than friendly colleagues of the same profession. As such, I do not have any personal knowledge of any reason why my father would have a personal interest of any kind in the outcome of these proceedings.

52. Lastly, I confirm that neither my father nor any other family member has ever engaged me in any discussion about the subject of the evidence or merits of these Court proceedings or any other pending Court proceeding. By way of explanation, for the past 20 years my family has been keenly aware and well-accustomed to my absolute refusal to partake in any dialogue relating to the merits or evidence of any pending Court proceeding whether or not I was directly involved or instructed in the case. (That fact is known and respected by both my immediate and extended families.) The logic behind this 20 plus year rule is tied to my awareness that even if I was not directly involved or instructed in the case at any particular stage of the proceedings, I might later become instructed or involved as either a prosecutor, criminal defense attorney, civil litigator, acting magistrate, Registrar, acting judge or now appointed judge. These proceedings are in no way an exception to that long-standing practice.

Mr. Justice Larry Mussenden

53. I have never known Dr. Brown and Mr. Justice Larry Mussenden to be personal friends or foes. Justice Mussenden has never made any statement to me which would lead me to believe or even suspect that he has any degree of personal animosity or bitterness for Dr. Brown. It is of note that when Mussenden J's previous tenure as the Attorney General came to what might fairly be termed as a natural end, I was employed in the role of Legal Aid Counsel and was not closely affiliated with Mussenden J at that stage of my career.

54. I do not recall ever having discussed the subject of Dr. Brown with Mr. Mussenden (as he then was) while in private practice, save in respect of Dr. Brown's status as a prospective client of our then law firm, Mussenden Subair Limited, which was formed in or around 2010. I do not recall the subject-matter of Dr. Brown's possible retainer only that it was in relation to a minor and non-litigious civil matter for which, as far as I recall or understood,

he sought our services on a *pro bono* basis. The attorney-client relationship never materialised, the reasons for which were uneventful and unknown to me (or which I have otherwise since forgotten). Any initial discussion about the possibility of Dr. Brown retaining the services of our then law firm would have been held directly between Mussenden J and Dr. Brown.

55. Mr. Mussenden and I wound up our practice in March/April 2016 in order to pursue our respective career paths. Upon closing the law firm, Mr. Mussenden was appointed as the DPP and I was appointed as the Registrar of the Courts of Bermuda. It is correct that Mussenden J and I are good friends and once again colleagues. However, during my tenure as the Registrar and Acting Judge/Assistant Justice, which was followed by my appointment in July 2018 as a full-time puisne judge, it was always clear between DPP Mussenden and I that our varying professional roles prevented us from engaging in any informal or collegial-type dialogue about the merits or evidence of any pending case before the Court. This was particularly obvious in respect of criminal matters as there always remained a real possibility that I would be assigned to handle any such matter in a judicial capacity. For that reason we respected the absolute prohibition between us from discussing pending Court matters and I am clear in my affirmation that Mr. Mussenden/Mussenden J has never made any comment to me disclosing his views of the proceedings against Dr. Brown nor of Dr. Brown's character or credibility. These barriers between Mussenden J and I are standard and are no different from those which would govern the friendships between any other member of the judiciary and the Bar. To date, Justice Mussenden and I have refrained (and will continue to refrain) from discussing his views, the merits or any evidential matters related to this case or any other case in which he was previously involved as the DPP.

My previous encounter with Dr. Brown prior to these proceedings

56. I have never had any personal or business relationship with Dr. Brown. Equally, I have never had any emotional sentiment for or against Dr. Brown nor have I ever had any cause to possess any such emotion. While the question of political bias ought not and has not been raised, I willingly confirm that I have never at any stage of my life formed a political affiliation for or against any politician or political group or governing party. For example, I have never been a member nor loyal supporter of any political party.

57. The one and only occasion on which I have ever had any encounter with Dr. Brown has been evidenced by the prosecutor who produced copies of government email correspondence setting out our dialogue leading up to and/or following my single meeting with him in 2008. At that time Dr. Brown was the Premier of Bermuda and I was the outgoing Legal Aid Counsel. This meeting was initiated and proposed by Dr. Brown. I

understood the meeting invitation to be an honourable acknowledgment of my 8 year term in government as a young prosecutor and as Bermuda's first Legal Aid Counsel.

58. I recall having attended Dr. Brown's office where I met with him for approximately 5-10 minutes. I was especially concerned to make it known that opportunities for lawyers employed in the Civil Service to benefit from career advancement and appropriate remuneration packages were lacking and in need of systematic reform. (Prior to my meeting with Dr. Brown I had expressed these same concerns to the then Attorney General, Mr. Phil Perinchief and to his predecessor, Mr. Larry Mussenden, in addition to the Permanent Secretary assigned to the Ministry of Legal Affairs and other senior officers of the Civil Service). I shared these concerns directly with Dr. Brown and I recall my encounter with him to be brief but unquestionably friendly.

THE RELEVANT LAW AND LEGAL PRINCIPLES

59. An application for recusal of a judge is a serious matter and one which requires a careful assessment of both the facts and the law. It is not a case management exercise (*AWG Group Ltd and another v Morrison and another* [2006] EWCA Civ 6) as a litigant's constitutional right to an independent and impartial tribunal is absolute and unaltered by his or her inability to demonstrate a substantial injustice (*Millar Dickson* [2002] 1 WLR 1615; [2001] UKPC D4).

60. In this case I am concerned with allegations of an appearance of bias rather than actual bias. 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 (*Porter v Magill* [2002] 2 AC 357).

61. In these proceedings I was referred to a considerable number of authorities, for which I express my gratitude to Counsel, having carefully examined each of the previous cases.

The Appearance of Bias

62. There are two classes of bias to which an allegation of an appearance of judicial bias may belong. These limbs were identified by the English House of Lords in *Pinochet, Re* [1999] UKHL and are now widely recognised as established law. The first limb of the principle applies *"if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome".* Under this first application of the principle, an appearance of bias is established on the basis that the judge is sitting in judgment of his or her own cause. The second category applies to a judge who *"is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give*

rise to a suspicion that he is not impartial, for example because of his friendship with a party." This second application of the principle is designed to weed out any scenario where it appears that a judge is sitting in a cause to provide a benefit for another.

63. In *Pinochet, Re,* the House of Lords provided written reasons for having set aside an earlier order made during the course of an interlocutory appeal in which Lord Hoffmann was a member of the Appellate Committee. The issue of conflict arose out of the link between Lord Hoffmann and Amnesty International ("AI"), the intervening party in the appeal proceedings concerned with the extradition of Senator Pinochet for alleged crimes against humanity in Chile when he, Senator Pinochet, was the Head of State. The substantive issue for which the House of Lords was seized was what, if any, immunity was owed to Senator Pinochet as a former Head of State in respect of the crimes against humanity for which his extradition was sought. Opposing the case advanced by the Crown Prosecution Service, Senator Pinochet contended that his immunity extended beyond his tenure as Head of State.

64. In proceedings before the Divisional Court, it was determined that Senator Pinochet was entitled to immunity and the provisional warrant ordered against him was quashed leaving him free to return to Chile subject to a stay pending appeal to the House of Lords. On appeal before Lords Slynn, Lloyd, Nicholls, Steyn and most notably Lord Hoffmann, the appeal was allowed by a majority of three to two and the warrant of 23 October 1998 was restored. As noted in the judgment of Lord Browne-Wilkinson on the issue recusal, Lord Nicholls and Lord Steyn each delivered speeches holding that Senator Pinochet was not entitled to immunity. Lord Hoffmann agreed with their speeches without providing any separate reasons for allowing the appeal. (Lord Slynn and Lord Lloyd had each given their own dissenting judgments.)

65. Lord Browne-Wilkinson, delivering the judgment of the House of Lords on the decision for recusal explained the link between Lord Hoffmann and AI as follows:

"The link between Lord Hoffmann and AI
It appears that neither Senator Pinochet nor (save to a very limited extent) his legal advisers were aware of any connection between Lord Hoffmann and AI until after the judgment was given on 25 November. Two members of the legal team recalled that they had heard rumours that Lord Hoffmann's wife was connected with AI in some way. During the Newsnight programme on television on 25 November, an allegation to that effect was made by a speaker in Chile. On that limited information the representations made on Senator Pinochet's behalf to the Home Secretary on 30 November drew attention to Lady Hoffmann's position and contained a detailed consideration of the relevant law of bias.

It then read:

"It is submitted therefore that the Secretary of State should not have any regard to the decision of Lord Hoffmann. The authorities make it plain that this is the appropriate approach to a decision that is affected by bias. Since the bias was in the House of Lords, the Secretary of State represents the senator's only domestic protection. Absent domestic protection the senator will have to invoke the jurisdiction of the European Court of Human Rights."

After the representations had been made to the Home Office, Senator Pinochet's legal advisers received a letter dated 1 December 1998 from the solicitors acting for AI written in response to a request for information as to Lord Hoffmann's links. The letter of 1 December, so far as relevant, reads as follows:

"Further to our letter of 27 November, we are informed by our clients, Amnesty International, that Lady Hoffmann has been working at their International Secretariat since1977. She has always been employed in administrative positions, primarily in their department dealing with press and publications. She moved to her present position of Programme Assistant to the Director of the Media and Audio-Visual Programme when this position was established in 1994.

"Lady Hoffmann provides administrative support to the Programme, including some receptionist duties. She has not been consulted or otherwise involved in any substantive discussions or decisions by Amnesty International, including in relation to the Pinochet case."

On 7 December a man anonymously telephoned Senator Pinochet's solicitors alleging that Lord Hoffmann was a Director of the Amnesty International Charitable Trust. That allegation was repeated in a newspaper report on 8 December. Senator Pinochet's solicitors informed the Home Secretary of these allegations. On 8 December they received a letter from the solicitors acting for AI dated 7 December which reads, so far as relevant, as follows:

"On further consideration, our client, Amnesty International have instructed us that after contacting Lord Hoffmann over the weekend both he and they believe that the following information about his connection with Amnesty International's charitable work should be provided to you.

"Lord Hoffmann is a Director and Chairperson of Amnesty International Charity Limited (AICL), a registered charity incorporated on 7 April 1986 to undertake those aspects of the work of Amnesty International Limited (AIL) which are charitable under UK law. AICL files reports with Companies' House and the Charity Commissioners as required by UK law. AICL funds a proportion of the charitable activities undertaken independently by AIL. AIL's board is composed of Amnesty International's Secretary General and two Deputy Secretaries General.

"Since 1990 Lord Hoffmann and Peter Duffy Q.C. have been the two Directors of AICL. They are neither employed nor remunerated by either AICL or AIL. They have

not been consulted and have not had any other role in Amnesty International's interventions in the case of Pinochet. Lord Hoffmann is not a member of Amnesty International.

"In addition, in 1997 Lord Hoffmann helped in the organisation of a fund-raising appeal for a new building for Amnesty International UK. He helped organise this appeal together with other senior legal figures, including the Lord Chief Justice, Lord Bingham. In February your firm contributed £1,000 to this appeal. You should also note that in 1982 Lord Hoffmann, when practising at the Bar, appeared in the Chancery Division for Amnesty International UK."

Further information relating to AICL and its relationship with Lord Hoffmann and AI is given below. Mr. Alun Jones Q.C. for the CPS does not contend that either Senator Pinochet or his legal advisors had any knowledge of Lord Hoffmann's position as a Director of AICL until receipt of that letter.

Senator Pinochet's solicitors informed the Home Secretary of the contents of the letter dated 7 December. The Home Secretary signed the Authority to Proceed on 9 December 1998. He also gave reasons for his decision, attaching no weight to the allegations of bias or apparent bias made by Senator Pinochet.

On 10 December 1998, Senator Pinochet lodged the present petition asking that the order of 25 November 1998 should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that Lord Hoffmann's links with AI were such as to give the appearance of possible bias. It is important to stress that Senator Pinochet makes no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done. There is no allegation that any other member of the Committee has fallen short in the performance of his judicial duties.

66. Laying down the application of the legal principles applicable to apparent bias, Lord Browne-Wilkinson stated [page 7]:

"*2. Apparent bias*

As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.

The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his

own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

In my judgment, this case falls within the first category of case, viz where the judge is disqualified because he is a judge in his own cause. In such a case, once it is shown that the judge is himself a party to the cause, or has a relevant interest in its subject matter, he is disqualified without any investigation into whether there was a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him unless he has made sufficient disclosure: see Shetreet, Judges on Trial, (1976), p. 303; De Smith, Woolf & Jowel, Judicial Review of Administrative Action, 5th ed. (1995), p. 525. I will call this "automatic disqualification."…"

67. Having found that AICL plainly had a non-pecuniary interest in the criminal proceedings against Senator Pinochet as it sought to establish that Senator Pinochet was not immune to prosecution for crimes against humanity, Lord Browne-Wilkinson reasoned in favour of setting aside the order made on appeal and in favour of Lord Hoffman's recusal [pages 7-9]:

"*On occasion, this proposition is elided so as to omit all references to the disqualification of a judge who is a party to the suit: see, for example, Reg. v. Rand (1866) L.R. 1 Q.B. 230; Reg. v. Gough at p. 661. This does not mean that a judge who is a party to a suit is not disqualified just because the suit does not involve a financial interest. The authorities cited in the Dimes case show how the principle developed. The starting-point was the case in which a judge was indeed purporting to decide a case in which he was a party. This was held to be absolutely prohibited.*

That absolute prohibition was then extended to cases where, although not nominally a party, the judge had an interest in the outcome.

The importance of this point in the present case is this. Neither AI, nor AICL, have any financial interest in the outcome of this litigation. We are here confronted, as was Lord Hoffmann, with a novel situation where the outcome of the litigation did not lead to financial benefit to anyone. The interest of AI in the litigation was not financial; it was its interest in achieving the trial and possible conviction of Senator Pinochet for crimes against humanity.

By seeking to intervene in this appeal and being allowed so to intervene, in practice AI became a party to the appeal. Therefore if, in the circumstances, it is right to treat Lord Hoffmann as being the alter ego of AI and therefore a judge in his own cause, then he must have been automatically disqualified on the grounds that he was a party to the appeal. Alternatively, even if it be not right to say that Lord Hoffmann was a party to the appeal as such, the question then arises whether, in non-financial litigation, anything other than a financial or proprietary interest in the outcome is sufficient automatically to disqualify a man from sitting as judge in the cause.

Are the facts such as to require Lord Hoffmann to be treated as being himself a party to this appeal? The facts are striking and unusual. One of the parties to the appeal is an unincorporated association, AI. One of the constituent parts of that unincorporated association is AICL. AICL was established, for tax purposes, to carry out part of the functions of AI--those parts which were charitable--which had previously been carried on either by AI itself or by AIL. Lord Hoffmann is a Director and chairman of AICL which is wholly controlled by AI, since its members, (who ultimately control it) are all the members of the International Executive Committee of AI. A large part of the work of AI is, as a matter of strict law, carried on by AICL which instructs AIL to do the work on its behalf. In reality, AI, AICL and AIL are a close-knit group carrying on the work of AI.

However, close as these links are, I do not think it would be right to identify Lord Hoffmann personally as being a party to the appeal. He is closely linked to AI but he is not in fact AI. Although this is an area in which legal technicality is particularly to be avoided, it cannot be ignored that Lord Hoffmann took no part in running AI. Lord Hoffmann, AICL and the Executive Committee of AI are in law separate people.

Then is this a case in which it can be said that Lord Hoffmann had an "interest" which must lead to his automatic disqualification? Hitherto only pecuniary and proprietary interests have led to automatic disqualification. But, as I have indicated, this litigation is most unusual. It is not civil litigation but criminal litigation. Most unusually, by allowing AI to intervene, there is a party to a criminal cause or matter who is neither prosecutor nor accused. That party, AI, shares with the Government of Spain and the CPS, not a financial interest but an interest to establish that there is no immunity for ex-Heads of State in relation to crimes against humanity. The interest of these parties is to procure Senator Pinochet's extradition and trial--a non-pecuniary interest. So far as AICL is concerned, clause 3(c) of its Memorandum provides that one of its objects is "to procure the abolition of torture, extra-judicial execution and disappearance". AI has, amongst other objects, the same objects. Although AICL, as a charity, cannot campaign to change the law, it is concerned by other means to procure the abolition of these crimes against humanity. In my opinion, therefore, AICL plainly had a non-pecuniary interest, to establish that Senator Pinochet was not immune.

That being the case, the question is whether in the very unusual circumstances of this case a non-pecuniary interest to achieve a particular result is sufficient to give rise to automatic disqualification and, if so, whether the fact that AICL had such an interest necessarily leads to the conclusion that Lord Hoffmann, as a Director of AICL, was automatically

disqualified from sitting on the appeal? My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties. Thus in my opinion if Lord Hoffmann had been a member of AI he would have been automatically disqualified because of his non-pecuniary interest in establishing that Senator Pinochet was not entitled to immunity. Indeed, so much I understood to have been conceded by Mr. Duffy.

Can it make any difference that, instead of being a direct member of AI, Lord Hoffmann is a Director of AICL, that is of a company which is wholly controlled by AI and is carrying on much of its work? Surely not. The substance of the matter is that AI, AIL and AICL are all various parts of an entity or movement working in different fields towards the same goals. If the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." (see Rex v. Sussex Justices, Ex parte McCarthy [1924] KB 256, 259)

Since, in my judgment, the relationship between AI, AICL and Lord Hoffmann leads to the automatic disqualification of Lord Hoffmann to sit on the hearing of the appeal, it is unnecessary to consider the other factors which were relied on by Miss Montgomery, viz. the position of Lady Hoffmann as an employee of AI and the fact that Lord Hoffmann was involved in the recent appeal for funds for Amnesty. Those factors might have been relevant if Senator Pinochet had been required to show a real danger or reasonable suspicion of bias. But since the disqualification is automatic and does not depend in any way on an implication of bias, it is unnecessary to consider these factors. I do, however, wish to make it clear (if I have not already done so) that my decision is not that Lord Hoffmann has been guilty of bias of any kind: he was disqualified as a matter of law automatically by reason of his Directorship of AICL, a company controlled by a party, AI.

For the same reason, it is unnecessary to determine whether the test of apparent bias laid down in Reg. v. Gough ("is there in the view of the Court a real danger that the judge was biased?") needs to be reviewed in the light of subsequent decisions. Decisions in Canada, Australia and New Zealand have either refused to apply the test in Reg. v. Gough, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial: see, for example, the High Court of

Australia in Webb v. The Queen. It has also been suggested that the test in Reg. v. Gough in some way impinges on the requirement of Lord Hewart's dictum that justice should appear to be done: see Reg. v. Inner West London Coroner, Ex Parte Dallaglio [1994] 4 All E.R. 139 at page 152 A to B. Since such a review is unnecessary for the determination of the present case, I prefer to express no view on it.

It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a Director of a charity closely allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or Director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.

Finally on this aspect of the case, we were asked to state in giving judgment what had been said and done within the Appellate Committee in relation to Amnesty International during the hearing leading to the Order of 25 November. As is apparent from what I have said, such matters are irrelevant to what we have to decide: in the absence of any disclosure to the parties of Lord Hoffmann's involvement with AI, such involvement either did or did not in law disqualify him regardless of what happened within the Appellate Committee. We therefore did not investigate those matters and make no findings as to them."

68. Lord Browne-Wilkinson's judgment was unanimously agreed by the House of Lords in *Pinochet, Re*. Delivering one of the three concurring judgments of the House, Lord Hope of Craighead said:

"*I have had the advantage of reading in draft the speeches which have been prepared by my noble and learned friends, Lord Browne-Wilkinson and Lord Goff of Chieveley. For the reasons which they have given I also was satisfied that the earlier decision of this House cannot stand and must be set aside. But in view of the importance of the case and its wider implications, I should like to add these observations.*

One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered. In civil litigation the guiding principle is that no one may be a judge in his own cause: nemo debet esse judex in propria causa. It is a principle which is applied much more widely than a literal interpretation of the words might suggest. It is not confined to cases where the judge is a party to the proceedings. It is applied also to cases where he has a personal or pecuniary interest in the outcome, however small. In London and North-Western Railway Co. v. Lindsay (1858) 3 Macq. 99 the same question as that which arose in Dimes v. Proprietors of Grand Junction Canal (1852) 3 H.L.Cas. 759 was considered

in an appeal from the Court of Session to this House. Lord Wensleydale stated that, as he was a shareholder in the appellant company, he proposed to retire and take no part in the judgment. The Lord Chancellor said that he regretted that this step seemed to be necessary. Although counsel stated that he had no objection, it was thought better that any difficulty that might arise should be avoided and Lord Wensleydale retired.

In Sellar v. Highland Railway Co. 1919 SC (HL) 19, the same rule was applied where a person who had been appointed to act as one of the arbiters in a dispute between the proprietors of certain fishings and the railway company was the holder of a small number of ordinary shares in the railway company. Lord Buckmaster, after referring to Dimes and Lindsay, gave this explanation of the rule at pp. 20-21:

> *"The law remains unaltered and unvarying today, and, although it is obvious that the extended growth of personal property and the wide distribution of interests in vast commercial concerns may render the application of the rule increasingly irksome, it is none the less a rule which I for my part should greatly regret to see even in the slightest degree relaxed. The importance of preserving the administration of justice from anything which can even by remote imagination infer a bias or interest in the Judge upon whom falls the solemn duty of interpreting the law is so grave that any small inconvenience experienced in its preservation may be cheerfully endured. In practice also the difficulty is one easily overcome, because, directly the fact is stated, it is common practice that counsel on each side agree that the existence of the disqualification shall afford no objection to the prosecution of the suit, and the matter proceeds in the ordinary way, but, if the disclosure is not made, either through neglect or inadvertence, the judgment becomes voidable and maybe set aside."*

As my noble and learned friend Lord Goff of Chieveley said in Reg. v. Gough [1993] AC 646,661, the nature of the interest is such that public confidence in the administration of justice requires that the judge must withdraw from the case or, if he fails to disclose his interest and sits in judgment upon it, the decision cannot stand. It is no answer for the judge to say that he is in fact impartial and that he will abide by his judicial oath. The purpose of the disqualification is to preserve the administration of justice from any suspicion of impartiality. The disqualification does not follow automatically in the strict sense of that word, because the parties to the suit may waive the objection. But no further investigation is necessary and, if the interest is not disclosed, the consequence is inevitable. In practice the application of this rule is so well understood and so consistently observed that no case has arisen in the course of this century where a decision of any of the courts exercising a civil jurisdiction in any part of the United Kingdom has had to be set aside on the ground that there was a breach of it.

In the present case we are concerned not with civil litigation but with a decision taken in proceedings for extradition on criminal charges. It is only in the most unusual

circumstances that a judge who was sitting in criminal proceedings would find himself open to the objection that he was acting as a judge in his own cause. In principle, if it could be shown that he had a personal or pecuniary interest in the outcome, the maxim would apply. But no case was cited to us, and I am not aware of any, in which it has been applied hitherto in a criminal case. In practice judges are well aware that they should not sit in a case where they have even the slightest personal interest in it either as defendant or as prosecutor.

The ground of objection which has invariably been taken until now in criminal cases is based on that other principle which has its origin in the requirement of impartiality. This is that justice must not only be done; it must also be seen to be done. It covers a wider range of situations than that which is covered by the maxim that no-one may be a judge in his own cause. But it would be surprising if the application of that principle were to result in a test which was less exacting than that resulting from the application of the nemo judex in sua causa principle. Public confidence in the integrity of the administration of justice is just as important, perhaps even more so, in criminal cases. Article 6(1) of the European Convention on Fundamental Rights and Freedoms makes no distinction between civil and criminal cases in its expression of the right of everyone to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Your Lordships were referred by Miss Montgomery Q.C. in the course of her argument to Bradford v. McLeod 1986 S.L.T. 244. This is one of only two reported cases, both of them from Scotland, in which a decision in a criminal case has been set aside because a full-time salaried judge was in breach of this principle. The other is Doherty v. McGlennan 1997 S.L.T. 444. In neither of these cases could it have been said that the sheriff had an interest in the case which disqualified him. They were cases where the sheriff either said or did something which gave rise to a reasonable suspicion about his impartiality.

The test which must be applied by the appellate courts of criminal jurisdiction in England and Wales to cases in which it is alleged that there has been a breach of this principle by a member of an inferior tribunal is different from that which is used in Scotland. The test which was approved by your Lordships' House in Reg. v. Gough [1993] AC 646 is whether there was a real danger of bias on the part of the relevant member of the tribunal. I think that the explanation for this choice of language lies in the fact that it was necessary in that case to formulate a test for the guidance of the lower appellate courts. The aim, as Lord Woolf explained at p. 673, was to avoid the quashing of convictions upon quite insubstantial grounds and the flimsiest pretexts of bias. In Scotland the High Court of Justiciary applies the test which was described in Gough as the reasonable suspicion test. In Bradford v. McLeod 1986 S.L.T. 244, 247 it adopted as representing the law of Scotland the rule which was expressed by Eve J. in Law v. Chartered Institute of Patent Agents[1919] 2 Ch. 276, 279 where he said:

"Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiased and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing that duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists."

The Scottish system for dealing with criminal appeals is for all appeals from the courts of summary jurisdiction to go direct to the High Court of Justiciary in its appellate capacity. It is a simple, one-stop system, which absolves the High Court of Justiciary from the responsibility of giving guidance to inferior appellate courts as to how to deal with cases where questions have been raised about a tribunal's impartiality. Just as Eve J. may be thought to have been seeking to explain to members of the council of the Chartered Institute in simple language the test which they should apply to themselves in performing their judicial duty, so also the concern of the High Court of Justiciary has been to give guidance to sheriffs and lay justices as to the standards which they should apply to themselves in the conduct of criminal cases. The familiar expression that justice must not only be done but must also be seen to be done serves a valuable function in that context.

Although the tests are described differently, their application by the appellate courts in each country is likely in practice to lead to results which are so similar as to be indistinguishable. Indeed it may be said of all the various tests which I have mentioned, including the maxim that no-one may be a judge in his own cause, that they are all founded upon the same broad principle. Where a judge is performing a judicial duty, he must not only bring to the discharge of that duty an unbiased and impartial mind. He must be seen to be impartial.

As for the facts of the present case, it seems to me that the conclusion is inescapable that Amnesty International has associated itself in these proceedings with the position of the prosecutor. The prosecution is not being brought in its name, but its interest in the case is to achieve the same result because it also seeks to bring Senator Pinochet to justice. This distinguishes its position fundamentally from that of other bodies which seek to uphold human rights without extending their objects to issues concerning personal responsibility. It has for many years conducted an international campaign against those individuals whom it has identified as having been responsible for torture, extra-judicial executions and disappearances. Its aim is that they should be made to suffer criminal penalties for such gross violations of human rights. It has chosen, by its intervention in these proceedings, to bring itself face to face with one of those individuals against whom it has for so long campaigned.

But everyone whom the prosecutor seeks to bring to justice is entitled to the protection of the law, however grave the offence or offences with which he is being prosecuted. Senator Pinochet is entitled to the judgment of an impartial and independent tribunal on the question which has been raised here as to his immunity. I think that the connections which existed between Lord Hoffmann and Amnesty International were of such a character, in view of their duration and proximity, as to disqualify him on this ground. In view of his links with Amnesty International as the chairman and a director of Amnesty International Charity Limited he could not be seen to be impartial.

There has been no suggestion that he was actually biased. He had no financial or pecuniary interest in the outcome. But his relationship with Amnesty International was such that he was, in effect, acting as a judge in his own cause. I consider that his failure to disclose these connections leads inevitably to the conclusion that the decision to which he was a party must be set aside."

69. In *Kenneth Hurf Williams v The Queen* [2020] Bda LR 49[1] I was concerned with a complaint of judicial bias as a ground of appeal from the Magistrate's Court. In my judgment I said:

"*In her written submissions, Ms. Tucker relied on a previous decision from this jurisdiction of Court where Wade-Miller J in F v F [2014] SC (Bda) 78 Div (25 August 2014) compiled examples of situations which call for the recusal of a judge [para 31]:*

"A judge will take him/herself off a case if there is a direct connection between the judge and the case. Examples include, but are not limited to, situations where the judge:

is an Appeals Court judge and was also a trial judge;
has a financial or personal interest in the result of the case;
is related to a party in the lawsuit;
is, or acts in a way to suggest he/she is, personally biased or prejudiced against a party or party's Counsel…"

The case of Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 decided in the Court of Appeal of England and Wales was cited with approval by the Privy Council in the consolidated appeals of Millar v Elgin and Payne et al v Procurator Fiscal, Dundee [2001] UKPC D4. The Locabail judgment [paras 2-3] featured in Lord Bingham of Cornhill's judgment of the Board [para 17]:

[1] This decision was overturned on appeal on grounds unrelated to the complaint of bias

"In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of the individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.

Any judge…who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge…or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."

Beyond the rare question of actual bias, the appearance of judicial impartiality is measured by whether, on the objective viewpoint of a fair-minded and informed observer, there is a real possibility or real danger of bias on the part of the judge (See Porter v Magill [2002] 2 AC 357). Lady Justice Arden (as she then was) in Mengiste & Anor v Endowment Fund for the Rehabilitation of Tigray & Ors [2013] EWCA Civ 1003 described the appearance of impartiality in these words: "…Courts need to be vigilant not only that the judiciary remains independent but also that it is seen to be independent of any influence that might reasonably be perceived as compromising its ability to judge cases fairly and impartially...""

70. The House of Lords in *Lawal v Norther Spirit Ltd* (HL(E)) [2003] ICR 856; [2003] UKHL 35 relied on their earlier statement of the test for bias in *Porter v Magill* [2002] 2 AC 357 which modified the common law position set out in *R v Gough* [1993] AC 646. Lord Steyn said [para 14]:

VII. The test for bias
14 In Porter v Magill [2002] 2 AC 357 the House of Lords approved a modification of the common law test of bias enunciated in R v Gough [1993] AC 646. This modification was

first put forward in In re Medicaments and Related Classes of Goods (No 2) [2001] ICR 564. The purpose and effect of the modification was to bring the common law rule into line with the Strasbourg jurisprudence. In Porter v Magill Lord Hope of Craighead explained, at p 494:

> *"102. . . . The Court of Appeal took the opportunity in In re Medicaments and Related Classes of Goods (No 2) [2001] ICR 564 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 575G-H, that the precise test to be applied when determining whether a decision should be set aside on account of bias had given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in R v Gough had not commanded universal approval. At p 575H he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review R v Gough to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at p 591: '85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fairminded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'*
>
> *"103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to 'a real danger'. Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded an informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.*

The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context. The small but important shift approved in Porter v Magill [2002] 2 AC 357 has at its core the need for "the confidence which must be inspired by the courts in a democratic society": Belilos v Switzerland (1988) 10 EHRR 466, 489, para 67; Wettstein v Switzerland (Application No 33958/96), para 44; In re Medicaments and Related Classes of Goods (No 2) [2001] ICR 564, 591, para 83. Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the

characteristics to be attributed to the fairminded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson (2000) 201 CLR 488, 509, para 53, by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious".”

71. Taking a closer look at what is meant by the ‘fair-minded and informed observer’, Baroness Hale of Richmond in *Gillies v Secretary of State for Work and Pensions* (HL (Sc)) [2006] 1 WLR 781 explained [39]:

“*The “fair-minded and informed observer” is probably not an insider (i e another member of the same tribunal system). Otherwise she would run the risk of having the insider’s blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair-minded. She is, as Kirby J put it in Johnson v Johnson 201 CLR 488, para 53, “neither complacent nor unduly sensitive or suspicious”*.

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]:

“*1 My Lords, the fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women, I shall avoid using the word “he”), she has attributes which many of us might struggle to attain to.*

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 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 fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

73. In *Helow v Secretary of State for the Home Department and another* an application for recusal was brought by a petitioner of Palestinian ethnicity who had been refused asylum in the United Kingdom by the Secretary of State for the Home Department. She was further refused leave to appeal by the Immigration Appeal Tribunal whereupon she petitioned the Lord Ordinary in the Court of Session for a statutory review of the decision under section 101 of the Nationality, Immigration and Asylum Act 2002. The Lord Ordinary, Lady Cosgrove, dismissed her petition before her advisers were made aware that Lady Grosgrove was a member of the International Association of Jewish Lawyers and Jurists who were responsible for magazine articles and pronouncements importing extreme pro-Israeli ideologies. The petitioner thereafter sought to set aside the Lord Ordinary's dismissal of her petition on the ground that a fair-minded and informed observer would have concluded that there was a real possibility that the Lord Ordinary was biased by reason of her membership of an association actively antipathetic to the interests with which the petitioner was identified.

74. Having outlined the characteristics of the fair-minded and informed observer, Lord Hope dismissed the appeal grounded on judicial bias stating, *inter alia* [4-5]:

"*4 The context is crucially important in a case such as this. As my noble and learned friend, Lord Mance, whose speech I have had the advantage of reading in draft has explained, the appellant's argument depends entirely on the judgment that the observer would make of the fact that Lady Cosgrove was, at all relevant times, a member of the International Association of Jewish Lawyers and Jurists. As a member of the Association, she must be assumed to have received its quarterly publication, "Justice", all of whose editions are readily accessible on the Association's website. She was present at a meeting held in Edinburgh on 30 November 1997 when, in the presence of a number of other distinguished Jewish members of the legal profession, a Scottish Branch of the Association was inaugurated. There is no suggestion that she either did or said anything after that date which associated her either one way or the other with views that were being expressed on behalf of the Association. It was on the contents of some of the more recent issues of "Justice", and those contents only, that Mr Bovey for the appellant concentrated in presenting his argument. The question is to what extent, if at all, the picture presented by this material would indicate to the observer, taking everything else into account, that there was a real possibility thatLady Cosgrove was biased.*

5 There is no doubt that some of the articles that have been published in "Justice", including messages by the Association's President, Judge Hadassa Ben-Itto, are fervently pro-Israeli. Inevitably, given the conflicts that have been taking place in the region, such a partisan stance carries with it sentiments that are hostile to those that people in Israel

feel are ranged against them. It is not difficult to find publicity being given in "Justice" to views that are markedly antipathetic to the Palestinian Liberation Organisation with whom the appellant, who is an ethnic Palestinian, has connections. Had there been anything to indicate that Lady Cosgrove had by word or deed associated herself with these views so as to indicate that they were her views too, I would have had no difficulty in concluding that the test of apparent bias set out in Porter v Magill [2002] 2 AC 357, para 103 was satisfied."

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*."

76. In *Saxmere Company Limited et al v Wool Board Disestablishment Company Limited* [2009] NZSC 72 the Supreme Court of New Zealand (the highest Court of New Zealand) was seized with the question of apparent bias in respect of Hon. Justice Wilson who sat as one of the panel of three judges in the Court of Appeal. The appellant ("Saxmere") complained that the appearance of bias arose out of Justice Wilson's close friendship in combination with his business relationship with Mr. Alan Galbraith QC who appeared on behalf of the opposing and successful party. Blanchard J in summarising the factual basis for the application said [2]:

[2] It should be emphasised at once that this is not a case in which it is suggested that the Judge had any apparent bias in favour of the Wool Board or against any of the Saxmere interests because of a personal financial interest or an association with any of the parties or any witness or deponent. Nor was there even the remotest connection between the Judge and the subject matter of the litigation. Moreover, it is not suggested that the Judge was actually motivated by any bias. Instead, the allegation is that, because of his connection with counsel for the Wool Board, his judicial independence may have been affected by an unconscious bias in favour of Mr Galbraith and, through him, of counsel's client. Mr Galbraith and the Judge are close friends and share an association in a horse stud and some broodmare partnerships. The Saxmere interests did not become aware of the full

extent of that association until after their first application to this Court, on other grounds, had been dismissed.

77. Before citing *Helow v Secretary of State for the Home Department* and adopting Lord Hope of Craighead's sketch of the fair-minded and informed observer, Blanchard J pointed out the similarities in approach to the test for apparent bias between the United Kingdom, Australia and New Zealand. He said [3] [footnotes not quoted]:

"***How issues of bias are tested***
[3] There was no disagreement before us concerning the test for apparent bias. After some semantic differences, the test in the United Kingdom and the test in Australia have become essentially the same. In Muir v Commissioner of Inland Revenue, the Court of Appeal brought New Zealand law into line. In the Australian case of Ebner v Official Trustee in Bankruptcy the leading judgment was given by Gleeson CJ and McHugh, Gummow and Hayne JJ. They stated the governing principle that, subject to qualifications relating to waiver or necessity, a Judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide". As that judgment proceeds to observe, that principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal (in the present case, the Court of Appeal) be independent and impartial. Unless the judicial system is seen as independent and impartial the public will not have confidence in it and the judiciary who serve in it."

78. Blanchard J, building on the remarks of Lord Hope of Craighead added [6-7] [footnotes not quoted]:

"*The courts must be careful not to subvert the hypothesis by ascribing too much legal knowledge to the lay observer. To do so might mean that justice is not both done and seen to be done by a notional representative of the public. On the other hand, if the court does not impute to the observer some knowledge about how barristers and judges commonly interact it may arrive at a hypothetical opinion of a hypothetical observer which does not reflect reality.*

[7] There therefore need to be added to the facts about the case known to the observer, which I will shortly describe, some basic knowledge of how counsel and judges are expected to act and interact. That information is conveniently set out in Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd:

> *(a) when barristers act on a client's behalf they do so in a professional capacity as their client's legal advocate selected to act in the case for that purpose. Any barrister so selected could have been briefed to fulfil the same task for the opposite side;*

(b) in accepting a brief to act for a client in a particular commercial case, the barrister does not become part of or identified with the client and has no direct or indirect financial interest in the outcome of the case;

(c) the barrister acts as such as a member of an independent bar. The barrister is instructed by a solicitor or a firm of solicitors to present the client's case and in doing so is bound by a professional code of ethics ensuring that the barrister's conduct is in accordance with his or her professional standards;

(d) it is common place for barristers who are close associates, or friends and who may even be from the same set of chambers, to fight on opposite sides of a case without compromising their professional duties to act in the interests of their clients;

(e) as judges are usually appointed from the senior ranks of the profession, particularly the bar, it is likely that they will be well acquainted, and have formed close associations, with senior counsel appearing before them. It is also likely that they will have personal and professional associations with many of the counsel appearing before them.

Those associations between judges and the profession have been said by Lord Woolf CJ, speaking for a Bench of five in the Court of Appeal of England and Wales, to promote an atmosphere which is totally inimical to the existence of bias.

[8] 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. Making this point in Muir, the Court of Appeal referred to the following passage from the judgment of Mason J in Re JRL; ex p CJL:

> *[I]t is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.*

Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel. As Mr Kós QC said in his argument for the respondent, counsel are not judged. They are, rather, a trusted element of the judicial system.

[9] It is important to bear in mind also, as Merkel J pointed out in Aussie Airlines, that the issue is not whether it would be better that another judge should have heard the case, but whether the judge who sat may not have brought an impartial and unprejudiced mind to

the resolution of the questions for decision. Nor is it simply a matter of whether a judge has conducted himself in accordance with guidelines for judicial conduct. A failure to do so, though it may be open to criticism, may well have no bearing on a question of apparent bias.

[10] Finally, and perhaps most obviously, the matter is not to be tested by reference to the perhaps individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all. Nor is it to be tested by reference to any statements by the judge as to what did or did not have an influence. The Court is not making a judgment on whether it is possible or likely that the particular judge was in fact affected by disqualifying bias and the judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously.

79. In *Saxmere Company Limited et al v Wool Board Disestablishment Company Limited* Saxmere and the other appellants accepted that the friendship between Wilson J and Mr. Galbraith QC was not in itself a matter of concern. The complaint arose on account of their personal friendship and business relationship combined. In resolving this assertion of apparent bias, Blanchard J stated in the judgment of the New Zealand Supreme Court [21-24]:

[21] In order to determine whether there was such a logical connection it is helpful to ask how Wilson J could have been unconsciously influenced by the possible effect of the outcome of the appeal on his relationship with Mr Galbraith. To answer this question one needs to inquire what that effect could possibly be. It is at this point, at the High Court of Australia's second step, that the appellants' argument breaks down.

[22] How can it sensibly be suspected, by the informed objective observer, that the relationship might have been damaged if the Wool Board's appeal were lost? It is to be borne in mind, in answering this question, that prior to the Judge's appointment to the Bench he and Mr Galbraith had been members of a small pool of Queen's Counsel in New Zealand who would have been briefed on opposite sides of many cases, some of great significance to their respective clients. (Members of this Bench have personal knowledge that this perception is correct, having presided over numerous of these encounters.)

[23] It is against such a background that Mr Galbraith would have come before Wilson J in this case. Although they are close friends of long-standing, the history of their roles as opposing counsel would lead an objective observer to conclude that Mr Galbraith would not expect any favour, which would in any event have been contrary to the Judge's oath. Nor would there be a perception that the Judge could believe that there might be any such expectation. It is realistically accepted by the appellants that the existence of a friendship such as the two men enjoyed, common among counsel and Judges both in New Zealand and in other jurisdictions, is not alone any cause for recusal. Case law confirms that such relationships between counsel and between counsel and the members of the Bench, engendering mutual trust and confidence, are positively regarded.

[24] But in this case there was more than their close personal friendship. Did the existence also of the Rich Hill business relationship give legitimate cause for concern? How might that dimension of the total relationship be affected by an adverse result for the Wool Board? The observer might perhaps wonder whether Mr Galbraith's fee in relation to the appeal was conditional upon a successful outcome. But that has never been suggested on behalf of the appellants and would be most unlikely in litigation of this character and for a client of this kind. The observer would quickly reject that view. Then the observer might ponder whether a loss in the case might affect Mr Galbraith's standing at the bar and with present and prospective clients and might diminish his future returns from his practice. Again, however, the observer would surely conclude after but a moment's thought that counsel, even very senior counsel, frequently are seen to lose some of their cases and could never be expected by prospective clients to win on every occasion. The loss in a particular case is hardly likely to have any adverse financial impact on a senior counsel who is far from making his early way in the profession. The conclusion which would be drawn, therefore, is that a loss for the Wool Board would have no financial consequences for Mr Galbraith or, indirectly, for Rich Hill Stud through his ability to support its financial requirements. And, equally obviously, a win for the Wool Board will have had no immediate or future financial benefit for him or for the stud.

[25] The objective observer might then turn attention to whether the Judge might in some way be beholden to Mr Galbraith because of the business dimension of their relationship…"

80. On this reasoning (which included an analysis of the controversial business relationship between the judge and Mr. Galbraith QC in addition to a critical assessment of the judge's late disclosure of the relevant facts) the New Zealand Supreme Court concluded that a fair-minded observer would not have had a reasonable apprehension of bias arising from Wilson J's personal and business relationships with Mr. Galbraith.

81. In *Sheikh Khalid Ben Abdullah Rashid El Fawaz v Wendy Ann El-Faragy and Others* [2007] EWCA Civ 1149 [para 24] the English Court of Appeal observed:

"*There is no dispute about the law. In Lord Hope's words in paragraph 103 in Porter v McGill: "the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased". Mr Randall also directs our attention to paragraph 63 in Lord Hope's speech in Millar v Dickson [2001] UK PC D4, [2002] 1 W.L.R. 1615 where he referred to:*

> *"… the fundamental importance of the convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done."*

Mr Cayford emphasises paragraph 14 in the speech of Lord Steyn in Lawal v Northern Spirit Ltd [2003] UK HL 35, [2003] I.C.R. 856:

"Public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in Johnson v Johnson (2000) 200 CLR 488, 509, at para 53, by Kirby J when he stated that "a reasonable member of the public is neither complacent nor unduly sensitive or suspicious"."

Finally I draw attention to the endorsement by this Court in paragraph 21 of Locabail of the observations of the constitutional court of South Africa in President of the Republic of South Africa v South African Rugby Football Union (1999) 4 S.A. 147, 177:

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

82. In *Sheikh El Fawaz v El-Faragy* the English Court of Appeal allowed an appeal which reversed the order of Singer J's refusal to recuse himself. In that case the appellant ("the Sheikh") was the third respondent in ancillary relief proceedings in which Singer J made inflammatory comments at the pre-trial review stage.

83. The underlying ancillary relief proceedings in *El Fawaz v El-Faragy* involved millions of Stirling pounds in assets and was bitterly fought between the Respondent ("the wife") and her former husband, Mr. Nael Mahmoud ("the husband"). The Sheikh, with the husband's support, claimed to be the beneficial owner of the husband and wife's last matrimonial home which was purchased for £1.7 million in the name of McKellar Holdings Ltd ("McKellar"), a British Virgin Island registered company. Accordingly, the Sheikh was joined as the Third Respondent on a summons application to determine the beneficial ownership of McKellar. It was therefore necessary for the Sheik to give evidence.

84. The Sheikh, a Saudi Arabia national with Arab ethnic origin and of the Muslim faith, complained that over the course of the proceedings Singer J had made numerous comments which would cause a fair-minded and informed observer to conclude that there was a real possibility that the judge was mocking the Sheik for his national, ethnic and /or religious status. The Sheikh further contended that there was a real possibility that the judge had formed a strong view that he and the husband had presented a false case and that it was done with the purpose of subjecting the wife to maximum possible delay and expense.

85. In the judgement of the English Court of Appeal [para 17], a transcript of the contentious remarks uttered by Singer J are quoted in full. Extracting particular portions of the transcript which were highlighted at the request of the Sheikh's Counsel [and in bold-type hereunder], it was recorded that Singer J said, *inter alia*:

"*MR JUSTICE SINGER: And what good would that do her if it turns out that he is not the owner, and/or that I do not think it appropriate to treat him as the beneficial owner, and therefore cast aside for Family Division purposes the cloak of incorporation, and if he chose to depart* ***[on his flying carpet]*** *never to be seen again –* ***[it should be Ramadan quite soon?]*** *the whole point about security for costs … is that the money is up front."*

"MR JUSTICE SINGER: But you want to come into this, or you might want to come into this, and you reserve your position, in certain circumstances you might come in to it if Mr Pointer does not ahead and I suppose it is possible if Mr Pointer does not want to go ahead the Sheikh would be here to see that no stone is unturned, ***[every grain of sand is sifted.]****"*

"MR CAYFORD: That is what the position would have been with effect from his oral evidence as given in court, but he is now resiling from that.

JUSTICE MR SINGER: And say what in relation to ICSID in his affidavit?

MR CAYFORD: It is not entirely clear. He does not, as I recall …

MR JUSTICE SINGER: ***[A bit gelatinous, is it?]***

MR CAYFORD: I am sorry?

MR JUSTICE SINGER: ***[A bit like Turkish Delight?]****"*

86. *In the judgment of the Court of Appeal, the following summary and quotes of other remarks made by Singer J were provided [para 17(4)-(6)]:*

"(4) During the course of this hearing there were some references to Ramadan. On the first day there was some dispute between counsel as to whether or not they expected the Sheikh to attend to be further cross-examined by Mr Cayford, it now being accepted that he had informed the court that he would not return. There was another reference to

Ramadan in the passage I have cited at (1) above. Exception is, however, taken to this passage at page 80:

> *"MR JUSTICE SINGER: I do not know what the lines of communication are to Saudi Arabia, or wherever the Sheikh may be* ***[at this I think relatively fast-free time of the year]****, do you want five minutes to consider your position?"*

(5) The first of the remarks said to throw doubt on the judge's ability to try the issues with an objective judicial mind was this:

> *"MR JUSTICE SINGER: He (the husband) is running a campaign. It is perfectly clear to me, prima facie, I keep having to say that because, of course,* ***I may be persuaded out of the near conviction****, that the campaign here is to make sure that she is put at the maximum disadvantage by the noncompliance with orders, even when he is able to deal with every one of his requirements, and it is not fair." (I have added the emphasis to the words in italics.)*

(6) The final comment is one made on page 47 where the judge was discussing the imaginative order he eventually made on 1st December 2006 to deal with the husband's contempt through his failures as found by the judge to pay costs and satisfactorily to explain his expenditure of monies drawn from the frozen accounts. For each £1 that he paid to his solicitors for preparation, representation or advice, he had to pay £1 into a joint account in the name of the parties' solicitors to be held to the order of the court but to be paid to the solicitors for the wife at the conclusion of the hearing unless the court then ordered otherwise. This was to ensure that the wife had some cover for future costs. He said:

> *"MR JUSTICE SINGER: Mr Pointer, it is going to be obvious whenever this case is before another court that* ***I have formed a view about this case****, not dissimilar from that which Lord Justice Thorpe formed, and maybe I should not ultimately take the final hearing. I do not know. The view I have taken <u>at this stage</u> is that it looks awfully like it is a war of attrition and if there is a way of evening it up then I will do so and if it is necessary to be inventive in order to achieve it I hope I will be able to, because I find it repugnant for reasons I outlined on Friday. Now I have come out in the open about it. My intention is to try and level the playing field and I will try and find a way to deal with it …" (The words in italics* [underlined] *are emphasised by me.)"*

87. In dismissing the summons for his recusal Singer J said [para 23 of the Court of Appeal judgment]:

"*31. Complaint is raised about certain references to Ramadan, when its onset is fixed in different parts of the Muslim world, and when it might fall in 2007. I certainly intended no disrespect or disregard for the tenets of Islam …*

32. References to flying carpets, grains of sand and Turkish Delight cannot in my judgment, whether in isolation or in combination with any of the other passages relied upon, give rise

in the fair-minded and informed observer to a real possibility of bias. Mr Cayford in his submissions referred to these examples of "colourful language", which I accept. I do not accept that they demonstrate disrespect or disregard for SK's Saudi nationality and Arab ethnicity.

…

35. I arrive therefore at the conclusion that there is no real as opposed to fanciful doubt about my impartiality which should be resolved by recusing myself. This summons therefore fails, and I will not rule myself out from further participation in this case, including at the final hearing (whether or not this autumn) if I am available to take it."

88. The Sheikh appealed to the Court of Appeal against Singer J's refusal to recuse himself on the ground that there was a real possibility that the judge had formed a strong view that he and the husband had presented a false case and that it was done to subject the wife to maximum delay and expense. This ground of the appeal failed. However, in respect of the grounds of appeal relating to the provocative remarks made by Singer J, the appeal succeeded. Lord Justice Ward delivered the unanimously agreed judgment of the Court of Appeal in *Sheikh El Fawaz v El-Faragy* stating [paras 28-31]:

"28. The other attack upon him is of a quite different character. It will be recalled that Mr. Randall invited us to read extracts 1-4 with brackets inserted around the offending words. This was an utterly compelling piece of advocacy. There is a world of difference between saying: "If he chose to depart never to be seen again" and gratuitously adding "if he chose to depart ***on his flying carpet*** *never to be seen again". Likewise it would have been unexceptional to say that the Sheikh would be present "to see that no stone is unturned", without glibly adding "****every grain of sand is sifted****". The judge could well make the point that he did not know what lines of communication were available to Saudi Arabia or wherever the Sheikh may be yet once again there was no need for the uncalled-for addition of "****at this I think relatively fast-free time of the year****". Without the additional words, the judge was making fair points but the incidental injections of sarcasm were quite unwarranted.*

*29. The third example is the worst. Mr Cayford quite clearly did not understand why the judge had interrupted his submission that the Sheikh's case was not entirely clear by commenting that the affidavit was "****a bit gelatinous****". He did not understand the interruption because he would not have appreciated that, as Mr Randall correctly submits, the judge was setting himself up to deliver the punch line to his joke, "****a bit like Turkish Delight****".*

30. When I said at the beginning of the judgment that I found this case embarrassing, no little part of my embarrassment comes from my belief that the injection of a little humour lightens the load of high emotion that so often attends litigation and I am the very last judge to criticise laughter in court. I fully appreciate the conventional view that jokes are a bad thing. Of course they are when they are bad jokes - and I am sure I have myself often erred

and committed that heinous judicial sin. Singer J. certainly erred in this case. These, I regret to say, were not just bad jokes: they were thoroughly bad jokes. Moreover, and importantly, they will inevitably be perceived to be racially offensive jokes. For my part I am totally convinced that they were not meant to be racist and I unreservedly acquit the judge of any suggestion that they were so intended. Unfortunately, every one of the four remarks can be seen to be not simply "colourful language" as the judge sought to excuse them but, to adopt Mr Randall's submission, to be mocking and disparaging of the third respondent for his status as a Sheikh and/or his Saudi nationality and/or his ethnic origins and/or his Muslim faith.

31. I have given most anxious thought to whether or not I am giving sufficient credit for the robustness of the phlegmatic fair-minded observer, a feature of whose character is not to show undue sensitivity. Making every allowance for the jocularity of the judge's comments, one cannot in this day and age and in these troubled times allow remarks like that to go unchallenged. They were not only regrettable, and I unreservedly express my regret to the Sheikh that they were made: they were also quite unacceptable. They were likely to cause offence and result in a perception of unfairness. They gave an appearance to the fair-minded and informed observer that that there was a real possibility that the judge would carry into his judgment the scorn and contempt the words convey. Singer J. may talk too much; yet he is a good judge. Unfortunately for him and for all of us, on this occasion he crossed the line between the tolerable and the impermissible. For that reason, allowing the appeal is inevitable."

89. The European Court of Human Rights in *Škrlj v. Croatia* (Application no. 32953/13) outlined a two-part subjective and objective test for determining the question of bias in a way which is not inconsistent with the principles emanating from the English case law. Quoting from the previous judgment in *Denisov v Ukraine* ([GC], no. 76639/11, 25 September 2018):

"*"61. As a rule, impartiality denotes the absence of prejudice or bias. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is, whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say, by ascertaining whether, quite apart from the personal conduct of any of its members, the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, among other authorities, Micallef v. Malta [GC], no. 17056/06, § 93, ECHR 2009, with further references).*

62. However, there is no watertight division between subjective and objective impartiality, as the conduct of a judge may not only prompt objectively held misgivings as to the tribunal's impartiality from the point of view of the external observer (the objective test) but may also go to the issue of the judges' personal conviction (the subjective test) (see Kyprianou v. Cyprus [GC], no. 73797/01, § 119, ECHR 2005-XIII). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the

judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see
Pullar v. the United Kingdom, 10 June 1996, § 32, Reports 1996-III).

63. In this respect, even appearances may be of a certain importance, or in other words, 'justice must not only be done, it must also be seen to be done'. What is at stake is the confidence which the courts in a democratic society must inspire in the public (see Morice v. France [GC], no. 29369/10, § 78, ECHR 2015)."

90. In *Locabail (UK) Ltd v Bayfield Properties Ltd* the English Court of Appeal emphasised that each application for recusal must be decided on the particular facts of the case and warned that a real ground for doubt about the impartiality of a judge should be resolved in favour of a recusal. The Court of Appeal also considered in a general sense that the greater the passage of time between the making of the recusal application and the facts giving rise to the complaint of bias, the weaker the merits of the recusal application. In the words of the Court of Appeal [480 D-F]:

"*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 C.L.R. 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 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. 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.*"

The Small Jurisdiction Factor

91. In *Kenneth Hurf Williams v The Queen* I also observed the nuances of the law on bias when applied in smaller jurisdictions such as Bermuda. I stated:

> *Ms. Tucker clarified that her complaint against bias falls under the more popular category of an appearance of bias rather than actual bias. Indeed, Magistrate Chin's position was that, unsurprisingly, he had no recollection of the relevant Family Court proceedings.*
>
> *In a jurisdiction as small as Bermuda it is an accepted reality that magistrates and judges are sometimes called upon to conduct trials involving a defendant previously tried by the same bench. This is particularly so in the case of repeat offenders well known to the Courts. In such instances, the Court is expected to adjudge* [adjudicate] *each case on the evidence and merits of the case. Such judicial maturity is a must in small jurisdictions which cannot reasonably be expected to have the resources to provide a new tribunal for every occasion that such an offender reappears before the Court for a new matter.*
>
> *This same point must therefore apply to a witness who has appeared before the same Court in previous proceedings. Whether any such connection will give rise to a judicial conflict will depend on the facts of each individual case. No doubt,* [the] *determining factors on the question of an appearance of impartiality will often include some consideration of the timespan which has lapsed between the different matters in question. In other cases, the question of bias might turn on the significance of the common witness to the present proceedings and whether, as a matter of importance to the present case, that witness is to be assessed on his or her credibility. So, where a witness was recently determined by the Court in an earlier case to be an especially honest or dishonest witness, the same judge or tribunal may properly be recused from assessing the credibility of that same witness in new proceedings where the credibility of that witness is a relevant and contested issue."*

92. The small jurisdiction factor was considered by the Privy Council in *Grant v The Teacher's Appeals Tribunal & The Attorney General (Jamaica)* [2006] UKPC 59. In that case the Judicial Committee was called upon to assess an allegation of bias founded on an assertion that the judge's family had a long-term friendship with the Chairman of the Board of Management for Montego Bay Community College. In that case the applicant, Mr. Grant, had been terminated from his employment as a teacher. On appeal from Justice Cooke's dismissal of an application for judicial review, the Court of Appeal was charged with assessing the question of apparent bias on the part of Cooke J as one of the grounds of appeal. In considering the complaint, Cooke J was invited to provide his remarks, which he did. He stated:

"*It is true that the chairman has been known to my family for some forty years. The description of a 'long time friend and acquaintance' is not a meaningful one. There is no special relationship between the chairman and my family. I myself may have encountered him no more than ten times over the last twenty years.*"

93. The Court of Appeal subsequently held that "*there was in effect no real likelihood or possibility of bias to have affected in any manner the decision arrived at by the learned judge.*" The Appellant appealed to the Privy Council which upheld the Court of Appeal on the question of bias. In the judgment of the Board, Lord Carswell stated [paras 36-40]:

"*36.The final issue is that of the allegation of bias on the part of Cooke J in the Supreme Court. It may be said at once that no question has been raised of actual bias or of any pecuniary or proprietary interest on the part of the judge. The complaint was rather of what one might term apparent or perceived bias. This was based upon the proposition that because of his friendship with the family of the Chairman of the Board there was a real possibility that the fair−minded and informed observer would conclude that the judge was biased: see the discussion by Lord Hope of Craighead of the applicable principles in Porter v Magill [2001] UKHL 67, [2002] 2 AC 357, paras 99−103.*

37. The Court of Appeal in the earlier case of Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 gave consideration to the circumstances in which a judge should recuse himself on the ground that bias of this type might be thought by the fair−minded and informed observer to exist. In paragraph 25 of his judgment Lord Bingham of Cornhill CJ pointed out that 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, as everything will depend on the facts, which will include the nature of the issue to be decided. He did, however, go on to point to some factors which were unlikely and others which were likely to give rise to a soundly based objection. Among the latter he enumerated personal friendship 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.

38. It is necessary to bear in mind that these remarks of Lord Bingham were intended as guidelines for judges in other cases and not as a comprehensive definition of the circumstances in which bias might properly be thought to exist. The facts of each case are of prime importance, as he pointed out. Their Lordships are mindful of the problems which may face judges in a community of the size and type of Jamaica and other comparable common law jurisdictions. In such communities it is commonly found that many of the parties and witnesses who are concerned in cases in the courts are known, and not infrequently well known, to the judge assigned to sit. It is incumbent on the judge to apply a careful and sensitive judgment to the question whether he is a close enough friend of the person concerned to make it undesirable for him to sit on the case. If he errs on the side of caution by too much, he may make it impracticable for him to carry out his judicial duties as effectively as he should. If, on the other hand, he is not ready enough to recuse himself, however unbiased and impartial his approach may in fact be, he will leave himself open to the suggestion of bias and damage the reputation of the judiciary for independence and impartiality. In this connection it is relevant to take into account the issues in the

proceedings. As Lord Bingham pointed out in the Locabail case, if the credibility of the judge's friend or acquaintance is an issue to be decided by him, he should be readier to recuse himself.

39. If the judge and the Chairman of the Board had been close family friends who saw each other frequently, or if they had been regular golfing partners, it would no doubt be much more likely that the real possibility of bias could be thought to exist. As it is, the judge has stated to the Court of Appeal that there was no special relationship between the Chairman and his family and that he "may have encountered him no more than ten times over the last twenty years". The issues in the appeal did not involve any assessment of the veracity or credibility of the Chairman's evidence and the issues to be decided did not affect his personal position as distinct from that of the Board which he chaired. Their Lordships do not consider that such a degree of acquaintance in these circumstances would have caused the fair−minded and informed observer in Jamaica to conclude that there was a real possibility or danger of bias.

40. Their Lordships are accordingly of [the] *opinion that the appellant has not made out any of the grounds of appeal upon which he relies and they will humbly advise Her Majesty that the appeal should be dismissed. The Board must order the appellant to pay the costs, but refers to the indication by the Assistant Attorney−General that the order is unlikely to be enforced.*

The Best Practice Approach to Applications for Recusal

94. In *Sheikh El Fawaz v El-Faragy* the English Court of Appeal, by way of a postscript to their judgment, encouraged judges to avoid sitting as the arbiter of their own conduct in cases alike and where circumstances so permit. Lord Justice Ward, without disregarding the many cases which call for the trial judge to directly determine the recusal, made the following comments [para 32]:

"*A postscript*
32. It is an embarrassment to our administration of justice that recusal applications, once almost unheard of, are now so frequently coming to this Court in ways that do none of us any good. It is, however, right that they should. The procedure for doing so is, however, concerning. It is invidious for a judge to sit in judgment on his own conduct in a case like this but in many cases there will be no option but that the trial judge deal with it himself or herself. If circumstances permit it, I would urge that first an informal approach be made to the judge, for example by letter, making the complaint and inviting recusal. Whilst judges must heed the exhortation in Locabail not to yield to a tenuous or frivolous objections, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour."

95. When faced with an application for recusal, the judge in question should jealously guard the applicant's constitutional right to a fair trial before an independent and impartial tribunal together with the applicable principles of natural justice. This may likely require the judge to disclose the relevant factual information to enable the Court to carefully and transparently assess what an informed and fair-minded observe would conclude. In dismissing an appeal against the judge's refusal to recuse, the English Court of Appeal in *Resolution Chemicals Ltd v H Lundbeck* A/S (CA) [2014] 1 WLR 1943 expressed its approval of a judge providing the parties with the facts which are strictly necessary for a fair adjudication. Sir Terence Etherton C said [42-43]:

"*42 As the judge noted, Patten LJ said in In re L-B (Children) [2011] FLR 889, para 22 that a judge faced with a recusal application on the ground of apparent bias should "explain in sufficient detail the scale and content of the professional and other relationship which is challenged on the application". It is plainly consistent with the policy underlying article 6.1 of the Convention and common law principles that, on such an application, the judge should provide to the parties relevant information. Such information, however, should not go beyond what is strictly necessary for a fair adjudication of the recusal application. I consider that the judge in the present case went well beyond what was necessary. The consequence of an excessively wide factual disclosure is to enlarge the opportunity for speculative arguments about the inferences to be drawn and the consequences that follow from the facts disclosed. That observation must be borne in mind when I address Mr Gordon's submissions about the factual context of the present case in the following paragraphs.*

43 Against the background of those principles and matters, I turn to the facts of the present case. The first and most obviously striking feature is that the relationship between the judge and Professor Baldwin was formed when the judge was a university student and it came to an end when his undergraduate studies were completed some 30 years ago. Mr Gordon's submissions were advanced on the basis that Professor Baldwin was in a position of authority and influence over the judge in those student days and that such influence should be presumed to continue unless there were factors negativing that inference. That seems to me to be an entirely artificial approach in the present case where the circumstances of the original relationship arose in a specific and limited context so very long ago and which bears no comparison whatever with the situation in which the judge will be trying a High Court action in which Professor Baldwin will be giving expert evidence."

ANALYSIS AND FINDINGS

DR. BROWN AND JUSTICE MUSSENDEN / DPP MUSSENDEN

96. The Applicant's complaint of apparent bias on the grounds of a nexus between me and Mussenden J is formulated in Mr. Lynch QC's written submissions as follows [8-12]:

> "…
> 8. *Additionally, and also giving rise to concern over the appearance of bias, there is the relationship between the learned judge and the former DPP Larry Mussenden, now a puisne judge. It is believed that the two are very close friends and have been in partnership together in their former legal practice. They are now brother and sister judges.*
>
> 9. *Mr Mussenden, as he then was, was pointedly not re-appointed as the Attorney General when the defendant was elected to office as Premier. The defendant believes, on credible grounds, that there has been a degree of animus between the two ever since.*
>
> 10. *The learned judge will be aware that there is an extant Constitutional claim in which criticism is made of the former DPP in relation to his independence in the decision-making process and the manner in which he conducted himself as DPP.*
>
> 11. *Mr Mussenden, as he then was, presided over many years of the investigation into the defendant's alleged criminal past, specifically delaying taking-up his appointment to the Supreme Court Bench, so as to conclude it. It was within a few days of his taking up his appointment that the incoming DPP charged the defendant.*
>
> 12. *It will readily be understood that here again, the appearance of bias is strong based on the not unreasonable assumption that close friends, particularly those in the same profession, discuss their work and allow their opinions to flow freely.*"

97. These assertions of fact are drawn from Dr. Brown's affidavit evidence filed in support of the recusal applications. In that evidence Dr. Brown implies that Justice Mussenden was personally invested and driven by his animosity for Dr. Brown when he "*presided over many years of the investigation into the defendant's alleged criminal past, specifically delaying taking-up his appointment to the Supreme Court Bench, so as to conclude it.*" Notably, however, Dr. Brown's proclamation of animosity is curiously absent from his affidavit evidence and pleadings in the civil proceedings where DPP Mussenden's tenure of nearly five years is plainly topical and relevant.

98. There is no hint of DPP Mussenden's alleged 15 year span of animosity against Dr. Brown on the case he advances in the civil proceedings. However, on Dr. Brown's evidence in these recusal proceedings, it said that DPP Mussenden '*presided*' over the investigation and it is implied that in his doing so, DPP Mussenden's objectivity was tainted by some

level of odium for Dr. Brown. This is to be contrasted against Dr. Brown's evidence and pleaded case in the civil proceedings where his complaint appears to be that DPP Mussenden (and DPPs Field QC and Clarke alike) never operated in any autonomous or independent way.

99. In fact, Dr. Brown's evidence in the civil proceedings is that up until April 2019 he felt reassured that DPPs Field QC and Mussenden, as constitutionally independent officers in their own right, would not be influenced by political considerations and would only consider the evidence before them. In Dr. Brown's 1st affidavit filed in support of the Originating Summons in the civil proceedings he deposed [7-9]:

> 7. *For the duration of the investigation into me which started in 2011 which I attach and exhibit at pages 1-2 of "EFB-1", the Attorney General has been a member of the House of Assembly and there has therefore been a DPP in office. During this period, that have been three holders of the office of DPP: Rory Field QC until the end of February 2016, Larry Mussenden until 1 December 2020,* [underlined for my emphasis] *and now Cindy Clarke*.
>
> 8. *During the long years of this public and degrading investigation, I have drawn comfort from section 71(6) of the Constitution: "In the exercise of the powers conferred on him by this section, the [DPP] shall not be subject to the direction or control of any other person or authority." These powers include instituting and undertaking criminal proceedings (Section 71(2)(a)). I felt reassured in as much as a constitutionally independent DPP would not let him- or herself be influenced by political considerations, and only consider the evidence.* [underlined for my emphasis]
>
> 9. *However, my faith in the Respondent's independence was severely shaken when my legal team received an affidavit of Special Investigator John Briggs sworn on 4 April 2019, filed in judicial review proceedings challenging the legality of police raids against BHCS and BDC* [underlined for my emphasis] … …"

100. Conversely, the partiality implicitly ascribed by Dr. Brown to DPP Mussenden in his affidavit evidence underlying the recusal applications [9-11] does not acknowledge any period of time since 2006 during which Dr. Brown believed or felt reassured that DPP Mussenden was beyond the influence of any matter other than the evidence. However, in Dr. Brown's evidence in these proceedings, he deposed:

> "*9. Mr. Mussenden, as he then was, was deliberately not re-appointed as the Attorney General when I was elected to office as Premier. I genuinely believe that there has been a degree of animosity between us ever since* [underlined for my emphasis].

10. The learned judge will be aware that there is an extant Constitutional claim in which criticism is made of the former DPP and the manner in which he conducted his role as DPP in relation to his independence in the decision-making process.

11. Mr. Mussenden, presided over many years of the investigation into my alleged criminal past, specifically delaying taking-up his appointment to the Supreme Court Bench, so as to conclude it [underlined for my emphasis]. *It was within a few days of his taking up his appointment that the incoming DPP indicated through my counsel that I was to be charged...*"

101. The '*notional representative of the public*' (to use the terminology of Blanchard J in *Saxmere Company Limited et al v Wool Board Disestablishment Company Limited*) would not, in my judgment, disregard these differences. That is to say that the fair-minded and informed observer would reasonably expect an allegation of personal animus by the DPP to prominently feature in Dr. Brown's constitutional action complaining that his constitutional rights to have his matter directed and controlled by a constitutionally independent DPP were breached. At the very least, the objective observer would wonder why it is that Dr. Brown's attorneys never corresponded with DPP Mussenden to at least flag and document their concerns about his involvement in Dr. Brown's investigation in light of the purported history of personal hostility between them.

102. In an attempt to answer to this point, Mr. Lynch QC contended that raising the issue of personal animosity prior to the DPP's making of a final decision on whether or not to charge Dr. Brown would have been premature. Responding to the Court's query on the absence of a pleading of personal animosity in the civil proceedings, Mr. Duncan QC submitted that the inclusion of this personal background in the pleadings was not necessary. I do not find either explanation to be persuasive in my assessment of [redacted] Dr. Brown's concern that the DPP's personal animosity for him is so strong and long-lasting that even my judicial impartiality would appear to be infected by it through my collegial friendship with Mussenden J.

103. The absence of any reference to this personal background in any correspondence or pleadings in the civil proceedings is particularly striking given that Dr. Brown's legal team is one which is made up of specialised lawyers widely-recognised for their formidable skill, detail and experience. Thus the only reasonable inference which could be drawn by the informed and fair-minded observer is that Dr. Brown's allegation (that he shares '*a degree of personal animosity*' with DPP Mussenden/Mussenden J and his innuendo that such animosity seeped into '*the manner in which he* [DPP Mussenden] *conducted his role as DPP in relation to his independence in the decision-making process*') [redacted]

was not of concern to him when the Originating Summons and his first affidavit was drafted, sworn and filed in the civil proceedings.

104. This analysis is built on my reading of an innuendo in Dr. Brown's evidence that Mr. Mussenden's conduct as DPP was influenced or driven by his personal animosity for Dr. Brown. Alternatively, if Dr. Brown did not intend to imply on his evidence in these recusal proceedings that Mr. Mussenden was fuelled by spite in carrying out his functions as the DPP, then it follows that his request for my recusal is premised on an allegation that an appearance of bias will arise in any case where the DPP and the relevant member of the judiciary are also friends. That is a most unconvincing proposition on any standard of test.

105. The alleged cause for animosity between Dr. Brown and DPP Mussenden, is said to be attributable to Dr. Brown's decision not to re-appoint Mr. Mussenden (as he then was) to the post of Attorney General. However, Ms. Christopher, in both her oral and written submissions [page 2] validly pointed out:

"*…it is ordinary that a Premier selects his own Senate, his team for all Cabinet positions. Mr. Mussenden would not have been re-affirmed in 2006 and has enjoyed great success in the ensuing fifteen years. It is being suggested without basis that his feelings were hurt and therefore the Judge here would be biased against the person who did not re-affirm him? On what objective basis*?"

106. I would add that it was never suggested by Dr. Brown that he acted out of any sense of personal enmity against Mr. Mussenden when he made his '*deliberate*' decision not to '*re-appoint*' Mr. Mussenden. Instead, Dr. Brown's evidence is suggestive that Mr. Mussenden, who ascended to the post of DPP and thereafter Puisne Judge of the Supreme Court, has been holding a 15 year grudge against Dr. Brown on account of Dr. Brown's exercise of his constitutional rights as the then Premier of Bermuda to select a Cabinet of his choice. Without any evidence from which such an inference can be reasonably drawn, that allegation must be rejected as speculative, if not wildly so.

107. In any event, the Constitutional proceedings do not target or even remotely engage DPP Mussenden in any personal way. The grievance underlying the constitutional application, on its face, is two-fold: (i) that DPPs Field QC and Mussenden unlawfully submitted the powers of the DPP to the supervision, direction and/or control of an oversight group (comprising the Commissioner of Police, the DPP, the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor) thereby offending the constitutional independence vested in the office of DPP and (ii) that DPP Ms. Clarke acted unlawfully by deciding to charge Dr. Brown with criminal offences when her decision to charge could not have been made on her independent assessment of the facts made known to her. I do

not see how the Applicant's criticism of DPP Mussenden in the civil proceedings could be properly described as personally scathing or such that it requires the assessment of a member of the judiciary who does not have any form of friendship with Mussenden J.

108. The legal community in Bermuda, comprising the judiciary, the magistracy and practising attorneys, is a small one. It is to be expected that friendships will exist between members of the various tiers of the profession. Sometimes, a practising attorney will appear in opposition to another lawyer who happens to also be a personal friend. It might also be that a friendship exists between an appearing attorney and the judge. In other cases a judge might be expected to sit in appeal over the decision of another friend and colleague. These are plainly the realities of a small jurisdiction such as Bermuda. However, a fair-minded and informed observer would be able to draw a proper distinction between the suspicion warranted for a case where the judge has a friendship with a lawyer who is party to a proceeding in his or her personal capacity on the one hand and where the friend of the judge is party to a proceeding only by virtue of the litigant's professional title or role. This may often be the case where the AG, the DPP or other Head of a Government Department or Ministry is named as a party to civil proceedings. Of course, no rule or principle is absolute and every case will ultimately turn on its particular facts.

109. However, in this case, for all of the reasons outlined above, I find that Dr. Brown has not established a proper case for my recusal on the grounds relating to Mussenden J.

DR. BROWN AND DR. SUBAIR

110. The Applicant's case for my recusal in relation to my father, Dr. Subair, is that there was and remains a sense of animosity between the two doctors arising out of the failed 1996 business venture attempted by the four doctors. It is said that as a result of that lingering animosity, Dr. Subair and Dr. Brown have not had an amicable social or business relationship since which.

111. As a starting point, I would note that there is no evidence before me to suggest that Dr. Brown and Dr. Subair ever shared a personal friendship or that they ever socialised with one another before, during or after 1996. This is contextually important in order to highlight that Dr. Brown has not alleged that there has been any breakdown of a friendship or any other form of a close acquaintanceship between he and my father.

112. What is evident on the facts deposed by the Applicant is that Dr. Brown holds an adverse opinion of my father because of the role he played in a 1996 business plan which never effectively took flight but which caused a $30,000.00 loss to each doctor involved. Dr.

Brown and Dr. Warner's evidence is that they and Dr. RW all angrily blamed Dr. Subair for the loss of a business opportunity. For the purpose of the recusal applications, I will treat that evidence as unchallenged and thus proven.

113. However, the Applicant's evidence does not reveal that Dr. Subair is aware of Dr. Brown's continuing resentment towards him or that Dr. Subair has any similar feelings of scorn for Dr. Brown. The Applicant would invite this Court to find that the following statement from Dr. Brown's evidence [para 7] supports a reasonable inference of mutual hostility between Dr. Brown and Dr. Subair:

"*7. Since the collapse of our business plans, to the best of my knowledge, Dr. Subair has not referred any patients to either of my clinics (BHCS and Brown-Darrell) for any scanning services even when the hospital has been closed to referrals and I had the only alternative facility on the Island.*"

114. This evidence alone is insufficient to establish personal animosity from Dr. Subair towards Dr. Brown. Any finding of shared bitterness from this evidence alone could only be speculative without explanatory evidence on the patient referral system for scanning services in Bermuda and Dr. Subair's reasons for not referring patients for scanning services to BHCS and/or the Brown-Darrell clinic. It must be accepted that any such reasons could be grounded in reasons which are professional rather than personal; so to form one conclusion over the other would be a purely speculative exercise.

115. Taking the evidence before me at its highest, I find that Dr. Brown, after a passage of 25 years, continues to feels aggrieved by the role Dr. Subair played in the contentious business venture. This is the sole source of the lingering animosity that Dr. Brown feels for Dr. Subair. However, the evidence does not enable a reasonable inference to be drawn that Dr. Subair feels or has reason to feel hostility towards Dr. Brown, whether in 1996 or at any point leading up to 2021. For example, there is no evidence before me alleging that Dr. Brown has ever had an encounter or an incident with Dr. Subair since the failed 1996 project from which an inference can reasonably be drawn that Dr. Subair also had or has any feeling of disdain towards Dr. Brown.

116. Further, given the significant passage of time which has lapsed since 1996, I consider it helpful to heed to the following words of the English Court of Appeal in *Locabail*:

"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."

117. From these findings of fact and law, an informed and fair-minded person would have no reasonable basis to suspicion judicial partiality on my part on account of any history between Dr. Brown and Dr. Subair.

EVEN IF THE APPLICANT HAD SUCCESSFULLY ESTABLISHED MUTUAL HOSTILITY BETWEEN HIM AND JUSTICE MUSSENDEN AND/OR DR. SUBAIR

118. I have found that the facts do not support a reasonable inference of personal animosity from either Justice Mussenden or Dr. Subair against Dr. Brown. However, briefly supposing that the Applicant was successful in establishing an evidential basis for such an inference to be drawn, I would then be required to consider the effects of such personal animosity on my judicial assignment as the trier of these proceedings against Dr. Brown. This would call for me to consider two additional points:

(i) The extent of my knowledge, understanding and interest in the alleged acrimonious relationships and

(ii) Whether an informed and fair-minded observer would reasonably suspect partiality on my part based on the extent of my knowledge, understanding and interest in the alleged acrimonious relationships.

119. I have provided in the body of this Ruling a statement of the facts as I personally understood them to be. In that statement I disclosed that I have never understood or had cause to understand that there exists or ever existed a relationship of personal hostility or animosity between (i) Dr. Brown and Dr. Subair or (ii) Dr. Brown and Justice Mussenden.

120. However, supposing that there was and continues to be a two-way lane of enmity, it would be relevant to note from my statement that neither Dr. Subair nor Mussenden J (nor any other person for that matter) has ever attempted or been invited to share with me any view, comment, or opinion on the merits of any of the factual or legal matters relating to either the criminal or civil proceedings. So, the question of the impact of a feeling of spite (although unproven) by Dr. Subair and/or Mussenden J on my ability to impartially adjudicate these proceedings in accordance with my judicial oath can only be hypothetical.

121. Notwithstanding, it has to be said that the Applicant's claim that an appearance of bias attaches to me as an appendage for his acrimony with Dr. Subair and Mussenden J (which is derived out of matters of real vintage) imposes a superfluous frailty of mind on this Court. That analysis is inconsistent with the reasonable thinking of an informed and fair-

minded observer. To put it plainly, the notion that I would inherit and remain in possession of the alleged rancor of my father is simply far-fetched. It is equally implausible that the informed and fair-minded observer would suspect me of judicial partiality owing to Mussenden J's supposed bitter memory of Dr. Brown's decision in or around 2008 not to include Mr. Mussenden in his cabinet of Ministers in the post of the Attorney General/Minister of Justice.

122. It is also incumbent on me to point out that the judiciary is constitutionally and institutionally independent from all other branches of government and so it follows that an informed and fair-minded observer would reasonably expect any decision-making of a member of the judiciary sitting in a Court of law to be entirely immune to any conflict or grievance culled from a coterie of the political branch of Government. After all, the importance of impartiality and the requirement of a tribunal to disassociate its mind from extraneous factors are points well understood by both a civil court judge as the trier of both fact and law and a criminal court judge who is required to direct a jury in like terms. This is to say that a judge's earshot of an out-of-Court opinion will not ordinarily be sufficient on its own to give rise to a reasonable inference of impartiality. In this regard, I am reminded of the conclusory statements of Lord Hope of in *Helow v Secretary of State for the Home Department and another* [8-9]:

"*8. The Extra Division referred in its discussion section of its opinion to the fact that the judge had taken the judicial oath 2007 SC 303, para 44. This is, of course, a factor to be taken into account along with all the other In this case, however, where the issue is whether a judge having access to this material is to be associated with its contents, I would attach more weight to the other factor that the Division mentioned. <u>The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views about anything that she reads. She can be assumed to be capable of detaching her own mind from things that they contain which she does not agree with. This is why the complete absence of anything said or done by her to associate herself with the published material that the appellant complains of is so crucial to what the observer would make of this case. In the absence of anything of that kind there is no basis on which the observer would conclude that there was a reasonable possibility that the judge was biased</u>* [underlined for my emphasis].

9 For these reasons, and for those given by my noble and learned friends, Lord Rodger of Earlsferry and Lord Mance, with which I agree, I would dismiss the appeal and affirm the Extra Division's interlocutors."

123. So, the suggestion that a judge would reasonably be type-cast as impressionable and thus compromised by an uninformed comment from an outsider (whether by a family member, friend, colleague, member of the public or media outlet) is artificial. Otherwise, this would give rise to grounds for a recusal on each occasion that a controversial or notorious case attracting public scrutiny and commentary comes before the Court for impartial

adjudication. Such a proposition cannot properly stand and ignores the very relevant fact that a judge is a legally qualified, skilled and experienced constitutional public officer who has sworn on oath: "… [to] *do right to all manner of people after the laws and usages of Bermuda without fear or favour, affection or ill. So help me God*."

124. Of course, this Court is not ignorant to the fact that the prosecution of Dr. Brown is of extreme public interest and invokes strong public views both for and against. It is inevitable that any decision of the Court, no matter how it is decided, will spark and inflame the opinions of many who are politically and/or otherwise interested in the outcome of the criminal and civil proceedings. However, outside of all of that noise, I serve only as an impartial messenger of the law.

THE STAGE AT WHICH THE ISSUE OF RECUSAL WAS FIRST RAISED

125. Mr. Lynch QC contended that the application for my recusal in the criminal proceedings was brought at the earliest reasonable opportunity to do so. Mr. Duncan QC submitted the same in respect of the civil proceedings. At first blush, this may appear to be correct as I have not yet heard any substantive application in either the criminal or civil proceedings. However, a closer look at the background of these proceedings and at my judicial history in other matters involving Dr. Brown is an imperative step for providing a fair and thorough assessment on whether there were indeed earlier opportunities for the recusal applications to have been made and the significance of any such missed opportunities.

126. In the civil proceedings, the first notice given to the Court of an intention to apply for my recusal came by Mr. Duncan QC's letter of 24 June 2021. Prior to that correspondence, the subject of a recusal application was never raised in the civil proceedings and no enquiry or expression of concern was communicated to the Court to convey that an Assistant or Acting judge would be required to adjudicate the strike-out application which was to be listed on an expedited basis.

127. On 9 April 2021 I made a Directions Order in the civil proceedings in preparation for an expedited hearing of the strike-out application which was to take place within the following month of May. The relevant term of that Order provided:

"5. *The parties shall agree dates for a one day hearing within 3 days of this order <u>for the first available date in May</u>* [underlined for my emphasis] *and submit the dates to the Registry*"

128. The above-term for an expedited hearing in May was made at the behest of Counsel and each of the terms of the Order were made by consent between all of the parties. At the 25

June hearing, Mr. Duncan QC told this Court that my making of that Directions Order did not lead him to believe that I had been assigned to hear the strike-out application as judges may often give directions for cases in respect of which they are not seized. Mr. Duncan QC's strongly implied position was that had he in fact appreciated that I had been assigned to hear the strike-out application, an application for my recusal would have been raised earlier on the grounds which are currently before me. However, what begs to question is why Mr. Duncan QC did not write to the Court to request the assignment of an Acting Judge or an Assistant Justice if his Client's position in April 2021 was that I should not hear the matter on the grounds of apparent bias. Such a communication to the Court would have been particularly pressing given the direction for the strike-out application to be heard the following month.

129. Judicial notice may be taken that it is well known amongst the members of the legal profession that the Chief Justice and I are the only appointed judges assigned to the civil and commercial jurisdiction of the Supreme Court on a full-time basis. I would also take notice of the widely-known fact that the learned Chief Justice, Mr. Narinder Hargun, is plainly conflicted from adjudicating any of these proceedings on account of his previous legal representation in 2017 of a politically controversial Commission of Inquiry ("COI") appointed under the Commissions of Inquiry Act 1935 and ordered under the former Premiership of Mr. Michael Dunkley. The purpose of the COI was to address matters arising out of the Auditor General's Report on the Consolidated Fund for the Financial Years partly coinciding with Dr. Brown's Premiership. Certainly, Dr. Brown's legal team would not have been expecting these Court proceedings to be seized by Hargun CJ.

130. Judicial notice may also be taken that by 9 April 2021 when the Directions Order was made, Justice Mussenden's temporary assignment to sit in the civil and commercial division of the Court had been well underway. This, no doubt, was also widely known amongst the practising members of the Civil and Commercial Bar.

131. For the sake of completion I would also take notice that Justice Simmons, barring the rarest of occasions, only sits in the Court's criminal jurisdiction and is, in any case, winding down towards her retirement set for early next year. The only remaining judge, Stoneham J, heads the Matrimonial and Family Division and presides exclusively over family related matters. These facts are not unknown to Counsel.

132. All of this is to say that in April 2021 (when the strike-out summons was filed) the sitting judges of the Court's civil and commercial jurisdiction were Hargun CJ, me and Mussenden J. So, in the absence of a specific request to the Court for the Chief Justice to assign an Acting Judge or Assistant Justice to hear the strike-out application which was to proceed in short order in the following month of May, the Applicant's Counsel would have

surely anticipated my allocation to the civil proceedings. This is particularly so since the judge who issues case management directions in a matter is most often the judge assigned to the substantive matter.

133. At the 25 June 2021 hearing before me, the following exchange took place between the Court and Mr. Duncan QC:

SSW J *Let me ask this question and this question is directed to, ah Mr. Duncan and yourself [Mr. Mark Diel] and Ms. Christopher. There was a summons for directions in the constitutional matter and the subject of recusal was not raised- and in fact, if I recall the directions, I think there was a strike-out application filed by, ah Ms. Christopher seeking for that application to be heard within a definitive time frame, something like three weeks-*

Duncan QC *But at that stage My Lady, but at that stage My Lady, my understanding was that you were not the assigned judge for the matter*

SSW J *Well, there are only two judges that sit on this side- there are only full-time appointed judges that sit on this side- it would either be myself or the Chief Justice*

Duncan QC *I don't know how the Court was going to deal with this- if we're going to start saying-*

SSW J *No we… no, no, I don't want to be misunderstood- my point is, is that the constitutional matter had taken some flight- with the strike out application and there were directions- and those directions were set out by a Consent Order. Correct me if I am wrong.*

Duncan QC *That's correct.*

SSW J *Okay and it would have been-*

Duncan QC *My understanding is …[inaudible] by a judge then*

SSW J *Sorry?*

Duncan QC *My understanding is- I mean- had you- had you ah given directions, as we all know, the judge that gives directions isn't necessarily the judge that actually tries the matter and giving directions doesn't in any way impact on*

the issue of whether or not there is a recusal application at a later stage- now if, in those directions it had been said that the directions included the direction that you, My Lady, were the assigned judge for the matter- now that would be a different issue- but I don't recall it was stated anywhere that you would be the assigned judge for the matter- I stand to be corrected but that's my understanding."

134. The following points were expressly and/or implicitly made by Mr. Duncan QC in his making of the above statements to the Court at the 25 June 2021 hearing:

(i) that it was known by Mr. Duncan QC that I made the Directions Order of 9 April 2021, notwithstanding that the Order was signed by the Registrar on my behalf;

(ii) that it was not understood by the Applicant or by Mr. Duncan QC that my making of the 9 April Directions Order signified my assignment to the strike-out application; and

(iii) that on 9 April 2021 the Applicant's Counsel was ready to object to any direction the Court might have made confirming my assignment to the civil proceedings in that Directions Order.

135. Mr. Duncan QC's statements to the Court were both puzzling and surprising because three weeks after the 9 April Consent Order was made in the civil proceedings, Mr. Lynch QC informed Simmons J during the 3 May 2021 monthly arraignment session that I was seized of the civil proceedings. Mr. Lynch QC's statement to Simmons J disclosed that my assignment to hear the civil proceedings was already known to Counsel in those civil proceedings and that they were expecting to be heard on the strike-out application later that same month in May or thereabouts.

136. When Simmons J informed Counsel that I was also to be assigned to preside over the criminal proceedings, Mr. Lynch QC complained (in the presence of Dr. Brown) that it may be inappropriate for me to be seized of both the criminal and civil proceedings, especially for as long as the civil proceedings remained pending. However, not an utter of a word was made to the Court to advise that the Applicant's invitation for my recusal was grounded on reasons other than or beyond the fact of my assignment to both the civil and criminal proceedings.

137. Implicitly, my suitability as the judge presiding over the civil proceedings had been accepted by the Applicant and Mr. Duncan QC on 3 May 2021 and prior thereto (and certainly after the making of the 9 April Directions Order). After all, on 25 June Mr. Lynch

QC informed this Court that he and Mr. Duncan QC had been working closely together on Dr. Brown's Court proceedings as they occupy offices located right next to one other in the same law firm.

138. It is plain that the question as to which of the five resident judges could appropriately sit on Dr. Brown's Court proceedings without giving rise to a complaint of conflict or bias from Dr. Brown had already been considered by Dr. Brown's legal team prior to my making of the 9 April 2021 Directions Order. This is apparent from a review of the 1 April 2021 arraignment session hearing when Mr. Lynch QC appeared before Wolffe AJ. At that 1 April 2021 hearing Mr. Lynch QC impressed upon the Court the need to identify a trial judge and to avoid the assignment of a conflict-stained judge. He went so far as to convey his opinion that Wolffe AJ would be ideal for assignment to the criminal trial. Addressing Wolffe AJ on 1 April 2021, Mr Lynch QC said:

"*Your Lordship would be ideal* [for assignment as the criminal trial judge], *if I may say so. But there are other judges which are for obvious reasons – unnecessary to spell out at this moment who have necessarily been recused and so it makes sense to identify the right judge and once we've done that, to have listed before that judge a preliminary application for a temporary stay of the indictment because there is a constitutional motion before the Supreme Court on the separation of powers and the manner in which the matter was investigated. That needs to be heard. The remedy being sought… …. …. is that the case should be stayed completely amongst other things. It clearly makes no sense for us to proceed to prepare this trial if that motion were to be successful. We are asking for it to be expedited so that it can be dealt with as speedily as possible and I am told that it is listed on the 8th of this month for directions. So what we would ask for is a date that could be identified once a judge is identified for a hearing for a temporary stay of these proceedings pending the outcome of the resolution of that matter…*

[The civil proceedings] *It's listed for directions and I think all parties appreciate the urgency that has to be attached to that application. So we would hope that any temporary stay, given that we have waited 10 years for this to happen- it would be as short as possible so that we can move then, so that if that application fails, we can then move to um a section 31 submission and a number of other matters that arise by way of abuse of process and other issues that I'd identified with my learned friend. But for the moment, as I say, what we need to do is identify a judge and then fix a day for this temporary stay application to be made…* "

139. The following month, at the 3 May 2021 hearing before Justice Simmons, Mr. Lynch QC confirmed his knowledge (and by extension, that of Mr. Duncan QC) of my assignment to the civil proceedings. Dr. Brown was present at the 3 May hearing via video screen. During

the course of that hearing, Mr. Lynch QC robustly insisted that I should first determine the strike-out application in the civil proceedings before any confirmation of my assignment as the trial judge in the criminal proceedings was given. Again, this was done in the presence of Dr. Brown. Mr. Lynch QC submitted that it would likely be inappropriate for me to sit as the trial judge in both the civil and criminal proceedings.

140. On 3 May, the clear focus and aim of the Defence was to achieve a stay of the criminal proceedings pending the outcome of the civil proceedings. [redacted] In the presence of Dr. Brown, the following exchanges transpired between Counsel and the Court on 3 May 2021:

"…

Lynch QC: *…But what the Court do need to understand is that there was filed before Christmas a motion dealing the Constitutional issues that arise on this particular case…*

Simmons J *Okay hold on a moment- let me see if we have that at least-*

Lynch QC *You won't have that- it's in the Civil Court*

Simmons J *Oh- oh- I wondered why you were using those terms- okay- so the Motion was filed in the Civil Court*

Lynch QC *Yes*

Simmons J *… and how are you saying it touches upon this?*

Lynch QC *Well, because, um the relief being sought in that is that the um- the, the prosecution should be dismissed*

Simmons J *Okay- hold on*

Lynch QC *-amongst other things ah- but as it stands at the moment, we were served, I don't have the date on my fingertips but I think about a month ago by the DPP, the Attorney General ah- and the Deputy Governor who are the Defendants in the Constitutional Motion- we were served with an*

application to strike out. That has been responded to I think um- over this weekend.

Simmons J *To strike out the civil action- to strike out the constitutional action-*

Lynch QC *to strike out the constitutional action. That is due to be heard, we hope this month. Dates have been filed by the parties to the Court for a hearing. As I understand it, there is no reason why that can't be done electronically- that is to say in the virtual Court rather than um making by appearance-*

Simmons J *Yes, Can you just give me those dates please? Can you provide me with those dates please?*

Lynch QC *Can I do that electronically after we write in? Certainly I can give those dates- but the dates that were scheduled have been supplied by both sides so as to be able to hear this strike out this month.*

Simmons J *Okay, alright*

Lynch QC *Obviously much will depend upon the outcome of that. If it is struck out then ah, clearly we need to um, get on with the preparation of the criminal - criminals…*

Simmons J *Yes- Yes, I agree with you. Ms. Clarke would you agree in the circumstances that – that, um, we ought not to be ah doing anything to advance this matter until the civil matter has been resolved?* [underlined for my emphasis]

DPP Clarke: *Yes, My Lady, that's agreed.*

[Pause for Simmons J to confer with Court Administration]

Simmons J *Okay, I'm back. First of all let me say that I will not- if this matter does proceed to a trial- I will not be the trial judge and I should say for the record that it would be- it should be clear at least to Dr. Brown and perhaps you, Mr. Lynch, by now, or Ms. –ah- Clarke that um um um I ah am conflicted- I'm conflicted – for personal reasons, alright? Um-*

Lynch QC *Ah, well I wasn't aware of that…*

Simmons J *My my my husband is a doctor and he and Dr. Brown have been colleagues and are friends I do believe, so for that reason I will not be- if this matter comes to trial hearing that matter… … …. I had in mind that I was going to transfer this matter to another trial judge and that is Justice Subair Williams* [underlined for my emphasis]- *um…*

Lynch QC *Well- uh-*

Simmons J *If you have an issue with that- yes*

Lynch QC *Before you do that- um- there are, of course, issues that arise um in relation to ah which judge should try this case should it ever get that far. Um and I understand that ah Ms. that ah- that ah- that uh uh* [Justice] *Subair Williams- uh* [Justice] *Subair Williams is is to be the judge determining the civil matter* [underlined for my emphasis].

Simmons J *Okay*

Lynch QC *It may be- it may be that it would be inappropriate following any decision or ruling in that and were to be the trial judge in the criminal matter- it would be arguable-*

Simmons J *So…* - *so you have been informed that she has been assigned to the civil matter?* [underlined for my emphasis]

Lynch QC *Yes, yes* [underlined for my emphasis]

Simmons J *Okay*

Lynch QC *And Ms. Clarke will no doubt correct me if I am wrong about that but I understand that to be the case- and it may be that there is no issue arising from that but, I am concerned that you shouldn't as it were assign this to her as the criminal trial judge at this time depending on the outcome of any determination in respect of the constitutional motions currently before her* [underlined for my emphasis].

DPP Clarke *With all due respect, My Lady, I don't agree with that and that should be a matter for Justice Subair Williams to decide upon* [underlined for my emphasis].

Lynch QC *Well, whether it is or not, all I'm asking is that we don't determine it now and that it is not necessary for Your Ladyship to make that determination now. Let us deal with the legal submissions on the Constitutional argument before Ms* [Justice] *Subair Williams and if it is determined that she should be one of the potential candidates to try the case, should it get that far, then we can make such submissions- both my learned friend and I can make submissions as to which judge, ah ah might be conflicted* [underlined for my emphasis].

DPP Clarke *With all due respect, My Lady, I am surprised to hear my friend say that when on the last occasion, he was specifically requesting which judge will be assigned, so now that he has been told he-*

Simmons J *I'm sorry- are you?*

DPP Clarke *-is saying that he is not interested-*

Simmons J *Are you suggesting that he was judge shopping?*

Lynch QC *Well-*

DPP Clarke *I wouldn't call it that but I will say that his submission was quite clear-*
Simmons J *You can't both talk at the same time- Ms. Clarke?*

DPP Clarke *Well, My Lady-*

Simmons J *Ms. Clarke?*

DPP Clarke: *I'm grateful. On the last occasion my learned friend's submission was quite clear that he wanted to know which judge was going to be assigned and now that the Court has provided him with that information he doesn't seem to be happy with it. That's my only submission* [underlined for my emphasis].

Simmons J: *Ms. Clarke I don't want to put words in Mr. Lynch's mouth, he has enough already- and more than enough on most occasions* [Simmons J chuckles] *but I think what he is suggesting is that, and I may be going too far, but if his application on the Constitutional issue comes before Justice Subair Williams and they are unsuccessful then in those circumstances he does not think she will be the appropriate judge to deal with the criminal trial…Now, is that correct Mr. Lynch? Is that correct Mr. Lynch?*

Lynch QC: *Well, what I am doing is to say, as I have… what Ms. Clarke said is not quite accurate. I indicated that there was an issue that needed to be determined as to the trial judge. I certainly made that clear. I do not wish to be appearing to and neither would I seek to -*

Simmons J *Okay*

Lynch QC: *go judge shopping as it's been couched.*

Simmons J *My words*

Lynch QC: *…I am simply pointing out the fact that a number of judges are potentially conflicted, as Your Ladyship has pointed out in respect of yourself. I am simply observing that since she* [Subair Williams J] *has been the appointed judge to deal with the Constitutional Motion that it may be that she would not be the appropriate judge to be assigned the criminal trial at this time* [underlined for my emphasis]. *She may herself, as Your Ladyship has, and exclude herself before we even have to determine it… but it seems to me inappropriate that this Court to assign that judge at this time.*

Simmons J: *Right, okay. I do not see any harm in this matter remaining with me for the time being because nothing is going to be happening on this matter until the um Constitutional um matter has been resolved one way or the other- so um-*[underlined for my emphasis]

Lynch QC *Thank you* [underlined for my emphasis]

Simmons J: *so in that case then it need not necessarily, it need not be assigned to a specific judge at this time* [underlined for my emphasis]. *Ms. Clarke I am sure that you will be able to deal with any application that Mr. Lynch may make for what he considers to be an appropriate trial- assignment to a trial judge- what he considers.*

DPP Clarke: *Well, My Lady, with that comment I won't say anything else but except for the fact that Mr. Lynch knows full well that it is not his decision as to whether or not a judge is conflicted* [underlined for my emphasis].

Simmons J: *Oh, most definitely not his decision but he has a right to speak to it but we need not get caught up in that at the moment because ah-*[underlined for my emphasis]

Lynch QC *Thank you* [underlined for my emphasis]

Simmons J *-because I am going to adjourn this matter until the conclusion of the constitutional issue* [underlined for my emphasis] *Okay? The Constitutional matter since it's already in hand*

DPP Clarke *I'm guided My Lady*

Simmons J *Right- okay. So matter adjourned and just to be on the safe side, um we will go the June the 1st - June 1st arraignment simply because Mr. Lynch seems to be of the view that um this matter will be heard um sooner than then and um hopefully a decision rendered sooner than then and you Ms. um Clarke may also be hopeful of that yourself- so um – to be on the safe side…*

Lynch QC *We canvassed, I think on the last occasion, although it didn't form part of the Order that the 15th June for directions would have been ah an appropriate time to give a little leeway just in case there was a slight delay rather than listing it again on the on the 1st. I don't know if that would meet with Your Ladyship's concern- we are anxious, obviously to proceed with the trial, if that comes about as quickly as possible- but as I've indicated there is a very substantial body of material that we will need to be working through- and if we, if at the strike out, that is that fails, there will then need to be fixed a date for the hearing in full- um so that the determination of the constitutional motion is is then argued. Um, so can I ask that perhaps that ah additional two weeks provided, as we mooted on the last occasion, is is available rather than the 1st.*

Simmons J *You mean the 15th of June?*

Lynch QC *Yes*

Simmons J *Oh, I have no difficulty with that, Ms. Clarke have you?*

DPP Clarke *No My Lady- the 15th will be fine.*

Simmons J *Okay, matter adjourned to the 15th of June at 11*[am]…

141. So, on 1 April 2021 and 3 May 2021 the Defence's primary aim was to obtain a temporary stay of the criminal proceedings pending my determination of the strike-out application in

the civil proceedings. The conflict concerns in relation to my assignment to the criminal proceedings was raised by Mr. Lynch QC as a means to resist the result that I would preside over both the criminal and civil proceedings. However, the sought-after stay was granted by Simmons J.

142. The Order made by Simmons J was plainly intended to operate as a stay of the criminal proceedings and it is evident that Simmons J's Order eased the Defence's concern that the criminal and civil proceedings would progress simultaneously under my case management. While the DPP acquiesced to Justice Simmons' preferred approach, it is clear from the preceding April arraignment session that the DPP's original position was to advance through the preliminary stages of the criminal proceedings by obtaining directions for the section 31 pending application etc. (Notably, in both April and May, the DPP was a legally represented party to the civil proceedings and would have been aware of the status of those proceedings.)

143. The much-wanted stay obtained by the Defence by the Order of Simmons J was abruptly disturbed the very next day on 4 May 2021 when, pursuant to my direction, the following correspondence was sent by the Court to the parties:

"*Good day Counsel,*

Please find attached a Court Order in respect of the above captioned matter.

Also note that subsequent to the Court Order, Justice Subair Williams has directed for this matter to be mentioned before her ***via Zoom*** *on* ***Friday 14 May 2021 at 10:00 a.m****. and as such, the mention on Tuesday, 15 June, 2021 is hereby administratively delisted. Zoom details will be forthcoming.*

Please confirm your attendance.

Kind regards…"

144. In a same-day reply the Court received the following email communication from Mr. Lynch QC:

"*Dear …*

I am currently working in the Turks and Caicos Islands which is one hour behind Bermuda. It is difficult for me to be in court before Subair Williams J on Friday 14th May at 10:00 am (9am for me) as directed. I have a virtual hearing before the recorder of Wolverhampton in the UK starting at 9:30 am - listed at 10:00 am which I anticipate will last at least 3 hours. I ahd [had] *hoped to have a virtual link with the client in advance*

from his prison. It has been listed for many weeks and has been previously adjourned because of Covid illness of one of the counsel involved in the case.

I am then listed in The Supreme Court in Bermuda, also remotely, for [another case matter] *listed at 11:00 (my 10:00 am) but at present it does not appear as if anything can be achieved as we still await the discovery and service of FORM 1 promised to be expedited but not yet materialised. I am hopeful to have that matter adjourned administratively to another date or I will have to arrange for alternative counsel to assist my clients.*

I anticipate that Subair Williams J wishes to know whether any application for recusal will be made in relation to her sitting as the judge in the Criminal Case. If that is so it would be helpful to know that is why it is to be listed, in order for me to consider the position and be able to help the court reach a proper decision. I have not yet settled on whether this is a proper application to make as yet and await certain instructions [underlined for my emphasis].

I am at her command any other time during the course of that week or much later into the afternoon of 14th. Please be good enough to convey my professional embarrassment to the judge.

In the interim may I please have the orders made by Charles Etta Simmons J at the hearing yesterday.

Regards"

145. On my behalf, the Court administrator replied to Mr. Lynch QC on 5 May 2021 as follows:

"*Justice Subair Williams has advised that this matter may instead be listed for a short mention at 2:30pm on 14 May to precede another criminal matter listed for a section 31 application.*

It is the intention of the Court that the parties will address the Court on the status of the matters raised in Form 1 and Form 2. The Court will also be keen to hear Counsel on what, if any, trial case management measures should be set into motion or stayed during this interim period where proceedings for a constitutional challenge are underway [underlined for my emphasis]."

146. Mr. Lynch QC thereafter replied by a letter to the Court dated 7 May 2021 stating:

"*Thank you for your response to my enquiry as to what Justice Subair Williams had in mind for the Case of Crown v Brown now listed next week at her behest.*

It is, as I understand it, to "address the Court on the status of the matters raised in Form 1 and Form 2. The Court will also be keen to hear Counsel on what, if any, trial case management measures should be set into motion or stayed during this interim period where proceedings for a constitutional challenge are underway."

It follows that the learned judge is seizing the management of the case [underlined for my emphasis].

As indicated before the CM Juan Wolffe on 1 April 2021 and Justice Charles Etta [Simmons] *on 3 May 2021, the issue of trial judge is a sensitive one given the particular defendant. I am attempting to obtain instructions from my client who was under the impression that he was not required before 15 June 2021 following Justice Charles Etta's Order, but anticipate that we will need to make an application for the recusal of Subair Williams J. That will entail an affidavit setting out the facts as we understand them to be, together with a comprehensive skeleton argument. We will need to provide the same to the Prosecution and to the court and will need sufficient time set aside to deal with it* [underlined for my emphasis].

I would also like to obtain the recording of the hearing on Monday last to assist me with that and out of an abundance of caution I should also like to obtain the recording of the ex parte hearing dealing with the [sealed] *proceedings.*

That seems to be a tall order for next Friday so that all parties have an opportunity to properly consider the issues. I am also conscious that the learned judge has fixed the matter for Friday afternoon at 2:30 pm for my convenience (although I as yet do not know if the defendant can be there), but that it is listed for a short mention "to precede another criminal matter listed for a Section 31 application". Some proper amount of time will need to be allocated to the hearing of the matter.

In the circumstances, would you be good enough to place this letter before the learned judge and ask her if the matter can be set down for a convenient date for the court and the parties in the near future. We are of course happy for the judge to make such administrative directions as she deems necessary to ensure all parties and the court are aware of the arguments.

Please can someone copy the recordings onto a disc and I shall arrange for payment and someone to collect them posthaste."

147. In response the Court sent the following statement:

"*Justice Subair Williams has had sight of Mr. Lynch QC's letter of correspondence to the Court dated 7 May 2021.*

The points raised in Mr. Lynch QC's letter, together with proposed appropriate directions, may be canvassed openly before the Court in the upcoming mention listed for Friday 14 May at 2:30pm."

148. Having received my direction, Mr. Lynch QC wrote to the Court by letter dated 10 May 2021:

"*Thank you for the indication that the judge will deal with directions on Friday as listed.*

I have now been able to contact my client and as you can imagine he has made personal and family arrangements following the ruling of Justice Charles Etta that the matter would not be heard again until Tuesday 15th June 2021 at 11:00am rather than this week. Could I crave the judge's indulgence to allow the defendant to be excused on this occasion?

May I also confirm that having taken some instructions I am clear that it will be necessary to bring an application before the judge to deal with her recusal" [my emphasis].

[redacted]

150. On 3 May 2021 Dr. Brown implicitly accepted without contention that I would be presiding over the strike-out application in the civil proceedings. This highlights the inconsistency between the Applicant's stance on my assignment to his matters in the criminal proceedings and his stance on the subject of my appearance of bias in the civil proceedings.

151. Mr. Lynch QC informed the Court in his 7 May correspondence that he was awaiting instructions on the issue of my recusal which he first confirmed on 10 May in the criminal proceedings (after my assignment in the civil proceedings had been expressly and repeatedly acknowledged by Mr. Lynch QC in the presence of Dr. Brown at the 3 May hearing without any expression of concern for the appearance of a personal bias).

[redacted]

[redacted]

Bypassing other Earlier Opportunities for my Recusal

Director of Public Prosecutions v Ewart Frederick Winslow Brown (Case No. 468 of 2020) ("the Sealed Proceedings")

154. On 31 December 2020 I heard an *ex parte* application which commenced the proceedings in *R v Ewart Brown* in Case No. 468 of 2020. On 4 January 2021 I also delivered a written ruling. My *ex parte* Order and the *ex parte* written Ruling was served on Mr. Lynch QC on behalf of Dr. Brown on 5 January 2021.

155. On 6 January 2021 Mr. Lynch QC wrote directly to me on the subject of publication of my ruling with an assurance that my Order would not be frustrated. Further correspondence was sent to the Registrar on the same date by email advising that a variation application would be made absent an agreed position with the Crown. Dr. Brown subsequently filed affidavit evidence in support of his application to vary my Order. He deposed, *inter alia*:

"*…I make this affidavit in support of a summons lodged on* [his own] *behalf… to vary…order…imposed by Mrs. Justice Subair Williams on 4 January 2021…*"

156. The *inter partes* application was listed for 8 January 2021. However, Mr. Lynch QC wrote to the Court seeking a later hearing date and highlighted the interest and the intention of the other parties' arguments to be heard. Mr. Lynch QC wrote:

"*...Moreover is it anticipated that counsel for* [an interested person]*, Richard Horseman, who I understand has written to the court asking to be heard on the matter and the DPP who clearly have an interest will be asked to contribute to the argument?*"

157. Accordingly, the *inter partes* hearing was listed for Friday 15 January 2021 and relisted to Friday 22 January 2021 by consent between the parties. On 21 January 2021 Mr. Richards emailed the Court seeking a later hearing date and advised that the parties were close to an agreed position on the terms of a variation order. The hearing of 22 January 2021

nevertheless proceeded at my insistence with both Mr. Richards for the Crown and Mr. Lynch QC present. Mr. Horseman, on behalf of the interested party closely associated with Dr. Brown, also appeared.

158. The possible publication of my *ex parte* Ruling was the subject of the oral and written submissions (11 pages) successfully made and hard-fought by Mr. Lynch QC during the one-hour 22 January 2021 hearing before me. At the close of that hearing of 22 January 2021, having granted the application made by Mr. Lynch QC, I informed the parties that I would reassess the Court's decision at the conclusion of the civil and/or criminal proceedings:

> *SSW J* *I will revisit the position once there is some level of final disposition to the criminal proceedings. That may be that there's a decision that there will not be a criminal trial. That may be that there is a criminal trial and it has come to an end. But I will revisit the position once one of those two things or something alike occurs.*
>
> *Lynch QC* *I'm sure Mr. Richards and/or your office will be more than happy to alert us to that point and ah…of course I would be happy to address you as and when that arises, should you feel it necessary to do so…*

159. It would no doubt strike the informed and fair-minded observer as odd that Dr. Brown never once in these proceedings disclosed his apprehension for the appearance of judicial partiality via his Counsel of considerable esteem and experience. This is especially curious, on any reasonable and objective view, given that the proceedings involved my handing down of (i) an *ex parte* written Ruling (11 pages) against him (ii) a written Ruling (9 pages) on the papers dated 12 January 2021 in respect of an issue raised by Mr. Lynch QC and (iii) a written Ruling (3 pages) on the papers dated 12 January 2021 in respect of a similar issue raised by the interested person with whom Dr. Brown is closely associated. Each of these three written Rulings were delivered prior to the 22 January hearing.

160. It would surely be reasonable of the informed and fair-minded observer to expect that the objection now on the table calling for my recusal would have been raised in the sealed proceedings no later than at the point when I informed the parties that I would later reassess the 22 January order upon the disposal of the criminal proceedings. In my judgment, Dr. Brown's silence on the subject of judicial bias in the sealed proceedings which spanned the month of January 2021 undermines the Applicant's contention months later that the informed and fair-minded would have reason to suspicion the objectiveness of this Court.

The JR Proceedings: *M. Sannapareddy et al v The Commissioner of Police et al* [2019] SC (Bda) 18 Civ (1 March 2019)

161. Prior to the sealed proceedings of January 2021, I was also the assigned judge of judicial review proceedings ("the JR proceedings") in which Dr. Brown, in his corporate capacity, was the Applicant. I was seized of the JR proceedings from June 2018 through to March 2019.

162. The First Respondent was the Commissioner of the Bermuda Police Service and the Senior Magistrate was the Second Respondent. In these proceedings, the First Applicant was a medical practitioner employed by the Second and/or Third Applicants, Bermuda Healthcare Services Limited ("BHSL") and Brown Darrell Clinic Limited ("BDCL"), respectively. Dr. Brown is the founding director and majority shareholder of both of those corporate entities who were legally represented at all material times by Mr. Duncan QC.

163. On 1 March 2019, I delivered a written decision outlining my reasons for refusing to allow the Intervener Applicant (a patient of the Second and/or Third Applicants acting in a personal and representative capacity on behalf of over 100 other patients of BHSL and BDCL) leave to appeal against my refusal of an adjournment request. That decision[2], *M. Sannapareddy et al v The Commissioner of Police et al* [2019] SC (Bda) 18 Civ (1 March 2019), is instructive on the background facts with which I was concerned in those proceedings. The opening paragraphs of that Ruling provided as follows [1-3]:

> *"**Introduction***
>
> 1. *This is the Intervener's ex parte application (on notice) for leave to appeal against my interlocutory ruling made on 12 February 2019 wherein I refused the Intervener's application for an adjournment of the hearing of the First Respondent's summons application dated 11 June 2018 ("the protocol access summons"). The protocol access summons prayed an order of this Court sanctioning a written protocol for an independent scanning and review of patient medical files seized by the Bermuda Police Service*
>
> 2. *("BPS") pursuant to two special procedure warrants issued by the Senior Magistrate on 2 and 10 February 2017 ("the warrants" or "both warrants").*

[2] A copy of the Ruling in *M. Sannapareddy et al v The Commissioner of Police et al* [2019] SC (Bda) 18 Civ (1 March 2019) is enclosed as an Appendix.

Summary of Police Investigation

3. *On the Second Affidavit of Detective Sergeant James Hoyte, sworn on 31 May 2018 in support of the protocol access summons, he summarized the nature of the relevant police investigation at paragraphs 4 and 5 in the following way:*

" 4. …The BPS is in the midst of an ongoing investigation concerning the conduct and activities of Dr. Ewart Frederick Brown ("Dr Brown"), [redacted]*, and Mahesh Babu Sannapareddy ("Dr Reddy").*

5. The line of inquiry into the conduct and activities of the above-named subjects was initiated upon reports of former employees of BHCS, who made allegations of improper practices with respect to the operations of the Clinics, and the conduct of Dr. Reddy [redacted] *and Dr Brown. These allegations were outlined in the search warrant applications and Dramatis Personar provided to the court. The BPS thoroughly examined the allegations made by the former employees and conducted its own independent inquiry into matters. That independent inquiry has produced further evidence in addition to and in support of the reports from former employees. As such, the BPS had reasonable grounds to believe that:-*

a. Dr Reddy and others committed the indictable offences identified in the Information namely fraud / corruption and money laundering…

b. The medical files sought would qualify as excluded material under the Police and Criminal Evidence Act 2006 ("PACE"); and

c. The medical files sought were relevant and of substantial value to the ongoing investigation (as evidenced by paragraphs 52-62 of the Information)."

4. *A detailed narrative on the case of the First-Third Applicants (alternatively referred to as "the Applicants") outlining the historical background to the police investigation is provided from paragraph 29 onwards in the Form 86A exhibited to the Notice of Originating Motion dated 21 August 2017."*

164. In my 1 March 2019 ruling, I also quoted extracts from the Applicants' pleaded case in those proceedings [11-13]:

"*11. A Form 86A Notice of Application for leave to apply for judicial review, which enclosed a document entitled 'Detailed Grounds upon Which Relief is Sought', was dated 13 February 2017 and filed by Counsel on behalf of the First-Third Applicants*

on 17 February 2017. I shall refer to this as "the first amended Form 86A" since it followed the filing of a previous Form 86A dated 11 February 2017 ("the un-amended Form 86A").

12. The subject of the application on the first amended Form 86A was "The decision(s) of the Commissioner of Police to seek and execute search warrants against the business premises known as Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda and Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda" and "The decision of a Magistrate made on or about 2nd February 2017 to grant a request for and issue to the Commissioner of Police a search warrant for execution against the medical business and premises known as Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda."

13. The First-Third Applicants pleaded that the issuance and execution of the 2 February 2017 warrant ("the First Warrant") was unlawful on grounds of "a. Non-fulfilment of the statutory conditions for the issuing of a warrant" and "b. The warrant was unreasonable and disproportionate in all the circumstances."

14. In respect of the complaint of non-fulfilment of the statutory conditions, the First-Third Applicants stated that the further conditions referred to at paragraphs 12(a)(ii) and 14 of Schedule 2 of the Police and Evidence Act 2006, were not fulfilled. These further conditions dealt with the practicability of communicating with any person entitled to grant access to the premises in question or the material in question. On the First-Third Applicants' pleaded case, the First Respondent could not have had any plausible concern that by communicating with them beforehand, the evidence would have been destroyed. It is the First-Third Applicants' case that there were alternative means of obtaining the material as "the subjects of the investigation, in particular Bermuda Health Care Services and Dr. Reddy, have co-operated voluntarily with various investigations into the subject-matter of the present investigation." (See para 9 of the amended Form 86A).

15. Where it was complained that the warrant was unreasonable and disproportionate, the First-Third Applicants averred at paragraph 11 that the issuance of the warrant "would inevitably lead to sever disruption to the provision of critical medical services in Bermuda. The history of this investigation clearly shows that there were more effective and less disruptive means to obtain such information as the police could lawfully require."

16. It was further pleaded in the amended Form 86A that the execution of the First Warrant by the First Respondent was unlawful and/or ultra vires on the following grounds:

a. Excessive force was used to gain entrance to the premises resulting in significant damage to property.
b. Video recording equipment on the premises was unjustifiably interfered with.
c. Individuals employed at the premises were unjustifiably prevented from observing the execution of the warrant.

17. At paragraph 4, legal professional privilege was pleaded as follows:

"In addition, the material seized includes electronic material containing material subject to legal professional privilege. Even if this application were ultimately unsuccessful, the First Respondent must not be allowed to review the electronic material before a protocol is established for how the material subject to legal professional privilege is to be filtered and quarantined."

18. The Applicants asserted that the warrant was nevertheless issued "in large-part due to the First Respondent's material non-disclosure".

19. A breach of right to patient confidentiality was not pleaded in the 'Detailed Grounds upon Which Relief is Sought' in the amended Form 86A. However, in the un-amended Form 86A there was a passage subtitled "Grounds upon Which Relief is Sought" on the final page which provides:

"That the learned Magistrate issuing the search warrant(s) and the Commissioner of Police executing the search warrants failed to take into account that confidential and sensitive medical files of patients at Bermuda Healthcare Services, the Brown Darrell Clinic and the King Edward VII Memorial Hospital have been seized in breach of their right to confidentiality the effect of which will potentially injure ongoing patient care and treatment."

...

23. By Order of the Court dated 15 June 2017, the First-Third Applicants were granted leave to file and serve a Notice of Originating Motion exhibiting what was termed in the said Order as 'the amended Form 86A'. In reality, this was a re-amended Form 86A. I will refer to the re-amended Form 86A as "the Notice of Motion Form 86A exhibit" and for a shortened reference, "the Form 86A exhibit".

24. In the Form 86A exhibit, the lawfulness of both special procedure warrants issued on 2nd and 10th February 2017 is challenged. The relief sought is for an order quashing the Senior Magistrate's decision to issue the warrants and a declaration that the searches made thereunder were unlawful. It is further prayed that the First Respondent return all items seized under the warrants and for the First-Third Applicant to be awarded compensation for the alleged material damage caused (which was pleaded to also arise out of unlawful trespass to property) and their legal costs.

25. Enclosed with the Form 86A exhibit is an amended document outlining the "Detailed Grounds Upon Which Relief is Sought" ("the Detailed Grounds exhibit"). The grounds relied on in the First Amended Form 86A were abandoned and re-pleaded as follows:
a. Material non-disclosure...
b. Non-fulfilment of the statutory conditions for the issuing of a warrant…
c. The Warrants were disproportionately and unreasonably wide, amounting to the bulk collection of confidential patient information...
26. The particulars of ground c. above are contained at part VII of the Detailed Grounds exhibit:

"107. Although item i. on the Warrants is limited ("[i]n the first instance") to three named patients and the 265 patients listed in the schedule labelled JH3, items ii., iv., v., vi., and vii. are not so limited. These items therefore authorise the First Respondent to proceed with the bulk collection of confidential personal, medical data, in the form of sensitive information concerning the medical treatment of hundreds of patients.

108. The Information sets out no reasoning for why such a wide collection of sensitive personal data is warranted and we have no record that the Second Respondent gave any consideration to whether warrants of such an extremely wide scope were proportionate in the circumstances.

109. It is submitted that, at the very least, the very scope for the special procedure warrants sought by the First Respondent with respect to sensitive material and confidential personal, medical data, should have led the Second Respondent to apply particularly close to scrutiny to the application in order to balance the legitimate interests of the hundreds of third parties with the stated interests of the investigation.

110. That this reinforced scrutiny was necessary follows, it is submitted from the plain fact that the constitutionally protected right to privacy was engaged…, as well as the right to respect for private and family life enshrined in Article 8 of the ECHR. The European Court of Human Rights has held, in the context of search warrants, that

"having regard to the severity of the interference with the right to respect for his home of a person affected by such measures, it must be clearly established that the proportionality principle has been adhered to…

111. It is submitted that by not addressing the proportionality of proceeding with the bulk collection of confidential and sensitive patient information, the Respondents failed in their duty to have adequate regard to the constitutionally protected fundamental rights of hundreds of interested third parties into consideration. For that reason the Warrants are disproportionate and fall to be quashed. "

27. A claim for breach of legal professional privilege is repeated in the Form 86A exhibit.

28. In contemplation of alternative relief, paragraph 6 of the Detailed Grounds exhibit states:
"…Even if this application were ultimately unsuccessful, the First Respondent must not be allowed to review the electronic material before a protocol is established for how the material subject to legal professional privilege is to be filtered and quarantined."

29. The Form 86A exhibit is also supported by affidavits from eight deponents and addresses the affidavit evidence previously filed on behalf of the First Respondent.

165. Having heard arguments from Counsel for the Applicants and the First Respondent, I granted leave for WF to intervene. Notably, Mr. Duncan QC made oral submissions in support of the intervener application on behalf of Dr. Brown's corporate entities.

166. The material parts of the intervener summons are quoted in my ruling as follows [33]:
"…
1. *…*
2. *…*
3. *…*
4. *That the Applicant did not give permission for the removal of the file or for the Police to have access to any of the information on her personal medical files and feels completely violated and offended by this action and believes that her right to privacy has been fundamentally breached.*
5. *That the Applicant attended a meeting in May of 2017 at the Cathedral Hall in Hamilton with over a hundred (100) patients of the Brown Darrell Clinic in attendance. All of who were vociferous in their disdain for the unlawful Police action.*

6. *That the Applicant is representative of a number of patients who suffered the same injustice.*
7. *That no safeguard or assurance has been given to the Applicant to protect her privacy or safeguard the dissemination of her private information.*

That the Applicant, as supported by the other patients, wishes to intervene as an obviously affected party in these proceedings and have the Court rule in regard to the irregularity of the Police action and order such legal remedy as may be warranted in the circumstances."

167. The relevant portions of the affidavit evidence from WF in support of that intervener application were also reproduced in my ruling [32]:

> "*1. That I am a patient of the Brown Darrell Clinic and Dr. Ewart Brown has been my personal physician for over 20 years.*
>
> *2. That I am aware that my personal medical files in addition to the files of other patients were seized by the BPS on 11 February 2017.*
>
> *3. That I attended a public meeting at the Cathedral Hall in Hamilton in May of 2017 where there were over 100 patients of the Brown Darrell Clinic who voiced their significant concern with regard to the seizure of their personal medical files by the BPS.*
>
> *4. That I am prepared to be the patient of record in a legal action to intervene in current proceedings on behalf of a large group of patients.*
>
> *5. That I have always received excellent health care from both Dr. Brown and The Clinic and I have always had full confidence in the confidentiality that exists between Doctor and patient.*
>
> *6. That as a result of the BPS action in executing a warrant and now being in possession of my personal information I feel completely violated and offended by the actions of the Police. I am aware that there are numerous patients that have absolutely no confidence that the Police will properly safeguard their private medical information and that there is a real risk that said information may find its way into the hands of third parties or the public domain through social media or some other unregulated source*."

168. In Dr. Brown's first affidavit [para 4] filed in the civil proceedings he outlined the factual background he relied on in support of the Originating Summons. In doing so he referred to

the same judicial proceedings with which I was judicially seized from June 2018 through to March 2019. He deposed:

"The investigation into the Applicant became public and aggressive with, first, the arrest of the Chief Medical Officer of BHCS and BDC [Dr. Sanapareddy] *and search of his home in May 2016, and police raids on both BHCS and BDC in February 2017. The former was held unlawful by both the Supreme Court and the Court of Appeal. Also the police raids were challenged in judicial review proceedings. In the context of these latter proceedings, in April 2019 an affidavit was submitted by Special Investigator John Briggs where he explained that a "Joint Investigation into the Applicant and individuals associated with him. This JIPT comprised the "Commissioner of Police, the [Department of Public Prosecutions], the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor". At least at that time (April 2019), the JIPT met monthly and received updates from "the DPP lawyer and Senior Investigating Officer".*

169. As was the case for the sealed proceedings of January 2021, the subject of judicial bias was never once raised by Dr Brown's Counsel in the JR Proceedings before me between June 2018 and March 2019. In my judgment, this could not possibly go unnoticed by the informed and fair-minded observer as the JR proceedings engaged issues of real constitutional and corporate significance to Dr. Brown. Here, I would take judicial notice of the widespread public and media attention which lurked over these proceedings and note the very high level of importance those proceedings undoubtedly had to Dr. Brown in both his corporate and personal capacity.

[redacted]Against this background, I am satisfied that the informed and fair-minded observer would find that the absence of a single objection to my 9 month assignment to the JR proceedings is cause for doubt of the merits of the recusal applications. [redacted]

Inferences drawn from the stage at which the Recusal Applications were made

[redacted]

[redacted]

172. This issue of an alternative motive is not dissimilar to that which was noted by Hargun CJ in *Athene Holding Ltd v Siddiqui and Ors* [53]:

"*53. 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.*

54.Furthermore, the Conyers connection was highlighted when Mr McCosker swore his First Affidavit on 20 November 2018 exhibiting the emails between Mr Cernich and Mr Charles Collis, a partner in the insurance/corporate department of the firm, relating to Mr Cernich's instructions to Conyers to incorporate Caldera. Again, the Defendants made no objection that I should recuse myself on the basis that there was a real risk that I might be perceived to be biased in favour of Athene on the basis that Athene was a long-standing client of Conyers.

55.The objection based on apparent bias was taken immediately after I had delivered my Ruling of 14 January, 2019 dismissing the First and Second Defendants' application to set aside the Order giving leave to serve these proceedings on them outside the jurisdiction."

173. Like Hargun CJ did in *Athene Holding Ltd v Siddiqui and Ors* I have not outlined the numerous earlier occasions on which my recusal ought to have been raised in order to build a case of waiver. Instead, I have referred to these ignored opportunities to illustrate the added weaknesses of the Applicant's claim to my appearance of bias.

THE DANGER OF GRANTING A MERITLESS RECUSAL APPLICATION

174. Mr. Lynch QC submitted that I should err on the side of caution and recuse myself since there are other available judges who could be assigned to adjudicate these proceedings. Firstly, I must remind myself that the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* did warn that a real ground for doubt about the impartiality of a judge should be resolved in favour of a recusal. That being the case, I would also point out that it was never suggested in the *Locabail* case (nor in any other authority cited by Counsel) that a recusal would ever be appropriate in the absence of a real ground for doubt.

In this case there are many reasons why I must take particular care not to recuse myself in circumstances where no real ground for doubt has been established.

175. One of those reasons to avoid an unwarranted recusal is owed to the lack of availability of other judges to sit on these proceedings. It is appropriate for me to take notice of the fact that there are no other full-time appointed judges resident in Bermuda who are suitable for assignment by the Chief Justice to the criminal and civil proceedings, for one reason or the other. In all likelihood an overseas judge would be required to preside over the criminal and/or civil proceedings in the event of my recusal. These proceedings will likely span several months at great or significant expense to the public purse if a non-resident judge is required to take over.

176. I am also particularly conscious that the decision of this Court will also lead to the fixing of a precedent for future applications for judicial recusal on the grounds of apparent bias. In a small jurisdiction such as Bermuda, an excessively liberal and cautious approach to recusal applications may impose an impracticable standard approach to recusal applications by judges and magistrates alike. On this point, I am guided, if not bound, by the reasoning of the Privy Council in *Grant v The Teacher's Appeals Tribunal & The Attorney General (Jamaica)* [2006] UKPC 59 where Lord Carswell noted the dangers of *'*[erring] *on the side of caution by too much'.* The Privy Council warned that such an approach may make it "*impracticable for…* [a judge] *to carry out his* [or her] *judicial duties as effectively as he* [or she] *should*".

177. Further, acceding to the request for my recusal on the grounds associated with Mussenden J would automatically call into question my past, present and future adjudication of the criminal appeals and criminal indictments which were brought before the Court by Mr. Mussenden as the then DPP. As raised on the prosecutor's written submissions before me, I have judged numerous cases in which DPP Mussenden's professional decisions were impugned. That includes the vast majority (if not all) of the criminal appeals from the Magistrates' Court since 2018, applications subject to judicial review of DPP Mussenden's decisions to bring criminal charges, and jury trial matters in respect of indictments founded on his decision as the DPP to proceed with the criminal charges.

178. This, nor any other consideration, disentitles or in any way dilutes Dr. Brown's constitutional rights to access to an independent and impartial Court of law. His rights to a fair trial before an impartial and independent Court of law are absolute. That being said, the consequential effects of an illegitimate recusal ought not to be ignored. It is after all, imperative that litigants who seek to tactically avoid or promote the assignment of any particular judge for reasons other than what the law permits, be shown that such efforts will bear no fruits in a Court of law.

179. This reasoning is consistent with that of the English Court of Appeal in *Otkritie International Investment Management Ltd et al v George Urumov* [2014] EWHC 1323 (Comm) where an appeal was allowed quashing Elder J's decision to recuse himself. The Court of Appeal, having unanimously agreed that the High Court judge ought not to have recused himself, made the following statements in the judgment of Lord Justice Longmore [25-27] and [32]:

"*25. Secondly Eder J applied the observation in Locabail that, if there is any real ground for doubt, that doubt should be resolved in favour of recusal. But he does not explain what the real ground for doubt is in this case. The judge specifically said (in para 17 and also in para 13 of the judgment giving permission to appeal) that the allegations of bias are "groundless" and "spurious".*

26. The third reason given by the judge is that the matter could be dealt with by another judge of the Commercial Court. No doubt it could be but that cannot in itself be a good reason for recusal any more than it could be a good reason not to recuse himself (in a proper case) that another Commercial judge could not be made available.

27. The judge appears not to have been referred to the remarks of Chadwick LJ in this court in Triodos Bank N.V. v Dobbs [2001] EWCA Civ 468; [2006] C.P. Rep 1 in which Mr Dobbs invited the court to recuse itself and (more particularly) Chadwick LJ to recuse himself, as a result of his conduct in relation to a permission to appeal application in related proceedings. Chadwick LJ, giving the judgment of the court of which Neuberger LJ and I were members, said this:-

> *"7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If the judges were to recuse themselves whenever a litigant – whether it be a represented litigant or a litigant in person – criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised – whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally, Mr Dobbs' appeal could never be heard.*
>
> *8. In the circumstances of this case, I have considered carefully whether I should recuse myself. Mr Dobbs has not advanced this morning any reason why I should approach his appeal with a disposition to decide against him; other than that he tells*

me that he is criticising me in relation to past conduct. That, I am afraid, is not a good reason for me to recuse myself. I do not do so. The other members of the court, who are within the rather wider ambit of Mr Dobbs' application take the same view."

If the judge had been referred to these remarks (reiterated by this court in Ansar v Lloyds TSB Bank Plc [2007] IRLR 211, para 17) he might very well have decided he ought not to recuse himself.

…

32. Usually this court will be astute to support judges exercising what I have called "this delicate jurisdiction" of recusal. But it is also important that judges do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined. Of course, if the judge himself feels embarrassed to continue, he should not do so; if he does not so feel, he should."

180. For all of these reasons, this Court is duty-bound to properly decide the recusal applications and to ensure that it will be vetted if it is without merit.

DECISION ON THE PRELIMINARY POINTS RAISED

Request for me to Refer Recusal Applications to another Judge

181. The Applicant invited this Court to refer the determination of the recusal applications to another judge. In doing so, I was referred to the postscript remarks of Lord Justice Ward in *Sheikh El Fawaz v El-Faragy* where the English Court of Appeal discouraged judges from sitting as the arbiter of their own conduct. Mr. Lynch QC's emphasis was on the following portion of the postscript which I quoted in full further above: "*...Whilst judges must heed the exhortation in Locabail not to yield to a tenuous or frivolous objections, one can with honour totally deny the complaint but still pass the case to a colleague. If a judge does not feel able to do so, then it may be preferable, if it is possible to arrange it, to have another judge take the decision, hard though it is to sit in judgment of one's colleague, for where the appearance of justice is at stake, it is better that justice be done independently by another rather than require the judge to sit in judgment of his own behaviour*."

182. It is important to point out that in *Sheikh El Fawaz v El-Faragy* the recusal application entailed an assessment of the character and significance of the trial judge's inflammatory remarks made at the pre-trial review stage of ancillary relief proceedings. In this Ruling I have outlined the extracts of the transcript disclosing the offensive comments made by Singer J. Thus the grounds for recusal in *Sheikh El Fawaz v El-Faragy* were directly tied to Singer J's own misconduct which targeted the applicant, the Sheikh. Against that

background, it is unsurprising that the English Court of Appeal deemed it necessary to warn judges against sitting "*in judgment of his own behaviour*".

183. However, in this case my own conduct or behaviour is not in question and does not give rise to the complaint of an appearance of bias. For that reason, I see no reason to deviate from the standard approach to deciding the applications for my recusal.

Request for a Statement of the Facts on my Personal Understanding

184. Counsel for the Applicant urged me to provide an outline of the facts personally known or understood by me prior to these proceedings with the request for a return hearing date to enable further submissions to be made. While I have obliged the request to the extent that I have disclosed the matters necessary for a fair determination of the question of a recusal, I do not deem it necessary for further submissions to be made because, as rightly pointed out by Mr. Diel, I confirmed that I would decide the issue of recusal on the strength of the unchallenged evidence before the Court. Further, the factual outline provided confirms the very limited personal knowledge I had of these matters which did not and do not factually concern or involve me.

185. I would also add, from a case-management perspective, that Mr. Lynch QC's request for me to provide a statement of facts as I understand them was first made during the course of the substantive hearing on 3 August 2021, notwithstanding the earlier opportunities to do so at the case management hearing on 14 May 2021 and at the subsequent adjourned hearing of 25 June 2021. It was suggested in *Resolution Chemicals Ltd v H Lundbeck* that a judge's statement of facts should be voluntarily provided in the first instance in order to enable the Applicant to decide whether or not to bring an application for recusal. However, this case is not an example of the facts being locked away behind the gates of the judge's private knowledge. In this case, the facts underlying the application for recusal are far better known to the Applicant than they are to me. As such, an invitation for me to provide a personal statement ought to have been made prior to the 3 August hearing if it was intended that submissions would be made to the Court on my statement. In any event, the Applicant has not been prejudiced in this case in my declining to hear further oral or written arguments as I have not materially contributed to the scope of facts deposed.

CONCLUSION

186. Dr. Brown had the burden of articulating a logical connection between his lingering animosity for Mussenden J and Dr. Subair and his fear that I will deviate from my course of impartial judging over his matters (*Saxmere Company Limited et al v Wool Board Disestablishment Company Limited)*. In my judgment, he has failed to discharge that burden. I find that an informed and fair-minded observer would not reasonably suspect that I have any personal interest (whether directly or indirectly via Dr. Subair or Mussenden J) in the outcome of the criminal or civil proceedings. Equipped with a fair mind and all of the facts, the objective observer fitting the characteristics described by Lord Hope in *Helow v Secretary of State for the Home Department and another* and Justice Blanchard in *Saxmere Company Limited et al v Wool Board Disestablishment Company Limited* would not suspect this Court of being closed-minded or anything other than independent and impartial.

187. This Court's constitutional duty to function as an equitable and non-discriminate applicator of the law is in no way compromised by the matters raised by the present application or by the Applicant's bringing of the recusal applications.

188. The application for my recusal is accordingly dismissed.

189. Unless any party seeks to be heard on the issues of costs by filing a Form 31D within 14 days of this Ruling, the Respondents in the civil proceedings shall be awarded costs on a standard basis, to be taxed by the Registrar if not agreed.

Dated this 10th day of September 2021

THE HON. MRS JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT

APPENDIX

M. Sannapareddy et al v The Commissioner of Police et al [2019] SC (Bda) 18 Civ (1 March 2019)

[2019] SC (Bda) 18 Civ (1 March 2019)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017 No: 51

BETWEEN:

WF (anonymized)

Intervener Applicant

MAHESH SANNAPAREDDY

First Applicant

BERMUDA HEALTHCARE SERVICES LIMITED

Second Applicant

BROWN DARRELL CLINIC LIMITED

Third Applicant

And

THE COMMISSIONER OF THE BERMUDA POLICE SERVICE

First Respondent

THE SENIOR MAGISTRATE

Second Respondent

EX TEMPORE CHAMBERS RULING

Ex parte Application on Notice for Leave to Appeal (s. 12(2) of the Court of Appeal Act 1964)
Appeal against Interlocutory Ruling refusing Application to Adjourn

Date of Hearings: Tuesday 26 February 2019
Date of Decision: Tuesday 26 February 2019
Date of Reasons: Friday 01 March 2019

Appearances:
Intervener Applicant: Mr. Mark Pettingill (Chancery Legal Limited)
First Respondent (on notice): Mr. Dantae Williams (Marshall Diel & Myers Limited)

Non-Appearances:
First-Third Applicants (on notice): Mr. Delroy Duncan (Trott & Duncan Limited)
Second Respondent (not served): Mr. Alex Potts QC (Kennedys Limited)

REASONS of Shade Subair Williams J

Introduction

1. This is the Intervener's ex parte application (on notice) for leave to appeal against my interlocutory ruling made on 12 February 2019 wherein I refused the Intervener's application for an adjournment of the hearing of the First Respondent's summons application dated 11 June 2018 ("the protocol access summons"). The protocol access summons prayed an order of this Court sanctioning a written protocol for an independent scanning and review of patient medical files seized by the Bermuda Police Service ("BPS") pursuant to two special procedure warrants issued by the Senior Magistrate on 2 and 10 February 2017 ("the warrants" or "both warrants").

Summary of Police Investigation

2. On the Second Affidavit of Detective Sergeant James Hoyte, sworn on 31 May 2018 in support of the protocol access summons, he summarized the nature of the relevant police investigation at paragraphs 4 and 5 in the following way:

" *4. …The BPS is in the midst of an ongoing investigation concerning the conduct and activities of Dr. Ewart Frederick Brown ("Dr Brown"), Wanda Gayle Henton-*Brown *("Wanda Henton-Brown"), and Mahesh Babu Sannapareddy ("Dr Reddy").*

5. The line of inquiry into the conduct and activities of the above-named subjects was initiated upon reports of former employees of BHCS, who made allegations of improper practices with respect to the operations of the Clinics, and the conduct of Dr. Reddy

Wanda Brown and Dr Brown. These allegations were outlined in the search warrant applications and Dramatis Personar provided to the court. The BPS thoroughly examined the allegations made by the former employees and conducted its own independent inquiry into matters. That independent inquiry has produced further evidence in addition to and in support of the reports from former employees. As such, the BPS had reasonable grounds to believe that:-

a. Dr Reddy and others committed the indictable offences identified in the Information *namely fraud / corruption and money laundering…*

b. The medical files sought would qualify as excluded material under the Police and Criminal Evidence Act 2006 ("PACE"); and

c. The medical files sought were relevant and of substantial value to the ongoing investigation (as evidenced by paragraphs 52-62 of the Information)."

3. A detailed narrative on the case of the First-Third Applicants (alternatively referred to as "the Applicants") outlining the historical background to the police investigation is provided from paragraph 29 onwards in the Form 86A exhibited to the Notice of Originating Motion dated 21 August 2017.

Background Court Proceedings

The 11 February 2017 Court Order:

4. On Saturday 11 February 2017 the First-Third Applicants appeared before the Court on an *ex parte* with notice[3] basis in pursuit of urgent interim injunctive relief, pending a proposed *inter partes* hearing.

5. The Applicants' concerns, as expressed by Counsel Mr. Delroy Duncan, were that the number of patient files seized and the forced manner in which it was done risked an avoidable cessation to the Applicant's business. Mr. Duncan submitted to the Court that his Clients were cooperative and willing to agree an 'orderly process' for the exchange of information sought by the First Respondent.

6. On 11 February 2017, the learned Mr. Justice Stephen Hellman made the following order:

"1.All patient files seized by the 1st Respondent must be returned to the premises (Bermuda Healthcare Services and the Brown Darrell Clinic) by 8a.m on Monday 13 February.

[3] The Court adjourned momentarily on 11 February 2017 during the hearing to enable Counsel for the First-Third Applicants to contact an appropriate officer of the Bermuda Police Service to be heard by the Court.

2.The 1st Respondent is not to review the content of the material seized, save in so far as is necessary for the purpose of copying the material.

3….

4.This application is adjourned until 10am on Monday the 13th February 2017.

5.The 1st Respondent is to provide the Applicants with a copy of the evidence relied upon before the Magistrate in support of the application for the search warrant issued on the 2nd February 2017. The evidence can, subject to the order of the Court, be redacted to exclude any material subject to public interest immunity.

6.At the hearing on Monday the 13th February 2017, the parties are to provide the Court with a protocol for dealing with the seizure and copying of patient files.

7.The Court will order directions for the Applicants(') application for judicial review

8.The Court will order directions to hear the 1st Respondent's public interest immunity application if so advised.

The 13 February 2017 Court Order:

7. On 13 February 2017 the First Respondent appeared though its Counsel, Mr. Dantae Williams and Mr. Duncan appeared for the First-Third Applicants. The Court heard viva voce evidence from Sue Reilly, the Chief Operating Officer of the Second Applicant.

8. At the close of the hearing, the Court ordered, *inter alia*, various directions in relation to the First-Third Applicants' leave application and the First Respondent's anticipated public interest immunity application. Directions were also provided for the First Respondent to disclose the information and materials relied on to secure the issuance of the warrants and for the First Respondent to obtain leave of the Supreme Court before executing any further searches under the warrants.

9. Additionally, the Court ordered a confidential seal on all of the material seized under the warrants pending the outcome of the application for leave for judicial review or further Court order. The effect of the seal was to prohibit the First Respondent from directly or indirectly reviewing or otherwise utilizing the material or any information contained therein for the purposes of their investigation. However, photocopying of any uncopied material (which expressly included medical records) was permitted by the Court's order

subject to various specified conditions. Such conditions included a direction for the photocopying to be carried out by staff members not involved with the investigation and further directions were made outlining the process for removing from the relevant premises additional files, documents or medical records liable to seizure under the warrants for the purpose of completing the photocopying process.

10. Access and use of the seized medical records by the Second and Third Applicants was also permitted under the 13 February order.

The First Amended Form 86A:

11. A Form 86A Notice of Application for leave to apply for judicial review, which enclosed a document entitled 'Detailed Grounds upon Which Relief is Sought', was dated 13 February 2017 and filed by Counsel on behalf of the First-Third Applicants on 17 February 2017. I shall refer to this as "the first amended Form 86A" since it followed the filing of a previous Form 86A dated 11 February 2017 ("the un-amended Form 86A").

12. The subject of the application on the first amended Form 86A was "*The decision(s) of the Commissioner of Police to seek and execute search warrants against the business premises known as Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda and Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda*" and "*The decision of a Magistrate made on or about 2nd February 2017 to grant a request for and issue to the Commissioner of Police a search warrant for execution against the medical business and premises known as Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda*."

13. The First-Third Applicants pleaded that the issuance and execution of the 2 February 2017 warrant ("the First Warrant") was unlawful on grounds of "*a. Non-fulfilment of the statutory conditions for the issuing of a warrant*" and "*b. The warrant was unreasonable and disproportionate in all the circumstances*."

14. In respect of the complaint of non-fulfilment of the statutory conditions, the First-Third Applicants stated that the further conditions referred to at paragraphs 12(a)(ii) and 14 of Schedule 2 of the Police and Evidence Act 2006, were not fulfilled. These further conditions dealt with the practicability of communicating with any person entitled to grant access to the premises in question or the material in question. On the First-Third Applicants' pleaded case, the First Respondent could not have had any plausible concern that by communicating with them beforehand, the evidence would have been destroyed. It is the First-Third Applicants' case that there were alternative means of obtaining the material as "*the subjects of the investigation, in particular Bermuda Health Care Services*

and Dr. Reddy, have co-operated voluntarily with various investigations into the subject-matter of the present investigation." (Se para 9 of the amended Form 86A).

15. Where it was complained that the warrant was unreasonable and disproportionate, the First-Third Applicants averred at paragraph 11 that the issuance of the warrant "*would inevitably lead to sever disruption to the provision of critical medical services in Bermuda. The history of this investigation clearly shows that there were more effective and less disruptive means to obtain such information as the police could lawfully require*."

16. It was further pleaded in the amended Form 86A that the execution of the First Warrant by the First Respondent was unlawful and/or *ultra vires* on the following grounds:

    a. *Excessive force was used to gain entrance to the premises resulting in significant damage to property.*
    b. *Video recording equipment on the premises was unjustifiably interfered with.*
    c. *Individuals employed at the premises were unjustifiably prevented from observing the execution of the warrant.*

17. At paragraph 4, legal professional privilege was pleaded as follows:

    "*In addition, the material seized includes electronic material containing material subject to legal professional privilege. Even if this application were ultimately unsuccessful, the First Respondent must not be allowed to review the electronic material before a protocol is established for how the material subject to legal professional privilege is to be filtered and quarantined*."

18. The Applicants asserted that the warrant was nevertheless issued "*in large-part due to the First Respondent's material non-disclosure*".

19. A breach of right to patient confidentiality was not pleaded in the 'Detailed Grounds upon Which Relief is Sought' in the amended Form 86A. However, in the un-amended Form 86A there was a passage subtitled "Grounds upon Which Relief is Sought" on the final page which provides:

    "*That the learned Magistrate issuing the search warrant(s) and the Commissioner of Police executing the search warrants failed to take into account that confidential and sensitive medical files of patients at Bermuda Healthcare Services, the Brown Darrell Clinic and the King Edward VII Memorial Hospital have been seized in breach of their*

right to confidentiality the effect of which will potentially injure ongoing patient care and treatment."

The 16 March 2017 Court Order for Directions on Strike-Out Summons and Leave to Apply for Judicial Review

20. By summons dated 8 March 2017 supported by the affidavit evidence of Counsel, Mr. Dantae Williams, the First Respondent sought to strike out the First to Third Applicants' application for leave on various grounds which included an averment of abuse of process for non-disclosure of the underlying documents placed before the Court during the course of the ex parte hearings.

21. In open party correspondence between the Counsel for the First-Third Applicants and Counsel for the First Respondent strong complaints of intentional delay in prosecuting the application for judicial review were made and vigorously defended.

22. The strike out summons was made returnable for 16 March 2017 before Hellman J. The Court directed that the Applicants disclose the requested materials in relation to the *ex parte* hearing of 11 February 2017 and granted leave for the filing of a re-amended Form 86A. Directions were also given for the simultaneous hearing of the strike-summons and the leave application for judicial review.

Leave to Apply for Judicial Review Granted by Court Order of 15 June 2017:

23. By Order of the Court dated 15 June 2017, the First-Third Applicants were granted leave to file and serve a Notice of Originating Motion exhibiting what was termed in the said Order as 'the amended Form 86A'. In reality, this was a re-amended Form 86A. I will refer to the re-amended Form 86A as "the Notice of Motion Form 86A exhibit" and for a shortened reference, "the Form 86A exhibit".

24. In the Form 86A exhibit, the lawfulness of both special procedure warrants issued on 2nd and 10th February 2017 is challenged. The relief sought is for an order quashing the Senior Magistrate's decision to issue the warrants and a declaration that the searches made thereunder were unlawful. It is further prayed that the First Respondent return all items seized under the warrants and for the First-Third Applicant to be awarded compensation for the alleged material damage caused (which was pleaded to also arise out of unlawful trespass to property) and their legal costs.

25. Enclosed with the Form 86A exhibit is an amended document outlining the "Detailed Grounds Upon Which Relief is Sought" ("the Detailed Grounds exhibit"). The grounds relied on in the First Amended Form 86A were abandoned and re-pleaded as follows:

    a. *Material non-disclosure...*
    b. *Non-fulfilment of the statutory conditions for the issuing of a warrant…*
    c. *The Warrants were disproportionately and unreasonably wide, amounting to the bulk collection of confidential patient information...*

26. The particulars of ground c. above are contained at part VII of the Detailed Grounds exhibit:

    "107. Although item i. on the Warrants is limited ("[i]n the first instance") to three named patients and the 265 patients listed in the schedule labelled JH3, items ii., iv., v., vi., and vii. are not so limited. These items therefore authorise the First Respondent to proceed with the bulk collection of confidential personal, medical data, in the form of sensitive information concerning the medical treatment of hundreds of patients.

    108. The Information sets out no reasoning for why such a wide collection of sensitive personal data is warranted and we have no record that the Second Respondent gave any consideration to whether warrants of such an extremely wide scope were proportionate in the circumstances.

    109. It is submitted that, at the very least, the very scope for the special procedure warrants sought by the First Respondent with respect to sensitive material and confidential personal, medical data, should have led the Second Respondent to apply particularly close to scrutiny to the application in order to balance the legitimate interests of the hundreds of third parties with the stated interests of the investigation.

    110. That this reinforced scrutiny was necessary follows, it is submitted from the plain fact that the constitutionally protected right to privacy was engaged…, as well as the right to respect for private and family life enshrined in Article 8 of the ECHR. The European Court of Human Rights has held, in the context of search warrants, that "having regard to the severity of the interference with the right to respect for his home of a person affected by such measures, it must be clearly established that the proportionality principle has been adhered to…

    111. It is submitted that by not addressing the proportionality of proceeding with the bulk collection of confidential and sensitive patient information, the Respondents failed in their duty to have adequate regard to the constitutionally protected fundamental rights of

hundreds of interested third parties into consideration. For that reason the Warrants are disproportionate and fall to be quashed. "

27. A claim for breach of legal professional privilege is repeated in the Form 86A exhibit.

28. In contemplation of alternative relief, paragraph 6 of the Detailed Grounds exhibit states:

"…*Even if this application were ultimately unsuccessful, the First Respondent must not be allowed to review the electronic material before a protocol is established for how the material subject to legal professional privilege is to be filtered and quarantined*."

29. The Form 86A exhibit is also supported by affidavits from eight deponents and addresses the affidavit evidence previously filed on behalf of the First Respondent.

The First Respondent's Protocol for Access Summons

30. On 5 June 2018 the First Respondent filed a summons dated 11 June 2018 ("the protocol access summons") seeking the following orders:

1.The Court approve an independent agency from overseas to store scanned copies of all medical files seized by the First Respondent on 11 February 2017 that were the subject of the Special Procedure Search Warrants ("SPWs") issued by the Senior Magistrate on 2 and 10 February 2017 on a secure file server;

2.The Court approve two independent medical experts from overseas to review all scanned copies of medical files seized by the First Respondent on 11 February 2017 and forwarded to the independent agency for storage;

3.The Court approve the protocol outline in Schedule A attached hereto to allow for the storage and review of the medical files by the approved independent agency and medical experts.

…

31. The Protocol Access Summons was followed by a Consent Order for Directions dated 22 June 2018, which provided for the exchange of further affidavit evidence and skeleton arguments.

Application by WF on behalf of Class of Patients to Intervene

32. Under a cover letter to the Court, dated 14 September 2018, Chancery Legal Ltd ("Chancery Legal") filed the First Affidavit of WF sworn on 13 September 2018 in support of a summons application dated 26 September 2018 to intervene in the proceedings ("the intervener summons"). At paragraphs 1-6 of WF's affidavit she stated:

1.That I am a patient of the Brown Darrell Clinic and Dr. Ewart Brown has been my personal physician for over 20 years.

2.That I am aware that my personal medical files in addition to the files of other patients were seized by the BPS on 11 February 2017.

3. That I attended a public meeting at the Cathedral Hall in Hamilton in May of 2017 where there were over 100 patients of the Brown Darrell Clinic who voiced their significant concern with regard to the seizure of their personal medical files by the BPS.

4.That I am prepared to be the patient of record in a legal action to intervene in current proceedings on behalf of a large group of patients.

5.That I have always received excellent health care from both Dr. Brown and The Clinic and I have always had full confidence in the confidentiality that exists between Doctor and patient.

6.That as a result of the BPS action in executing a warrant and now being in possession of my personal information I feel completely violated and offended by the actions of the Police. I am aware that there are numerous patients that have absolutely no confidence that the Police will properly safeguard their private medical information and that there is a real risk that said information may find its way into the hands of third parties or the public domain through social media or some other unregulated source.

33. In the intervener summons it is prayed that WF be granted on her application"

'*leave to intervene in these legal proceedings on the grounds that:*

1. *...*
2. *...*
3. *...*
4. *That the Applicant did not give permission for the removal of the file or for the Police to have access to any of the information on her personal medical files and feels*

completely violated and offended by this action and believes that her right to privacy has been fundamentally breached.

5. *That the Applicant attended a meeting in May of 2017 at the Cathedral Hall in Hamilton with over a hundred (100) patients of the Brown Darrell Clinic in attendance. All of who were vociferous in their disdain for the unlawful Police action.*
6. *That the Applicant is representative of a number of patients who suffered the same injustice.*
7. *That no safeguard or assurance has been given to the Applicant to protect her privacy or safeguard the dissemination of her private information.*
8. *That the Applicant, as supported by the other patients, wishes to intervene as an obviously affected party in these proceedings and have the Court rule in regard to the irregularity of the Police action and order such legal remedy as may be warranted in the circumstances*.'

The 4 October 2018 Case Management Hearing

34. On 4 October 2018 Mr. Pettingill appeared before me on behalf of WF and the class of patients she sought to represent. Mr. Duncan appeared for the First-Third Applicants and Mr. Diel appeared for the First Respondent.

35. Mr. Duncan advised the Court that he was engaged in ongoing without-prejudice discussions with Mr. Diel in furtherance of reaching an agreement on a protocol under the protocol access summons. Mr. Duncan suggested that this would negate the need for the Court to hear the substantive judicial review application. Mr. Duncan submitted: that once the Court heard and resolved the intervener summons '*it would shape and give the contours to how we will deal with the protocol application. Either the protocol application is going to be dealt with by the First Respondent and the Applicants or it will be dealt with between the First Respondent and the Applicants and the Intervener. So that's really the direction we are going. I can say now that unless there is a very serious event that takes place in our discussions, it is unlikely that we are going to need time for a JR application... but again we have to see where the patients fit into that and it would be wrong for us to actually come down firmly on that until that issue has been resolved…*'

36. It was further agreed between Counsel for the Applicants and the First Respondent that the Applicants' summons dated 26 September 2018 to extend the time to file and serve a hearing bundle and skeleton arguments in support of its Notice of Motion for the judicial review application be adjourned *sine die*.

37. Mr. Diel weighed in and stated that it was hoped that all parties would agree to the protocol and abandon the judicial review application. The remainder of the hearing was focused on the Mr. Diel's call for the identity of the class of patients represented by WF to be made known. Mr Diel further argued that any patients whose files had not been seized ought not to be joined nor have any input on the discussions to agree a protocol.

38. I accordingly directed that Mr. Pettingill serve within 7 days a list containing the patient names who WF purported to represent and for the hearing of the intervener summons.

The 2 November 2018 Case Management Hearing

39. On 2 November 2018 the parties through their Counsel (save only for the Second Respondent who to date has never been served with the originating documents to cause an appearance) reappeared before me. Mr Duncan advised that he and Mr. Diel were in the early stages of producing an agreed protocol as sought under the protocol access summons. Mr. Duncan further advised the Court that the protocol would obviate the need for the substantive judicial review proceedings.

40. Mr. Duncan informed the Court that it was a matter of public knowledge that patients were aware that their medical records had been seized. Counsel said that the First-Third Applicants were keen to see the patients, as represented by Mr. Pettingill, formally intervene so that those patients could offer some input and direction on the protocol proposed. This, Mr. Duncan explained, would enable his clients to properly secure the patients' knowledge and consent for the Applicants to discontinue their judicial review application, thereby dissolving the substantive proceedings.

41. Mr. Pettingill agreed that there was wide media coverage and attention given to the police seizure of the patient files and that there were over 100 patients affected by such seizures.

42. Mr. Diel clarified that the First Respondent had no objection to WF being joined to the proceedings as an intervener. He observed that 152 patient names had been provided to him by Mr. Pettingill in compliance with my direction of 4 October 2018 but that 2 of those patients named were in fact deceased. This, said Mr. Diel, would potentially lead to a second set of representatives and further risk objections from the patients to an agreed protocol between the First Respondent and the Applicants.

43. Mr Diel queried how communication would be effected between WF and all of the living individuals out of the 152 patients and how any dissention between the patients on their varying views would be handled. Mr Diel challenged how it could even be known

whether WF had any communication with the patients she purported to represent. He explained that he had thus written to Mr. Pettingill on 23 October 2018 asking for WF to attend Court to be cross-examined on her affidavit, albeit that the Court had not previously been invited to issue a direction for her attendance to Court. Mr. Diel proposed at this stage that the Court direct for WF to appear to be cross-examined on these points.

44. Mr. Pettingill described the notion of a Court direction that WF be so cross-examined as 'grossly unreasonable' and an attempt to intimidate an elderly senior citizen. On the question of whether WF wished to intervene to represent herself and the other 152 patients, Mr. Pettingill stated; " …*no, she will be joined as a party. What she says in her affidavit- not that she's representing- she says at (paragraphs) 5 and 6 that she was at this meeting she attended in May with over 100 patients of the Brown Darrell Clinic, all of whom were vociferous in their disdain for the unlawfulness of the police action- and it's true, I was there. (Paragraph) 6 The Applicant (WF) is representative of a number of patients who suffered the same injustice. It's not one of these specifics where I'm representing as, you know, an individual or as Counsel all of these people that have suffered through the same thing. She is representative of that. If my learned friends want to come along and say, 'That's just not the case. There were no other files taken or her file wasn't taken-' She's representative of a class of people. That's how intervention actions occur. When Mr. Bassett in his affidavit, they had Preserve Marriage as a group- he was representative of the group of people, it was well known, that had an issue with same sex marriage. She (WF) is representative of other people whose files were taken-just speaking for them in a sense directly of this person and this persons…she is speaking for herself and she is aware there were over 100 others. I think to clarify that point, my friend wanted to know, 'well who are these other hundred people? We need to have the names of them' So, we provided that*…"

45. The Court then interjected: "*So Mr. Pettingill I think where the disconnect falls between the two of you is exactly what you mean when you say she is representative because if she is not speaking for the other patients and she is speaking in her own right, so when it comes to establishing the protocol, she is- you're taking instructions from her?*" Mr. Pettingill replied; "*Yes*". I then queried; "*You're not taking instructions from 152 – 152 names*-" to which Mr. Pettingill agreed; "*Just like with Mr Bassett*…"

46. The Court then remarked that WF should then be joined in her own right and Mr Pettingill again agreed; "*She can be and she will be joined in her own right. But for her in her affidavit to say that she is aware that this happened to all these other people- for us by way of a courtesy to provide a list saying, 'here's a list of all the people that she is*

aware of- that we're aware of - whose files were taken-'if that's an accepted fact, that those files were taken- that's the end of it. What do you need to cross-examine her for?"

47. The Court confirmed that it was Mr. Pettingill's intention that WF would be intervening personally as an interested party and not in a representative capacity.

48. Mr. Duncan flagged the importance of distinguishing between intervening as a representative capacity or intervening as a party and submitted that this distinction would be of significant importance on the issue of costs. He emphasized the desire to avoid having 152 named parties to this action and suggested that the ideal approach would be to intervene in a representative capacity. (The Court was then referred to paragraph 2068-2069 of *DeSmith's Law on Judicial Review*).

49. The Court was also referred to other authorities on the law of interveners. Mr. Duncan proposed that an affidavit setting out a narrative on the objection or relevant issue of contention which exhibited a signed document confirming each person's position would be a way for the Court to be clear on the extent to which the intervener spoke on her own behalf and on behalf of others. He submitted that this would stand as a representative intervention.

50. Mr. Duncan encouraged this approach on the basis that it would achieve the desired approach of establishing how many patients supported the proposed protocol. He submitted that the only alternative would be the undesirable approach of having each patient concerned named as a party to the proceedings.

51. Mr. Diel agreed in a general sense to the approach proposed by Mr. Duncan but expressed concern for the exposure to patient objections at this belated stage to the protocol.

52. Mr. Pettingill agreed to provide the suggested signed statements from the patients concerned and it was agreed by all parties present that this would be the settled approach for WF to in fact join in a representative capacity.

The 6- 15 November 2018 Patient Signatures for the Intervener Application

53. Chancery Legal filed with the Court signed statements by the 150-152 patients under the document cover entitled '*Brown Darrell Patients' Support of (WF) Intervener Application*.'

54. Each signed statement reads:

> "*I, undersigned, as a patient of Bermuda HealthCare Services, who believe that my medical files were removed without our consent from the premises of BHCS, do hereby attach my signature attesting to my outrage and indignation.*
>
> *I believe that as long as the Bermuda Police Services are in possession of my private medical records, my fundamental constitutional right to confidentiality is being breached.*
>
> *I call for an end to this reprehensible violation of our rights.*
>
> *I understand that an action against the seizure of medical records from the premises of Bermuda Healthcare Services and Brown-Darrell Clinic by BPS is being led by (WF) and I give consent for my name to be included in said action*"

55. The date range on these statements is 6 November 2018 – 15 November 2018.

The 22 November 2018 Case Management Hearing and Consent Order on Application to Intervene

56. On 22 November 2018 Mr. Duncan, Mr. Diel and Mr. Pettingill all appeared.

57. Mr. Diel confirmed his receipt of the patient letters of objections and stated that until his Client had the opportunity to confirm that each of the patients who signed a statement were the subject of a seized medical file he would operate on the presumption in the affirmative. Mr. Pettingill highlighted that the cautious wording employed in each statement confirmed that it was the respective patient's belief that his or her medical file had been seized. Against this background, the parties advised that they would file a draft consent order on the application to intervene.

58. Mr. Diel then requested for a hearing date of 5 December 2018 (as convenient to all Counsel) to be fixed for the hearing of his client's 11 June 2018 protocol access summons. As the Court calendar was unable to accommodate the proposed date, the parties all agreed to my direction for a listing form (Form 31D) to be filed so to secure a January 2019 hearing date.

The Intervener's Contempt of Court Summons Application

59. By summons filed on 25 January 2019 and dated 5 February 2019 ("the contempt summons") Chancery Legal prayed the following orders:

    (i) That as a result of a breach by the First Respondents of the Court Order dated 13 February 2017, the First Respondents be held in Contempt of Court;

    (ii) That Chief Inspector Grant Tomkins be removed from the investigation;

    (iii) Costs in the cause

60. The contempt summons was supported by affidavit evidence of a police officer who is also a patient of the Third Applicant whose medical file was seized. I shall refer to this person as "LG". As a brief description of the asserted contempt, LG stated in his/her affidavits that CI Tomkins approached him/her about the seizure of his/her medical file and stated that he understood that he/she had some medical issues. He / She stated that CI Tomkins also queried him/her about the meetings that had taken place at Cathedral Hall with other patients and advised him/her that this exchange was to be regarded as a personal conversation between the two of them.

61. Evidence in support of the contempt also came from the affidavit of another patient 'WB' who asserted that he was visited at his home by two unnamed members of the BPS who ordered him to accompany them to the police station to verify files that had been seized. WB described a hostile exchange and stated that he refused to attend the police station. He was unable to identify any of the officers who he stated approached him.

Notice of the Application to Adjourn the Protocol Access Summons

62. On13 December 2018 Marshall Diel Myers Limited ("MDM") filed a Form 31D requesting a hearing date for the First Respondent's 11 June 2018 protocol access summons. On 20 December 2018 a Court notice was emailed to the parties that the protocol access summons had been listed for hearing fixed for Tuesday 12 February 2019.

63. By letter dated Friday 8 February 2019, Chancery Legal, under the penmanship of Counsel Ms. Victoria Greening, wrote the following to the Court:

"*We refer to the above and write to advise that due to Lead Counsel Mr. Pettingill's unavailability on 12th February 2019, all parties have consented to delist the intervener's application.*

The Delist Form is attached however we have not remitted the Form to Re-list as we do not yet have agreed dates as of yet.

However, our application to have the hearing in respect of the First Respondent's application adjourned, which was to follow our application, is not agreed by consent.

The grounds of our application to adjourn are as follows:

1) *Lead counsel Mr. Mark Pettingill is out of the jurisdiction until 18th February 2019. It is essential that he is in attendance at all hearings;*
2) *It makes sense for the (sic) our application to be heard first;*
3) *We require further disclosure from the First Respondent before being able to respond to their application for access to the medical files. This will require making a separate application to the Courts.*

We apologize for the inconvenience that this may have caused but trust that this advanced notice will leave sufficient time for the Court to re-arrange its diary."

64. This correspondence onset a clear same-date email communication from MDM that it would oppose the application to adjourn its protocol access summons.

The Intervener's Summons Application for Disclosure

65. By summons filed and dated 11 February 2019, Chancery Legal sought an order from the Court that the First Respondent be required to '*provide full disclosure of all materials in their possession in respect of this matter*'.

66. This summons, unsupported by affidavit evidence, was listed (without prejudice to any rights of the First Respondent to be served with sufficient notice) to be mentioned on 12 February 2019 when the protocol access summons was fixed to be heard.

Court's Refusal to Adjourn the Protocol Access Summons and Court's Approval of Protocol

67. On 12 February 2019 the parties' Counsel, Mr. Duncan, Mr. Diel and Mr. Jerome Lynch QC and Ms. Greening (holding for Mr. Pettingill) appeared before me.

68. Mr. Lynch QC submitted that the Court should adjourn on the basis that the Court should hear all of the pending applications simultaneously. More pertinently, he argued, the Court should not hear the protocol summons application prior to hearing the substantive judicial review application.

69. Mr. Lynch QC complained that despite Chancery Legal having filed a search praecipe dated 18 May 2017 for access to the Court file, his Client was still without the benefit of adequate disclosure of the Court documents. Mr. Diel, however, pointed out that the Intervener was not entitled to access the Court file prior to having been joined as a party and that his non-receipt of Court documents since having been joined was a result of Chancery Legal's inaction to secure a copy of the file from the First-Third Applicants or from the Court on a subsequent search praecipe.

70. In assessing the complaints on non-disclosure, I agreed that Chancery Legal were entitled to obtain copies of the Court file from the Court as of 22 November 2019 and that they could have also availed themselves of the First-Third Applicants' willingness to serve them even earlier than that point.

71. On the subject of the contempt summons, Mr. Diel correctly observed that the only police officer named in the supporting affidavit to the contempt summons was CI Tomkins.

72. Turning to the central ground argued during the hearing that judicial review application should be heard first, Mr. Lynch QC argued that the Intervener would be entitled to join the judicial review application as if leave to apply for judicial review had been granted to the Intervener and the First-Third Applicants jointly.

73. I determined that such a submission should be fully argued on a formal application in order to secure a Court ruling on the restrictions or scope of the Intervener's entitlement to join the substantive judicial review application without having filed its own Form 86A application for leave to apply for judicial review. (Notably, at the subsequent leave to appeal hearing of 26 February 2019 Mr. Pettingill informed the Court that Chancery Legal would file its own Form 86A application for judicial review in short order as soon as he obtained disclosure of the Court documents).

74. In the end, in the exercise of my discretion, I refused the adjournment request on the basis that all of the non-disclosure concerns raised by the Intervening party was of its own making or were unresolved as a result of its own inaction.

75. I accepted Mr. Diel's submission that the protocol could be amended to ensure the exclusion of CI Tomkins' involvement in the process, so not to prejudice any subsequent hearing or findings of the Court on the Intervener's contempt summons. I accordingly determined that it was within the Court's powers to approve a protocol which excluded any participation from CI Tomkins.

76. In my assessment, none of the issues of concern raised by the Intervener posed a risk of prejudice to the patients which exceeded the risk of prejudice caused by the existing reality which was that the seized material was already in the sealed possession of the BPS, a process which relies, at least to some degree, on the integrity of the BPS.

77. For these reasons I refused to further delay the hearing of the protocol access summons. Having so ruled, the parties mutually proposed to reappear before the Court on 14 February 2019 so to review the proposed protocol during the interim period and to narrow any issues of dispute in relation to its content.

78. On Thursday 14 February 2019, Mr. Lynch QC confirmed that the parties had achieved an agreed protocol without prejudice to his primary objection to the making of the protocol.

79. Mr. Lynch QC reiterated his objections to approving the protocol without favour from the Court. Mr. Lynch QC made submissions on the importance of doctor patient confidentiality and argued that a doctor-patient relationship trumps in priority nearly any other professional confidentiality including legal professional privilege. Mr. Lynch QC reargued that the Court ought not to permit police access to the seized material until a ruling is passed on the lawfulness of the search warrants and their execution.

80. Having heard Mr. Lynch QC's submissions, I declined to make any findings on issues pleaded under the substantive judicial review application. (Mr. Lynch QC agreed that his primary objection to the Court's approval of the protocol was on the same basis and was inextricably linked to the grounds on which the lawfulness of the search warrants was challenged.)

81. I subsequently approved the proposed protocol placed before the Court.

The Relevant Legal Procedure

Requirement for Leave to Appeal against Interlocutory matters

82. Section 12(2) of the Court of Appeal Act 1964 provides as follows:

> "*No appeal shall lie to the Court of Appeal –*
> *(a) against a decision in respect of any interlocutory matter; or*
> *(b) against an order for costs,*
> *except with leave of the Supreme Court or the Court of Appeal*."

Application Procedure

83. Order 2/3 of the Rules of the Court of Appeal outlines the application procedure in respect of leave to appeal:

> "*3(1) Where an appeal lies only by leave of the Court or of the Supreme Court, any application to either Court shall be made by notice of motion ex parte in the first instance and the following provisions shall apply:*
>
> *(a) where the application is made to the Supreme Court, the notice of motion shall be filed with the Registrar of that Court not late(r) than fourteen days after the date of the decision of the Supreme Court;*
>
> *(b) if the application is refused by the Supreme Court and the intending appellant desires to apply to the Court for leave to appeal, he shall file his notice of motion with the Registrar not later than seven days after such refusal;*
>
> *(c) unless the application (whether to the Court or to the Supreme Court) is dismissed or it appears to the Court to which the application is made that undue hardship would be caused by an adjournment, that Court shall adjourn the application and give directions for the service of notice thereof upon the party or parties affected;*
>
> *(d) if leave to appeal is granted by the Supreme Court, the appellant shall file a notice of appeal;*
>
> *(e) where leave to appeal is granted by the Court, the time, prescribed by Rule 2 of this Order, within which notice of appeal must be filed shall run from the date when such leave is granted.*

(2) Every notice of motion filed in pursuance of paragraph (1) of this Rule shall set out the grounds of the application and shall be accompanied by an affidavit in support thereof and by a statement of the grounds of the intended appeal formulated in accordance with Rule 2 of this Order."

Applicable test in determining Application for Leave

84. In *Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd [2007] Bda LR 81*, the learned Chief Justice Mr. Ian Kawaley, as he then was, cited with approval the case of *The Iran Nabuvat [1990] 1 WLR 1115*, in which Lord Donaldson of Lymington stated the testfor leave to appeal; *"no one should be turned away from the Court of Appeal if he had* ***an arguable case*** *by way of appeal" (p. 1117 – emphasis added)* and *"That is really what leave to appeal is directed at, screening out appeals which will fail."*

85. I agree that this is the test to be applied in determining the merits of an application for leave to appeal.

Single Justice of Appeal may determine Interlocutory matters

86. Section 14 of the 1964 Act reads:

"*To the extent prescribed by Rules the powers of the Court of Appeal to hear and determine any interlocutory matter may be exercised by any Justice of Appeal in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions:*

Provided that every order made by a Justice of Appeal in pursuance of this section may, on application by the aggrieved party and subject to any Rules, be discharged or varied by the Court of Appeal."

87. Order 2/38 of the Rules of the Court of Appeal provides:

"*38 (1) In any cause or matter pending before the Court, a single Judge may hear, determine and make orders on any interlocutory application.*

(2) Any order made by a single Judge in pursuance of this rule may be discharged or varied by the Court on the application of any person aggrieved by such order."

Decision

88. Having heard Counsel's submissions and having reviewed the grounds of appeal stated in the Notice of Motion for leave to appeal filed on 25 February 2019 and Mr. Pettingill's first affidavit in support, I find as follows:

    (i) Leave to appeal on Ground 1 is refused as there is no reasonable argument available to the Intervener Applicant that the non-disclosure of documents is the fault of the Court or any other party other than itself. Non-disclosure of documents to the Intervener Applicant is a result of its own omission to file a Court search praecipe since having been joined to the proceedings on 22 November 2018. Further, no reasonable steps were taken by the Intervener to be served with all Court documents by the First-Third Applicants. I also accept Mr. Williams' submission that my decision to refuse the adjournment on this basis was a reasonable exercise of my judicial discretion and not an error of law.

    (ii) Leave to appeal on Ground 2 is refused as I find there no arguable point has been demonstrated to the Court that the protocol access summons should be adjourned on the basis of a substantive judicial application not yet filed with the Court. The Intervener Applicant has had the opportunity since November 2018 to file an application for leave to apply for judicial review and has not done so. Alternatively, the Intervener Applicant has, to date, still not filed an application before the Court for a finding that it is entitled to latch on to the previous order of Mr. Justice Hellman wherein he granted the First-Third Applicants leave to apply for judicial review in the form of the Form 86A exhibit. Again, I accept Mr. Williams' submission that my decision to refuse the adjournment on this basis was a reasonable exercise of my judicial discretion and not an error of law.

    (iii) Leave to appeal on Ground 3 is refused as no meritorious argument was raised which would have enabled the Court to reasonably refuse the First Respondent's proposed protocol.

89. Unless either party wishes files a Form 31D within 7 days to be heard on costs, costs on a standard basis is granted to the First Respondent to be taxed if not agreed.

Dated this 1st day of March 2019

SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT