

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANGUILLA CIRCUIT
(CRIMINAL)
A.D. 2020**

AXAHCR 2020/0009

BETWEEN:

REGINA

AND

GLENVILLE NKOMO KENYATTA HODGE

Appearances:

Mr. Tim Prudhoe with Mr. Carlyle Rogers of counsel for the Applicant
Mr. Thomas W.R. Astaphan QC, with Ms. Erica Edwards of counsel for the Crown
Mr. Dwight Horsford, Attorney General with Mr. Sasha Courtney Crown Counsel
intervening

2020: October 5; 16;
December 8.

- [1] **INNOCENT, J.:** Mr. Glenville Nkomo Kenyatta Hodge ('Mr. Hodge') the defendant, and the applicant in these proceedings, through his counsel, filed an application for the recusal or disqualification of the presiding judge from presiding over his criminal trial and hearing any further bail applications concerning him (the 'Recusal Application').
- [2] The grounds relied on by Mr. Hodge in support of the Recusal Application are as follows:
- (a) That the Applicant's Counsel has filed with the Judicial and Legal Services Commission ('JLSC') three formal complaints; the first two dated 7th August 2020 and the third complaint dated 22nd August 2020 respectively for breach of judicial canons 1, 2 and 3 (the 'Complaints') related to statements made by the presiding judge during earlier bail hearings made by the Applicant and specific findings of fact which indicate apparent bias.

(b) Further and in the alternative, the presiding judge made the following specific findings of fact in his earlier rulings against the Applicant that indicate apparent bias; and that the presiding judge has predetermined matters such that there is the appearance that he will not approach a future hearing and the trial involving the Applicant with an open mind.

- [3] In order to place the Recusal Application within its appropriate factual context it will be necessary to set out the chronology of events that preceded the Recusal Application.
- [4] Mr. Hodge was charged with the offence of murder on 11th September 2019 and remanded into custody on even date.
- [5] On 19th November 2019, Mr. Hodge filed an application before the High Court for admission to bail.¹ Bail was denied after the court heard and considered full written and oral arguments by counsel appearing for Mr. Hodge and counsel appearing for the Crown. The reasons for the denial of bail to Mr. Hodge were set out in a full written judgment of the court delivered on 16th December 2019.
- [6] Mr. Hodge subsequently filed an appeal against the court's decision denying him bail. This appeal was not pursued ostensibly because of the implications of section 29 of the Supreme Court (Anguilla) Act which proscribed the making of an appeal at this stage of the proceedings.
- [7] On 7th February 2020, Mr. Hodge filed a subsequent application which was heard and determined by the same judge of the High Court who had previously denied him bail.² On this subsequent application for bail Mr. Hodge was again denied bail for the reasons set out in the court's judgment delivered on 7th May 2020.

¹ AXAHCV 2019/0053

² AXAHCV 2020/0008

- [8] On 18th May 2020, Mr. Hodge filed a third application for admission to bail before the same judge who had heard and determined the previous two bail applications.³ Mr. Hodge's application for admission to bail was denied for the reasons contained in the full written judgment delivered by the court on 21st August 2020.
- [9] Mr. Hodge was committed to stand trial before the High Court on 11th June 2020.
- [10] Mr. Hodge stands charged with the offences of murder and rape on an indictment dated 4th August, 2020 and filed 5th August 2020.
- [11] Mr. Carlyle Rogers ('Mr. Rogers') one of the lawyers appearing for Mr. Hodge, wrote directly to the judge who has heard and determined Mr. Hodge's several bail applications by letter dated 23rd August 2020.⁴ It will be necessary at this juncture to refer to the full text of this letter. Mr. Rogers' letter was in the following terms:

"Request for Recusal of Your Lordship in all matters involving Mr. Glenville Nkomo Kenyatta Hodge, a prisoner on remand at Her Majesty's Prison

We act as Solicitors for Mr. Hodge referenced above. Yesterday we filed the final of three complaints against you for breach of Judicial Canons 1, 2 and 3 with the Judicial and Legal Services Commission on the grounds set out therein.

As a result of these complaints, we request that you recuse yourself in all matters related to our client especially the upcoming review of his remand on 6th October 2020. We trust that in light of these complaints, you will exercise the necessary prudence to ensure that our client receives a fair hearing and recuse yourself in the interest of justice.

We also request that you do so with sufficient notice to us so that both parties in this matter can seek from your replacement, the necessary directions as to what we need to do in terms of preparing for the said review granted that such a procedure, as far as we are aware, has never been followed in this jurisdiction before."

³ AXAHCv 2020/0027

⁴ Exhibit GH1 – 1st Affidavit of Mr. Hodge filed 15th September 2020

This was the first occasion that the presiding judge had any indication of complaints having been made to the JLSC by Mr. Hodge's legal practitioner.

- [12] On 15th September 2020, the Recusal Application was filed.
- [13] It appears that the two grounds relied on in support of the Recusal Application are to great extent interrelated. The second ground relied on relates to the contents of the written judgment of the court dated 16th December 2019 wherein at paragraph [5] thereof states "The Applicant and Ms. Goodwin were estranged lovers. There was a history of domestic violence between them".
- [14] In support of the second ground reliance is placed on what is contained in the written reasons delivered by the presiding judge on 21st August 2020 in respect of the third bail application, namely that "the Applicant cannot be admitted to bail, even with conditions, because the prosecution's evidence is so strong that if bailed, there exist the likelihood that he will abscond." Specifically the impugned remarks are contained at paragraphs [81], [82] and [85] of the presiding judge's written reasons for the refusal of bail.
- [15] Although the court has not had sight of the complaints made to the JLSC and neither was the same exhibited or disclosed in the present application for recusal, it is more than safe to assume, given the reliance on the Code of Judicial Ethics, it appears that they relate to the comments made by the judge in his reasons for refusing Mr. Hodge bail contained in the written judgments delivered in respect of the several bail applications made by Mr. Hodge.
- [16] It appears that the application for recusal is not premised on any allegation of actual bias but rather on apparent bias on the part of the judge in respect of both grounds one and two.
- [17] The issue that arises on the present application is whether any of the grounds relied on by Mr. Hodge can meet the threshold of the litmus test for apparent bias requiring

the disqualification of the judge from hearing any or any further bail application pursued by Mr. Hodge and presiding at Mr. Hodge's trial for that matter.

[18] In applying the test for apparent bias it is immaterial whether the parties or counsel appearing for Mr. Hodge themselves apprehend the existence of apparent bias on the part of the judge. It is also irrelevant whether the judge himself perceives that he may or may not have created the impression of apparent bias on his part to the extent that he has come to the proceedings with prejudgment of any issue or fact such that he cannot adjudicate on the matter with an open mind.

[19] It is without doubt that enshrined in the Constitution is a party's right to a fair hearing before an independent and impartial tribunal. There is no disagreement as to the time honoured test for apparent bias among the parties in the present case. The case law is replete with the appropriate distillation of the test. The test for apparent bias was distinctly identified in the case of **Potter v Margill**.⁵

Complaints to JLSC

[20] It appears that relative to this ground for recusal, Mr. Hodge does not rely on the strength or otherwise of the complaints made to the JLSC, but instead on the fact of the complaints having been made as the basis for alleging apparent bias.

[21] Mr. Tim Prudhoe ('Mr. Prudhoe') counsel for the Applicant, submitted that the complaints made to the JLSC were in fact that of Mr. Hodge's legal practitioner Mr. Rogers, and not that of Mr. Hodge. This much can be gleaned from Mr. Hodge's first affidavit in support of the application for recusal.⁶

[22] Mr. Prudhoe drew the court's attention to correspondence from the JLSC in response to the complaints made by Mr. Hodge's legal practitioner dated 7th October

⁵ [2002] 2 AC 357

⁶ At paras. 1 and 2 1st Affidavit of Mr. Hodge filed 15th September 2020

2020.⁷ According to Mr. Prudhoe, notwithstanding that the correspondence from the JLSC was indicative of the fact that the complaints had not met the required threshold to establish misconduct on the part of the judge, it does not say that the complaints were groundless or misguided.

[23] Before dealing fully with Mr. Prudhoe's submission on this point it is necessary to contextualize the nature of the complaints made to the JLSC by examining the substance of the Code of Ethics for Eastern Caribbean Supreme Court Judges (the 'Code of Ethics') the alleged breach of which informed the complaints made by Mr. Rogers.

[24] Canon 1 of the Code of Ethics states:

"An independent and honourable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."

[25] The main objects of Canon 1 of the Code of Ethics are contained at paragraphs 1 and 2, which state:

"1. Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favour. Although judges should be independent, they should comply with the law, as well as with the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary.

2. These Canons are rules of reason. They should be applied consistent with constitutional requirements and other law, and in the context of all relevant circumstances. The Code is to be construed so as to enhance the essential independence of judges in making judicial decisions."

[26] The provisions of Canon 1 of the Code of Ethics is subject to a most important proviso which reads as follows:

⁷ Exhibited at para 1 2nd Affidavit of Mr. Hodge filed 9th October 2020

“The purpose of the Code would be subverted if the Code were invoked by lawyers or litigants for mere tactical advantage in a proceeding.”⁸

The court will deal explicitly with this very salient aspect of the code of judicial ethics later on in this judgment.

[27] Canon 2 of the Code of Ethics deals substantively with the question of actual bias and the conduct of judicial officers in their professional and personal life, both as it relates to court proceedings and in public life.

[28] Canon 3 of the Code of Ethics deals with among other things the basis for disqualification of judges, and provides:

“1. A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances in which: 1. the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

[29] It appears from a proper reading of the full text of Canon 3 of the Code of Ethics that it encompasses a guide for judicial officers to avoid the appearance of actual and apparent bias in the conduct of affairs in their personal and public life.

[30] Therefore, it is the court’s view that the substance of the present recusal application is markedly different from what is contemplated by Canons 2 and 3 of the Code of Ethics. The court has arrived at this view quite reservedly given that the substance of the several complaints made to the JLSC is still a mystery.

[31] Mr. Prudhoe has offered up an explanation for the nondisclosure of the complaints made to the JLSC. In his written submissions, Mr. Prudhoe explained that the fact that the complaints were made is sufficient grounds for recusal and that in essence the substance of the complaints were irrelevant to the application for recusal.

⁸ Para 5 Canon 1 Code of Ethics

- [32] The court understood Mr. Prudhoe's position to be, that the mere fact of the complaints having been made without more, is sufficient to disqualify the judge in the manner contemplated by the present application. The court understood Mr. Prudhoe's argument to be, that the mere fact that the complaints were made would cause a fair minded and informed observer, having considered the relevant facts, to conclude that there exist a real possibility that the judge was biased, by reason of prejudgment, such that he could not approach his task with an impartial and open mind. The court has sought to make the connection between the complaints and the possibility of apparent bias.
- [33] It will be recalled that the complaints, the substance of which are still unknown, were made by Mr. Rogers, apparently in his own right, and not necessarily upon the instruction of his client. It appears from what has been canvassed before the court in respect of the present application, suggest that in some way or the other, the court would give the appearance of apparent bias on the part of the judge to the extent that a fair minded and informed observer would conclude that the fact of the complaints having been made by Mr. Hodge's legal practitioner, there exist a real possibility that the judge was either biased towards Mr. Hodge or his legal practitioner and that the court could not conduct the proceedings with an open and impartial mind.
- [34] If the court's interpretation of Mr. Prudhoe's argument is correct, then clearly the apprehension of bias would be that of Mr. Hodge's legal practitioners which somehow has been transferred to Mr. Hodge. This raises a very important point, the substance of which must be assessed in light of what is contained in Mr. Hodge's first affidavit.
- [35] The court has examined the contents of Mr. Hodge's first affidavit, particularly what is contained at paragraph 3 thereof. Mr. Hodge states at paragraph 3 of his first affidavit as follows:

“Without the continued assistance of my Solicitors, I fear that I will be unable to obtain legal representation for the charges of murder and rape that I now face. ... My current solicitor Mr. Rogers, is the only member of the Bar who offered me legal representation and he did so (and continues to do so) on a pro bono basis due to my inability to pay for it. I would wish him to continue to be my solicitor in all my legal matters going forward including and essentially the hearing in this matter scheduled for 6.10.2020, any renewed application for bail and my upcoming trial for murder and rape.”

- [36] Therefore, it appears that Mr. Prudhoe’s argument in relation to the complaints, when juxtaposed to the contents of Mr. Hodge’s affidavit, is capable of leading to the conclusion that the apprehension and or danger of bias arises within the context of Mr. Hodge’s legal practitioners complaints to the JLSC somehow being likely to cause a fair minded observer with knowledge of the relevant facts to conclude that the court was bias, insofar as the fact of the complaints having been made would prejudice the judge’s mind against Mr. Hodge’s legal practitioners. It appears to be on this basis that the application seeks to impugn the judge’s impartiality.
- [37] An important aspect of meeting the real possibility test, which bears on its support of public confidence in the judicial system, is the requirement to be specific concerning the perceived connection between the circumstances giving rise to concern and whether they establish the reasonable possibility of apparent bias or impartiality.
- [38] Therefore, in relation to the complaints made to the JLSC, the facts in relation to the association relied on must be spelt out, as well as why it is reasonable to be concerned that they, objectively, might lead the judge to decide the case other than on its merits. Establishing the existence of an association is never of itself enough to disqualify a judge. It must be shown that its nature is such as to cause concern objectively that it may influence the judge’s decision making.
- [39] The requirement of articulation of the connection ensures that disqualification is not established through a superficial impressionistic reasoning. In other words, the public can be reassured that parties or litigants are not able to change composition

of the court, or to have cases reheard following an unfavourable decision unless there is sound reason, based on principle for that course. While the test is one of possibility and not probability, it is not enough that the circumstances create a vague sense of unease or disquiet. It is always for the person who asserts there is a situation giving rise to a real possibility of bias to firmly establish that is indeed the case.

- [40] The veiled suggestion in the present case appears to be, that the mere fact that the complaints were made, leads ineluctably to the conclusion that a fair-minded and informed observer having considered all of the relevant facts would conclude that there exist a real possibility that the judge was biased such that he could not approach the task of conducting a fair and impartial trial or hear Mr. Hodge's bail applications with an open mind.
- [41] The court is mindful of the fact that our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel. In short, counsel are not judged. They are rather, a trusted element of the judicial process.
- [42] It is important to bear in mind that the law's approach to apparent bias immediately invites the party making the allegation to answer the question why the observer could reasonably think the judge might be bias. The question must be answered in an analytical way rather than as a matter of general impression or presumption. Whatever the grounds for the allegation of apparent bias may be, the reconciliation of a judge's duty to sit with the need sometimes to recuse, depends on a careful and logical factual examination rather than relying on instinctive reactions to facts superficially addressed. The subjective perceptions of the litigant, and or his counsel, claiming apparent bias are not relevant to the inquiry.
- [43] Mr. Prudhoe in the course of argument has taken the view that the recusal application was made at the first available opportunity. That proposition may to

some extent be true. However, given the approach to recusal outlined above, and which in this instance was not followed by Mr. Hodge's legal practitioner, coupled with the fact that the impugned remarks of the judge contained in his written reasons for decision concern the first and third bail applications, it appears seemingly odd that no recusal application was made after the decision handed down by the judge on the first bail application.

[44] The timing of the application for recusal relative to the timing of the complaints made to the JLSC raises some concerns. In light of the fact that the present application for recusal touches and concerns comments made by the judge in the written reasons contained in the judgment delivered with respect to the first bail application, it appears that Mr. Hodge made no recusal application with respect thereto but instead filed a second bail application shortly thereafter before the same judge. At this juncture no complaint was made to the JLSC.

[45] It was only after the third bail application and while the decision in that matter was pending that the first two complaints were made to the JLSC. The substance of which said complaints raises cause for speculation. In addition, Mr. Rogers registered the first two complaints to the JLSC only two days after Mr. Hodge was indicted.

[46] It was merely a day after the third judgment was delivered with respect to the third bail application that Mr. Rogers issued the third complaint to the JLSC. It is also seemingly odd, that only two days after the delivery of the judgment consequent on the third bail application that Mr. Rogers wrote to the judge in what can only be described as a letter written in unceremonious terms and conveyed in an unceremonious manner not in keeping with the traditions and high standards of decorum expected of the legal profession.

[47] The court's assessment of the chronology of events preceding the recusal application is informed by the principle that it is of paramount importance that judicial

officers discharge their duty to sit and do not, by acceding 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.

[48] Therefore, it is of particular relevance to the administration of justice that judges should not automatically disqualify themselves in response to litigants' and or their counsels' suggestions that there is an appearance of lack of impartiality. Judges allocated to sit in a case have a duty to do so unless they are disqualified. If a practice were to emerge, where judges disqualified themselves without having good reason, litigants may be encouraged to raise objections which are based solely on their desire to have their case determined by a different judge who they think is more likely to decide in their favour. Such a development would soon raise legitimate questions concerning breach of the rights of others.

[49] It must also be borne in mind 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 the guidelines for judicial conduct. A failure to do so, though it may be open to criticism, may well have no bearing on the question of apparent bias.

[50] Even more importantly, and relevant to the present case, the matter is not to be tested by reference to individual and 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.

[51] The court does not state affirmatively or otherwise that this was the intention of the parties in the present case. Furthermore, any suggestion of "forum shopping" or "judge shopping" raised implicitly or otherwise by the peculiar circumstances of the present case is overshadowed and outweighed by the overarching principles that

ought to guide the court in determining an application for recusal. In particular, that a fair-minded and informed observer having knowledge of all the relevant facts, may conclude that there is a real possibility of bias on the part of the judge such that he could not approach his task with impartiality in light of the complaints made to the JLSC.

[52] However, assuming that the complaints made to the JLSC touched and concerned the very matters complained of in the second limb of the present application for recusal, it appears seemingly odd, that experienced counsel rather than having made an application to the judge for recusal instead registered complaints to the JLSC, not only with respect to the penultimate decision on Mr. Hodge's third bail application, but also with respect to the first bail application. It seems more than passing strange that the complaints to the JLSC were on substantially the same grounds as advanced in the present application, would have preceded an application for recusal being made to the judge in the first instance.

[53] The course of conduct and the procedure employed by Mr. Hodge's legal practitioners in seeking the disqualification of the judge, prior to the application for recusal, raises the clear suspicion that the complaints to the JLSC were employed as a strategic means of creating a ground for the disqualification and recusal of the judge in the present application. It would be entirely impermissible for the court to countenance such a practice which has the tendency to subvert the due administration of justice.

[54] In this regard, the court has adopted the sentiments expressed by the Privy Council in the case of **Stubbs v The Queen**⁹ where Their Lordships said:

“...The Board wholeheartedly agrees with the Court of Appeal that a judge should not recuse himself unless there is a sound reason for recusal, lest unmeritorious applications for recusal become the norm and result in damage to the administration of justice. In particular, it is necessary to stand

⁹ [2019] AC 868

firm against illegitimate attempts to influence which judge shall sit in a particular case....”

- [55] At paragraph [17] of the judgment in **Otkritie International Investment Management Ltd and others v Urumov**¹⁰ Longmore LJ relied on the decision in **Bahai v Rashidian** where the claimant’s solicitor had given evidence in support of the claim and the judge had been very critical of that evidence. The defendant sought an order that the solicitor be jointly liable with his client for the defendant’s costs and the solicitor asked for the application to be heard by a different judge. The judge refused to make that order. In this court Sir John Donaldson MR said:

“I accept that it must always be open to a judge to decline to proceed further with the hearing of any matter on the grounds that he is personally embarrassed by, for example, an appearance of bias. Subject to that, I have no doubt that it was the duty of (the trial judge) having heard and determined the issues in the action, himself to determine all applications as to the costs of the action . . . the fact that a judge has determined the issues in the action and in doing so has expressed views on the conduct of the parties and of the witnesses, neither constitutes bias nor the appearance of bias in relation to subsequent applications in the action If the application can only be sustained by proof of serious misconduct or crime, the standard of proof should be higher than would otherwise be the case, but, subject to that, the application should be dealt with the same way as would any other application for costs against a solicitor.”

- [56] Parker LJ dissented as to the result on the particular facts of the case, but agreed as to the principle, saying at page 1343G “Save in exceptional circumstances, it will be for the judge, who heard the case ... to determine the matter on a subsequent hearing ... there can be no doubt of this, the judge is dealing with the costs of an action which he has himself heard.” Balcombe LJ agreed with Sir John Donaldson, saying at page 1346D:

“I accept that the judge has a discretion to direct that the application be heard by another judge, but the discretion is a judicial one, to be exercised in accordance with settled principles, of which one is undoubtedly that the application should be tried by the judge who heard the action unless there are compelling reasons to the contrary A judge properly exercising his judicial function, e.g. by criticising the conduct of a party’s solicitor in the

¹⁰ [2014] EWCA Civ 1315

course of his judgment on a matter which he considers relevant to his decision, cannot by that process be said to be biased. Bias is the antithesis of the proper exercise of a judicial function If such an application has to be heard by another judge, the procedure will lose its summary character. It will become even more expensive and time consuming than it is already, and the Defendants are justified in their contention that the remedy of the party damnified by the solicitor's misconduct will become illusory."

[57] In **Dobbs v Triodos Bank NV**¹¹, the applicant made a second application which was for the proceedings to be stayed generally. He put that application, first, on the very general assertion that any member of the judiciary -- and in particular any member of this court would not be impartial in relation to his litigation because of the criticisms which he made in his proceedings in Strasbourg. Those were criticisms which, included the criticism that the judiciary was likely to favour arguments advanced by professional advocates from the Bar or the solicitors' profession, against arguments advanced by unrepresented litigants. Mr. Dobbs advanced the position that his criticisms were directed, in particular, at one of the judges personally. That, he contended, stemmed from that judge's conduct in relation to a hearing on an application for permission to appeal in related proceedings. The application was refused.

[58] In the case of **Dobbs** it was held that:

"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 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

¹¹ [2005] EWCA Civ 468

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.

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. So the second application is also refused.”¹²

[59] The reasoning in **Dobbs v Triodos Bank NV** was followed in **Ansar v Lloyds TSB Bank plc and others**¹³ the court considered the decision in **Dobbs v Triodos Bank NV** related to an application for recusal because of criticism directed at Chadwick LJ personally, and made by way of complaint to the European Court of Human Rights in Strasbourg. Chadwick LJ, in giving the judgment of the Court of Appeal on preliminary issues, on 15th April 2005, records the criticism which Mr. Dobbs informed the court he was making in those proceedings in Strasbourg, at para 6:

“He tells ... us that his criticisms are directed, in particular, at me personally. That, he says, stems from my conduct in relation to a hearing on an application for permission to appeal on related proceedings ...”

[60] At paragraph 22 in **Ansar v Lloyds TSB Bank plc and others** Burton J said:

“We do not accept either of these propositions. First, it is quite clear that it is not suggested in this case that what the claimant is doing is part of any overall tactic, but the application of Chadwick LJ's approach, which is entirely consistent with the earlier Court of Appeal decision in *Locabail* [2000] QB 451, is that, as a matter of policy, courts should not yield too easily to applications for recusal, because of the inevitable knock-on effect which Chadwick LJ described. Even if it is appropriate for one judge to recuse himself because of the particular nature of the complaint made, it must not and cannot become a principle that every judge must recuse himself simply because a complaint is made. We shall return to this aspect

¹² At paras 7-8

¹³ [2006] ICR 1565

below. Secondly, we do not accept that there is a distinction between a case where the complaint is that a judge or tribunal has acted perversely in reaching an earlier decision hostile to the party making the application for recusal, and one where the complaint is of bias or misconduct in so doing. If the objection is, as it is, based upon whether the “fair minded and informed observer [would] conclude that there is a real possibility that the tribunal will not bring an open mind and objective judgment to bear” then there must be something of substance to cause that observer to reach that conclusion. In our judgment, it is not necessarily more likely that a judge will be concluded to have a closed mind if he is accused by the party in front of him of having previously been biased, than if he is accused by that party of having made a decision which is so stupid that no reasonable person could possibly have arrived at it.”

[61] The reasoning of Burton J in **Ansar v Lloyd's Bank plc and others** is of particular relevance to the present recusal application. This is the case particularly in view of the position advanced by Mr. Prudhoe that the mere fact that the complaint had been made to the JLSC was sufficient for the judge to disqualify himself from the proceedings. The reasoning of the court answers Mr. Prudhoe's proposition. Burton J delivering the judgment of the court said:

“We turn then to the dicta of Cox J in *Breeze Benton Solicitors (A Partnership) v Weddell* (unreported) 18 May 2004, referred to in proposition 7 above. This was a decision by the Employment Appeal Tribunal upon which the claimant places reliance. The facts in that case were that a chairman was asked to recuse himself by an employer who had, in respect of a hearing a year before, made a complaint to the regional chairman and the Lord Chancellor's Department as to the chairman's conduct of that hearing. Cox J, at para 12, recites the content of the relevant affidavit:

“In his affidavit Mr Reilly alleges that, during the discussion which took place between them and before any evidence was called in the case, the chairman made a number of disparaging remarks about both him and the respondent firm. In particular, it is said that the chairman stated that he was surprised that the respondent was still in business; that he suggested that the claims were only being defended because the respondent was in financial difficulties and shortly to become insolvent; and further that he said he found the behaviour of the respondent and of Mr Reilly difficult to understand, unprofessional and not the conduct of a solicitor. The chairman does not accept that he made these comments and we shall return to this dispute later.

“13. As a result of the chairman's conduct towards him during this preliminary period, Mr. Reilly states that he considered these comments to be entirely prejudicial to the respondent's position and that his role as an advocate in the case had been undermined ...”¹⁴

[62] Burton J went on further to say:

“Cox J also pointed out (at para 48 of her judgment) that, after the earlier hearing, the tribunal had found Mr. Reilly's conduct to be vexatious, that is pursued for an improper motive amounting to an abuse of the procedure, expressing itself in what Cox J described as “trenchant and critical terms”. *Breeze Benton* is not of course binding on us, although we, as always, pay due regard to another decision of this appeal tribunal, but what we entirely disagree with, and indeed regard as inconsistent with authority-although particularly inconsistent with what is in fact later authority, namely *Dobbs*, which, for that reason, could not be put before Cox J-is what Cox J said at para 47, namely:

“Secondly, the very fact that Mr. Reilly had complained about the chairman's conduct made it inappropriate that the chairman should sit. The significance of the complaint lay in the fact that it had been made and that the chairman knew that he had complained and was aware of the specific allegations made about his conduct.”¹⁵

[63] Burton J delivering the judgment of the court in delivering the judgment in **Ansar v Lloyds Bank** had this to say:

“It was that dictum which appears to have influenced Judge McMullen QC in a judgment he gave on 29 September 2005 on a rule 3(10) application in *Deman v Association of University Teachers* (unreported) 29 September 2005, when he said, at para 11:

“I have been made aware today of the complaint which is sought to be made against me. I understand that the complaint was made some time ago but while the Court of Appeal was seised of the matter, steps were no longer being taken. The Court of Appeal ... refused leave to Mr Deman to appeal against my judgment and refusal to review it, dismissed his allegation of bias as totally without merit and imposed the civil restraint order. According to the letter, the complaint to the Lord Chancellor will now be re-activated; and

¹⁴ At para 23

¹⁵ At para 24

so I am in the same position as the chairman in the *Breeze Benton* case.

“12. It seems to me that given the very long procedural history of this case, if there is a possibility that the matter can be handled by another judge, it ought to be taken rather than any distraction be introduced into the merits of Mr. Deman's case by consideration of whether or not he is having a fair hearing ...”

“14. It seems to me that no harm will be done by my standing aside from this case.”¹⁶

[64] The court in **Ansar v Lloyds Bank** criticised the approach mentioned above, and Burton J stated:

“We respectfully but firmly disagree with that approach, and we note that it was Judge McMullen QC himself who drew the attention of the parties in this case to the Court of Appeal's judgment in *Dobbs* [2005] EWCA Civ 468, which had not been cited to him in *Deman* .

In this case, we must, as we stated in para 10 above, look at what the position was when this application for recusal was made. There was an outstanding complaint (in the two letters, as in *Breeze Benton*, both to the regional chairman and to the Department of Constitutional Affairs), and in the notice of appeal, of bias and/or misconduct against Mr. Kolanko as chairman of the very recent 36-day hearing. Those allegations had not been, and could not be, until the hearing of the appeal which has only now taken place, resolved. What was necessary was to look at the nature of those allegations, and to see whether their making rendered it inappropriate for the case to proceed within the confines of the authorities to which we have referred. The nature of the allegations may, on occasion, be decisive, although it does not follow that, even if an allegation of wholly outrageous conduct, such as the taking of a bribe, were made, that that would necessarily qualify as a ground for recusal, if it was manifestly fanciful or unfounded. But the allegations in this case were in any event not of that kind. We have analysed them in detail in our first judgment, and found that they are without substance, but even at a time when they had not yet been adjudicated, it could be seen that they fell into the three categories which we have described in para 31 of that judgment: criticism of the allegedly one-sided approach of the chairman to the making of directions or orders, the conduct of the hearing and the control over leading questions and cross-examination, the exemplars being given amounting to a smattering of

¹⁶ At para 25

alleged occasions over a 36-day hearing, with “one of the clearest examples of apparent bias” being said to be that on one occasion, while counsel for the respondent was on his feet and it was intended to take a mid-morning break, it was at that counsel that the chairman nodded to indicate a suitable time to rise.

We have no doubt whatever that the regional chairman was correct not to respond to the claimant's application, prior to the hearing, to alter the chairman, and to direct the chairman to sit, and that the chairman was correct to form his own conclusion that he was not obliged to recuse himself. The claimant pointed out that two of the matters mentioned by Cox J in *Breeze Benton* were satisfied, namely the factual connection between the two hearings was similar, and the fact that little time had passed. However *Amec Capital Projects Ltd v Whitefriars City Estates Ltd* [2005] 1 All ER 723 makes clear that it may well make no difference, even if the factual matrix of the two hearings is identical, and as for the passage of time, this is not a case, as in *Lodwick*, where any issue relating to the passage of time would be relevant. In our judgment, the existence of the complaints, and the nature of those complaints, did not render it necessary or appropriate that the chairman should stand down or decline to hear the case; and there was nothing more (to import the *Locabail* and *Lodwick* inquiry).¹⁷

The Impugned Remarks

[65] Mr. Prudhoe, in his written submissions contended that based on the test for apparent bias, a real danger of bias might well be thought to arise if on any question at issue in the proceedings before the judge, the judge had expressed views, particularly in the course of the hearing, in such terms as to throw doubt on his ability to try the issue with an objective mind.

[66] It is stated in the written judgment delivered on 16th December 2019 at paragraph [5]:

“The Applicant and Ms. Goodwin were estranged lovers. There was a history of domestic violence between them. At the time of her death Ms. Goodwin was in a new relationship.”

¹⁷ At paras 26-28

- [67] According to Mr. Prudhoe, this was a finding of fact adverse to Mr. Hodge and portrays evidence of a closed mind on the part of the judge. Mr. Prudhoe submitted that this was an unproven allegation and the judge did not treat it as such.
- [68] This statement made by the judge hearing the bail application was made within the context of what was canvassed by the prosecution in support of their opposition to the grant of bail to Mr. Hodge. This was an allegation contained in the affidavit of the Deputy Commissioner of Police Mr. Elliot Forbes ('Mr. Forbes'). At paragraph 2 (b) of his affidavit Mr. Forbes stated:
- “Ms. Taitu Goodwin (hereinafter the "deceased") and the Applicant were in a relationship for about two years. The relationship ended and the deceased was in another relationship at the time of the incident.”
- [69] At paragraph 3 of his affidavit, Mr. Forbes stated:
- “It is my knowledge that the deceased made previous reports against the Applicant but requested no official police action. The reports were reports by the deceased of physical violence upon her by the Applicant.”
- [70] Mr. Rogers who appeared for Mr. Hodge at the bail hearing sought to cross-examine Mr. Forbes in relation to what was contained at paragraph 3 of his affidavit.¹⁸
- [71] In the written reasons for refusing bail, the judge said at paragraph [22]:
- “Mr. Rogers appearing for the Applicant sought leave of the court to cross-examine these witnesses on the contents of their respective affidavits. Although the court granted him leave to do so, it is necessary for the court to state at this juncture that “the strict rules of evidence are inherently inappropriate in a court concerned to decide whether there were substantial grounds for believing something, such as a court considering an application for bail”¹⁹. However, the evidential burden rests on the party opposing bail. That evidential burden is on a balance of probabilities.”
- [72] The judge's comment was plainly by way of introduction or commentary and in no way formed any basis for the grant or denial of bail to Mr. Hodge. In fact, the judge pointed out at paragraph [22] of his written reasons that the strict rules of evidence

¹⁸ Transcript of Proceedings 13th December 2019 at p. 76 lines 13 – 25 and p. 77 lines 1 - 18

¹⁹ In re Moles [1981] 2 NZLR 738

are inherently inappropriate in a court concerned with deciding whether there were substantial grounds for believing that there exist the likelihood of any of the risk inimical to the grant of bail occurring.

[73] In this instance, the judge could not have been said to have made any finding of fact in relation to what is contained in the impugned statement because those facts clearly had no bearing on the issue of the grant or refusal of bail, and were merely by way of introduction and background to the proceedings. Therefore, it cannot be said that the judge made any finding of fact in relation to that issue which in any event would be a question of fact to be determined by a jury at the substantive trial and not by the judge.

[74] It is to be noted that nowhere in his written reasons did the judge rely on these facts in applying the appropriate test for the grant of bail.

[75] In the case of **Locabail (UK) Ltd v Bayfield Properties Ltd and another**²⁰ it was held that: "...if, in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakauta v Kelly* (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we

²⁰ [2000] 1 All ER 65

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.”²¹

- [76] Whether or not Mr. Hodge and the deceased were estranged or had a history of domestic concerns bore no relevance to the judge’s assessment of the considerations relevant to the grant of bail.
- [77] The judge’s remarks were based entirely on submissions and evidence canvassed before the judge on the hearing of the bail application. The issue respecting the relationship between Mr. Hodge and the deceased was specifically raised and explored in cross-examination by Mr. Hodge’s counsel at the bail hearing.
- [78] In addition, the statements sought to be impugned had no connection to the actual trial itself. Furthermore, whether these matters are relevant or probative of the guilt or innocence of Mr. Hodge, is entirely a matter for the jury at the substantive trial.
- [79] The statements attributed to the judge were not made within the context of the substantive trial to the extent that the fair-minded observer would apprehend the possibility of apparent bias on the part of the judge so that it can be said that the judge had closed his mind to an issue or question of fact, which in any event fell within the purview of the jury.
- [80] On the contrary, a fair-minded observer, having knowledge of all the facts, including that this was a bail application and that the proceedings were by no means determinative of the guilt or innocence of Mr. Hodge, was not likely to conclude that there was the real possibility of apparent bias on the part of the judge. Given the

²¹ At para 25

attributes ascribed to a fair-minded observer, it would be safe to conclude, given the context in which the remarks were made, that they were neither obliquely nor directly pointed towards any issue likely to arise at the trial. Instead they were made within the context of what the judge was required to examine and assess when giving consideration to a bail application. In other words, the fair-minded observer would be alive to the fact that this was a bail application and did not concern any matter or issue preliminary to or in the course of Mr. Hodge's trial.

[81] There is one observation that the court makes relative to the first impugned statement. The timing of the present recusal application, particularly as it relates to the first impugned statement raises the question of whether Mr. Hodge had waived his right to complain about the judge's remarks contained in his written reasons for the denial of bail.

[82] In **Vakauta v Kelly**,²² cited in **Guild v The Queen**,²³ Brennan, Deane and Gaudron JJ stated that when comments which give rise to a reasonable apprehension of bias are made, a party with legal representation is not entitled to stand by and wait until the contents of the final judgment are known before deciding whether to attack the judgment. By failing to object to the judge's remarks at the time they are made, the party waives any right to appeal against an adverse judgment on the ground of what was said at the trial.²⁴

[83] In addition, Mr. Hodge also sought to impugn what is contained at paragraphs [81], [82] and [85] of the judge's reasons for the denial of bail to Mr. Hodge. It appears that the impugned statement made by the judge has been either paraphrased or misquoted in Mr. Hodge's recusal application and in his affidavit.

²² (1989) 167 CLR 568 ('*Vakauta*').

²³ *Infra* at para 25

²⁴ *Vakauta* (1989) 167 CLR 568, 572. Toohey J made similar remarks: at 587–8. See also Kuek [2017] VSCA 329 [67].

[84] At paragraph 2 (ii) of the notice of application reference is made to the judge's written reasons delivered on 21st August 2020 and it alleges that the judge made the following remarks equivalent to findings of fact that:

"The Applicant cannot be admitted to bail, even with conditions, because the prosecution evidence is so strong that if bailed, there exists the likelihood that he will abscond."

[85] At paragraphs [81] and [82] of his written reasons the judge said:

"[81] The respondent placed before the court in the present application evidence obtained at the preliminary inquiry which was not before the court on any of the previous bail applications. The court considered this evidence relevant to the grant of bail insofar as it related to the strength of the prosecution's evidence. In the circumstances, it was necessary for the court to consider whether the strength of the evidence presented by the respondent amounted to substantial grounds for believing that any of the risks contemplated by the grant of bail to the applicant existed.

[82] The strength of the prosecution's evidence is relevant to whether an accused would surrender to custody, in the sense that one who knows that there is a good chance of being acquitted is less likely to abscond than one who anticipates almost certain conviction. It can be argued that there is no point in an accused absconding if an acquittal is likely in any event. Conversely, if the prosecution's case is strong, so that conviction is likely, the accused may be more likely to abscond than face conviction on trial. The present case is not a borderline case where the prosecution's evidence is strong but not overwhelming."

[86] The full text of the statement made by the judge at paragraph [85] which Mr. Hodge complains of in the application for recusal read:

"In the circumstances, and for the reasons set out in this judgment, the court's order is as follows:

1. The application for admission to bail is denied for the reasons set out below.
2. The court is of the view that there are substantial grounds for believing that the seriousness of the offence creates the likelihood of the risk of the applicant absconding or failing to surrender to custody if admitted to bail which cannot be curbed by the imposition of conditions attached to the grant of bail.

3. The strength of the prosecution's case is a substantial ground for believing, that if bail is granted to the applicant, subject to conditions or not, there exist the likelihood of the applicant failing to surrender to custody."

[87] Mr. Prudhoe submitted that at paragraph [76] of the judge's written reasons on the third bail application quite rightly recognized the need to avoid making any determination on the evidence likely to be lead at the trial. However, Mr. Prudhoe argued that at paragraph [77] of the said written reasons, the judge expressly relied on the strength of the evidence as to Mr. Hodge's guilt as the basis for denying bail insofar as it presented the likelihood of the risk of Mr. Hodge absconding.

[88] At paragraphs [76] and [77] of the judge's written reasons on the third bail application he said:

"[76] The applicant has sought to challenge the strength of the evidence against him and in so doing vehemently denied that he committed the offence.²⁵ In fact, during oral submissions Mr. Prudhoe indicated that the available evidence, when taken in light of the applicant's third affidavit, suggests that an arguable case of self-defence is made out. The court having reviewed the evidence contained in the applicant's third affidavit will not endeavour to delve into the substance of the same in this judgment in the interest of fairness and justice to the applicant.

[77] However, having considered the affidavits of Mr. Forbes and the applicant's third affidavit, the court has concluded that the seriousness of the offence and the strength of the evidence of the applicant having committed the offence, there exist the likelihood of the risk of the applicant absconding or failing to surrender to custody which cannot be alleviated by the imposition of conditions on the grant of bail."

[89] In support of his contentions on this point, the applicant relied on the authorities of **Benjamin Exeter v Winston Gaymes**²⁶, **Almazeedi v Penner and another**²⁷, **Barry Hansen and others v Vincent Warner and others**²⁸, **Stubbs v The**

²⁵ At paras. 5-15

²⁶ Civil Appeal Nos SVGHC VAP 2016/0021 and 0022 ECSC CA June 13, 2017

²⁷ [2018] UKPC 3

²⁸ Civil Appeal No. 22 of 2001 CA TCI

Queen²⁹ and Keston Riley v The Attorney General and another³⁰. It is the court's humbly view that none of these authorities serve to buttress the recusal application. In arriving at this conclusion the court is mindful of the fact that in as much as the above cited authorities have laid down the principles to be applied on an application for the recusal of a judicial officer, there is also the clear legal position that each case must be assessed according to its merit and own peculiar facts and circumstances. Therefore, in the actual determination of the issue of recusal much depends on the particular circumstances of each case. The court has taken the view that the circumstances relied on by Mr. Hodge as the grounds for buttressing his arguments for the recusal of the presiding judge are quite distinguishable from the circumstances that existed in the authorities relied on in support of the present application.

[90] It appears that Mr. Hodge's complaint is not well founded. The judge's remarks in the written judgment delivered on 21st August 2020 have been paraphrased and misconstrued to mean that the judge commented favourably on the strength of the prosecution's case relative to that of Mr. Hodge. This is indeed not the case. The judge appeared to be stating one of the principles to be considered in applying the appropriate test for the grant of bail. Having attempted to paraphrase what the judge said seems to place the judge's remarks in an entirely different context from what it was meant and intended to be. The judge was merely performing an exercise which he was mandated to do when considering the grant of bail.

[91] In the court's view, the mere fact that the judge hearing the bail application had formed a view on the strength of the prosecution's evidence or the strength of the evidence of the defendant having committed the offence relative to the likelihood of the risk of the defendant absconding does not automatically give rise to grounds for disqualification. This is particularly the case since the judge hearing the bail

²⁹ [2018] UKPC 30

³⁰ [2020] ECSCJ No. 313

application would have made findings of fact or law that may not necessarily have any bearing on the substantive trial. More so, in a trial by jury the judge is not the arbiter of fact.

- [92] The case of **Hernan Manzanero v The Queen**³¹ is a perfect illustration of this point. In that case, a judge who conducted a judge alone trial made particular findings in a *voire dire* in relation to the defendant's credibility. On appeal, the critical issue which the Caribbean Court of Justice ('CCJ') had to consider was whether it could reasonably be said that an adverse finding on the appellant's credibility, made by the trial judge at the conclusion of the *voire dire*, resulted in the appellant having been denied a fair trial. Saunders PCCJ delivering the judgment of the Court said:

"...on the test of fairness in a judge alone trial where the judge has conducted a *voire dire*. The mere fact that a trial judge has made an adverse finding on the credibility of the accused on the *voire dire*, or has heard evidence which is prejudicial to or indicative of the guilt of the accused, does not lead to the inescapable conclusion that the accused has been denied a fair trial. In a judge alone trial, where the trial judge has conducted a *voire dire*, an appellate court must be satisfied that the trial judge, in determining the guilt of the accused, did not carry over to her deliberations on the main trial any adverse findings on the credibility of the accused, or was not improperly influenced in arriving at a guilty verdict by evidence which was prejudicial to or indicative of the guilt of the accused, and not ultimately admitted into evidence."³²

- [93] The same approach can be applied to a judge hearing successive bail applications or to a situation where a judge makes an adverse finding in the course of a bail application and later on goes on to conduct the substantive trial.

- [94] Saunders PCCJ went on further to conclude that:

"In determining whether the test of fairness has been met in this case, an appellate court is entitled to consider the following: the judge is an experienced professional trained to exclude from her mind any prejudicial material or inadmissible evidence to which she has been privy in assessing credibility or deciding other disputed issues."³³

³¹ [2020] CCJ 17 (AJ) BZ

³² At para [30]

³³ At para [31]

[95] The Honourable Mr. Justice Jamadar JCCJ delivering the concurring judgment in the case of **Manzanero** said in relation to the relevant test for apparent bias and the informed fair-minded observer:

“Such a hypothetical observer is assumed to know that a professionally trained judicial officer is ordinarily acknowledged to be impartial, independent, and capable of putting aside from their deliberations, evidence heard and/or findings made in prior proceedings in the same case, and of deciding the main case before them only on the evidence properly admissible in the main proceedings.”³⁴

[96] Applying the appropriate test for apparent bias, the question that arises is whether the remarks made by the judge supports the conclusion that having regard to the context in which the remarks were made, and all the surrounding circumstances, a fair-minded observer would conclude that there was a real possibility that the judge had made up his mind as to Mr. Hodge’s guilt or on any other issue of fact likely to arise at Mr. Hodge’s trial or that Mr. Hodge was guilty of the offences charged in the indictment by the time that he had delivered his reasons for the denial of bail and would not be willing to change his mind so that he could not conduct Mr. Hodge’s trial impartially; or that the judge had come to a concluded view on any issue or issue of fact such that he showed a closed mind or had taken a particular view of the evidence amounting to prejudgment.

[97] Ultimately, the question to be decided is not whether in fact the judge was prejudiced against Mr. Hodge or his counsel, which would amount to actual bias, which is not the contention on the present recusal application, instead the question to be decided is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the judge was biased such that he could not approach the remainder of the inquiry with an open mind.

[98] In the case of **JSC BTA Bank v Ablyazov and others (No 9)**³⁵ the judge heard an application to commit a defendant for contempt of court prior to trial. The court found

³⁴ At para [49]

³⁵ [2013] 1 WLR 1845

the contempt proven and sentenced the defendant to prison. On the question of whether the judge was precluded from acting as trial judge by reason of apparent bias which disqualified him from conducting the trial and whether the judge ought to have recused himself from conducting the trial, it was held that:

“...where a trial judge, who prior to trial has formed an expressed a view as to the credibility of a party or an important witness as a result of their cross-examination came to bear in mind his earlier finding and observations at the later trial; he would not be prejudiced by reference to extraneous matters but rather would be carrying out his judicial assessment of the litigation before him; that unless such a judge had committed some judicial error, such as the use of intemperate language, or some misjudgment which might set up a complaint of the appearance of bias, the fair minded and informed observer would be unlikely to conclude that there was a possibility of bias; and that accordingly the judge had been right not to recuse himself from further involvement in the litigation.”

[99] In relation to the situation where a judge has been involved in a case at the preliminary or interlocutory stage and has yet to conduct a trial or in cases where a trial has occurred and the judge has to consider consequential matters such as proceedings for contempt, the court sought guidance from the case of **Otkritie International Investment Management Ltd and others v Urumov**³⁶ the question arose as to whether there came a point when findings made by a judge in pretrial proceedings disqualified the judge from hearing consequential matters.

[100] In **Otkritie International Investment Management Ltd**, the appellant applied to the judge to recuse himself from conducting committal proceedings on the basis that a fair-minded and well informed observer would think that the judge had already decided the committal application in light of many adverse findings in the judgment to the extent that he had prejudiced the committal proceeding among other grounds. The Court of Appeal held that the judge was wrong to recuse himself. The court in that case set out the approach to be taken when such circumstances arose. Longmore LJ delivering the judgment of the court said:

³⁶ [2014] EWCA Civ 1315; [2014] All ER 157

“There is already a certain amount of authority on the question whether a judge hearing an application (or a trial) which relies on his own previous findings should recuse himself. The general rule is that he should not recuse himself, unless he either considers that he genuinely cannot give one or other party a fair hearing or that a fair minded and informed observer would conclude that there was a real possibility that he would not do so. Although it is obviously convenient in a case of any complexity that a single judge should deal with all relevant matters, actual bias or a real possibility of bias must conclude the matter in favour of the Applicant; nevertheless there must be substantial evidence of actual or imputed bias before the general rule can be overcome. All the cases, moreover, emphasise, that the issue of recusal is extremely fact-sensitive.”³⁷

[101] At paragraph 18 of the judgment Longmore LJ went on to say:

“In long trials where many applications have to be decided in the course of the hearing, a party may persuade himself that a judge is biased against him as a result of his rulings. In *Arab Monetary Fund v Hashim (No 8)* (1993) 5 Admin LR 348, it was suggested that Chadwick J should not continue with the case. He refused to recuse himself and, on appeal, Sir Thomas Bingham MR posed the question whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts would have a reasonable suspicion that a fair trial was not possible. He continued (pp 354-355):

“ . . . Most, if not all, of the cases in which this test has been discussed have been cases of modest dimensions. We know of no case approaching the scale of this where a charge of apparent bias has been made. That makes it the more important to recognise, as we understand to be agreed, that the hypothetical observer is not one who makes his judgment after a brief visit to the court but one who is familiar with the detailed history of the proceedings and with the way in which cases of this kind are tried. We find assistance in observations made in the Supreme Court of New South Wales by Mahoney JA in *Vakauta v Kelly* (1988) 13 NSWLR 502, 513A: ‘In considering the content of the apprehended bias principle the court must look to, inter alia, two things: what are the norms or standards relevant to the kind of case before it; and whether, on the facts, the requirements have been fulfilled.’”

Sir Thomas Bingham MR also said this, at p 355:

“In a case such as this, in which interlocutory applications proliferate, it may well be that one side fares more successfully, perhaps much more successfully, than the

³⁷ At para [13]

other. There are a number of possible explanations for this, the most obvious being that the successful party has shown greater judgment, determination and knowledge of the rules than its opponent. Mr. Ross-Munro accepted, as we understood, that no inference of apparent bias could be drawn from the fact that most, or all interlocutory applications had been decided against Dr Hashim. We agree. He also disclaimed any attack on the correctness of Chadwick J's interlocutory decisions. This we find puzzling. It must, we think, be hard to show consistent unfairness in the absence of consistent error."

[102] Longmore LJ citing the case of **JSC BTA Bank** went on further to say:

"Lastly there is the similar (though converse) case of *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551, [2013] 1 WLR 1845, [2012] NLJR 1536 in which Teare J had made findings adverse to Mr. Ablyazov in interlocutory proceedings holding him to be in contempt by failing to comply with a freezing order, dealing in frozen assets and lying while being cross-examined about his assets. At a later stage Mr. Ablyazov applied to the judge to recuse himself from continuing with the case and trying the actions. The judge refused to recuse himself and was upheld by this court. Rix LJ (with whom Toulson and Maurice Kay LJJs agreed) asked whether there could be any difference between the judge who bears in mind his own findings and observations and another (second) judge who reads what the first judge has written, as he must be entitled to do. He answered his own question by saying (para 69):

"... unless the first judge has shown by some judicial error, such as the use of intemperate, let me say unjudicial, language, or some misjudgement which might set up a complaint of the appearance of bias, the fair-minded and informed observer is unlikely to think that the first judge is in any different position from the second judge – other than that he is more experienced in the litigation.

In this connection, it seems to me that the critical consideration is that what the first judge does he does as part and parcel of his judicial assessment of the litigation before him: he is not 'pre-judging' by reference to extraneous matters or predilections or preferences. He is not even bringing to this litigation matters from another case (as may properly occur in the situation discussed in *Ex Parte Lewin*; *In re Ward* [1964] NSW 446, approved in *Livesey v New South Wales Bar Association* 151 CLR 288). He is judging the matter before him, as he is required by his office

to do. If he does so fairly and judicially, I do not see that the fair-minded and informed observer would consider that there was any possibility of bias. I refer to the helpful concept of a judge being 'influenced for or against one or other party for reasons extraneous to the legal or factual merits of the case': see *Secretary of State for the Home Department v AF (No 2)* [2008] 1 WLR 2528, para 53. I have also found assistance in this context in Lord Bingham's concept of the 'objective judgment'. The judge has been at all times bringing his objective judgment to bear on the material in this case, and he will continue to do so. Any other judge would have to do so, on the same material, which would necessarily include this judge's own judgments."

[103] Longmore LJ went on to say that:

"There is thus a consistent body of authority to the effect that bias is not to be imputed to a judge by reason of his previous rulings or decisions in the same case (in which a party has participated and been heard) unless it can be shown he is likely to reach his decision "by reference to extraneous matters or predilections or preferences". There can be no suggestion that Eder J would proceed in the present case by reference to such matters."³⁸

[104] The same principles applied in **Otkritie** were also espoused in the case of **Ansar v Lloyds TSB Bank plc and others**. In relation to this issue the court was also guided by the decision in **Stubbs v The Queen** where Lord Lloyd Jones delivering the judgment of the Privy Council said:

"A judicial ruling necessarily involves preferring the submissions of one party over another. However, it is obviously not the case that any prior involvement by a judge in the course of litigation will require him to recuse himself from a further judicial role in respect of the same dispute. In the great majority of such cases there will simply be no basis on which it could be suggested that the judge should recuse himself, notwithstanding earlier rulings in favour of one party or another, and there will often be great advantages to the parties and to the administration of justice in securing judicial continuity. The issue will only arise at all in circumstances where prior involvement is such as might suggest to a fair-minded and informed observer that the judge's mind is closed in some respect relevant to the decision which must now be made. It is not possible to provide a comprehensive list of factors which may be relevant to this issue which will necessarily depend on the particular circumstances of each case. (See

³⁸ At para 22

generally, *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 per Lord Bingham of Cornhill CJ at para 25; *Livesey v The New South Wales Bar Association* [1983] 151 CLR 288 at p 299.) However, relevant factors are likely to include the nature of the previous and current issues, their proximity to each other and the terms in which the previous determinations were pronounced.”

[105] Comments made by a judge in proceedings preliminary to a criminal trial has also been examined by the case law. One such case is that of **Michael Gild v The Queen**³⁹ where in a criminal trial the judge had made decisions adverse to the defendant’s case at the pretrial stage of the proceedings in relation to the admissibility of evidential material. In the course of pretrial submissions made by the defendant, the judge permitted the prosecution to lead new evidence in response to the defendant’s submissions. On the same day, the judge made a statement that it would be highly likely that the defendant would get a custodial sentence if he maintained his plea of not guilty and was convicted by the jury. The trial judge refused the defendant’s application that he recuse himself on the basis that the statement about the likely sentence gave rise to apparent bias. On appeal it was contended that the trial judge made remarks at an early stage of the trial which suggested that he had prejudiced the matter.

[106] **Gild v The Queen** appears to be authority for the proposition that the appearance of impartial justice would be compromised if the words or actions of a judge conveyed the impression that he or she had preconceived views about a party’s case and that those views were strongly held that he or she was unwilling or unable to consider on their merits any submissions made, or evidence adduced, by that party which were inconsistent with those views. However, the expression of tentative views during the course of argument as to matters on which the parties are permitted to make full submissions does not manifest partiality or bias.⁴⁰

³⁹ [2017] VSCA 367

⁴⁰ At para 24

- [107] The court's reasoning in **Gild v The Queen** was that, notwithstanding the above concerns and the strong language used by the judge, the court was not satisfied that the principles relating to apprehended bias were engaged. A fair-minded lay observer who heard the impugned statement in the context in which it was made would not reasonably apprehend that the judge might not bring an impartial mind to the resolution of any question the judge was required to decide. That was because the judge did not say, or by his words convey, that, irrespective of what the applicant submitted on a plea, he would be sentenced to a custodial sentence if the jury returned a guilty verdict. The judge's statement could not fairly be construed as evincing a closed mind on what the appropriate sentencing disposition would be if the applicant were found guilty. The judge's discussion with the applicant's counsel indicated that the judge recognised that such a disposition would have to take into account any matters relied upon by the applicant on a plea.⁴¹
- [108] The bail applications made by Mr. Hodge were not preliminary to any issue of fact or law likely to arise in the course of the trial. Rather they may properly be viewed as consequential to Mr. Hodge's charge and incarceration and indictment awaiting trial. In the circumstances, the remarks made by the judge, which Mr. Hodge seeks to impugn, did not impinge on any issue or any preliminary issue likely to arise in the conduct of the trial. The judge merely applied the principles that were necessary in giving consideration to Mr. Hodge's application for release on bail.
- [109] In the premises, and for the reasons set out in this judgment, the recusal application is dismissed.

Shawn Innocent
High Court Judge

By the Court

Registrar

⁴¹ At para 30

