

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE COURT OF APPEAL**

**SAINT CHRISTOPHER AND NEVIS**

**SKBHCVAP2020/0003**

**BETWEEN:**

**[1] ADAM BILZERIAN  
[2] LEMON GROVE COMPANY LIMITED  
[3] CARIBBEAN BUILDING SYSTEMS (ST KITTS) LTD**

**Appellants**

**and**

**[1] TERRENCE V. BYRON  
[2] BYRON & BYRON  
[3] KEVIN HORSTWOOD**

**Respondents**

**SKBHCVAP2019/0028**

**BETWEEN:**

**[1] GREGORY GILPIN-PAYNE  
[2] INTERNATINOAL INVESTMENT & CONSULTING  
LIMITED**

**Appellants**

**and**

**[1] STEPHEN FIRST  
[2] CORPORATE CAPITAL (ASIA) LIMITED**

**Respondents**

**SKBHCVAP2019/0029**

**BETWEEN:**

**ADAM BILZERIAN**

**Appellant**

**and**

**[1] ZACHARY GETZ**

**[2] ST. CHRISTOPHER CLUB CONDOMINIUMS**

**[3] ST. CHRISTOPHER CLUB CONDOMINIUMS  
HOMEOWNERS ASSOCIATION**

**Respondents**

**SKBHCVAP2019/0030**

**BETWEEN:**

**ADAM BILZERIAN**

**Appellant**

**and**

**KEVIN HORSTWOOD**

**Respondent**

**SKBHCVAP2019/0031**

**BETWEEN:**

**[1] KEYAPAHA INTERNATIONAL LTD**

**[2] DAN BILZERIAN**

**Appellants**

**and**

**[1] LAURA GETZ**

**[2] ROBERT GETZ**

**[3] VICTOR DOCHE**

**[4] VISTAS INTERNATIONAL, LLC**

**Respondents**

**SKBHCVAP2019/0032**

**BETWEEN:**

**[1] ADAM BILZERIAN  
[2] LEMON GROVE COMPANY LIMITED  
[3] CARIBBEAN BUILDING SYSTEMS (ST.KITTS  
LTD**

**Appellants**

**and**

**[1] TERRENCE V. BYRON  
[2] BYRON & BYRON  
[3] KEVIN HORSTWOOD**

**Respondents**

**SKBHCVAP2019/0033**

**BETWEEN:**

**ADAM BILZERIAN**

**Appellant**

**and**

**[1] GERALD LOU WEINER  
[2] KATHLEEN WEINER**

**Respondents**

**SKBHCVAP2019/0040**

**BETWEEN:**

**ADAM BILZERIAN**

**Appellant**

**and**

**[1] GERALD LOU WEINER  
[2] KATHLEEN WEINER**

**Respondents**

**BETWEEN:**

**[1] GREGORY GILPIN-PAYNE  
[2] INTERNATIONAL INVESTMENT &  
CONSULTING LIMITED**

**Appellants**

**and**

**[1] STEPHEN FIRST  
[2] CORPORATE CAPITAL (ASIA) LIMITED**

**Respondents**

**Before:**

|                                     |                         |
|-------------------------------------|-------------------------|
| The Hon. Mde. Louise Esther Blenman | Justice of Appeal       |
| The Hon. Mr. Mario Michel           | Justice of Appeal       |
| The Hon. Mr. John Carrington, QC    | Justice of Appeal [Ag.] |

**Appearances:**

Mr. Victor Elliot-Hamilton for the Appellants in Appeal No. 3 of 2020 and Appeal Nos. 28, 29, 30, 31, 32, 33, 40, 44 of 2019  
Mr. Terrence Byron for the Respondents in Appeal No. 3 of 2020 and Appeal Nos. 30 and 32 of 2019  
Ms. Jean Dyer for the Respondents in Appeal No. 33 of 2019 and holding a watching brief for the Respondents in Appeal No. 40 of 2019  
Ms. Miselle O'Brien for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents in Appeal No. 29 of 2019  
Ms. Vanessa Fennell for the Respondents in Appeal No. 28 of 2019 and holding a watching brief for the Respondents in Appeal No. 44 of 2019  
Ms. Renal Edwards holding papers for Ms. Angelina Sookoo-Bobb holding watching brief for the 3<sup>rd</sup> Respondent in Appeal No. 31 of 2019

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2020: October 27;  
2021: October 22.

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*Interlocutory appeals – Appeal against refusal of applications for recusal – Apparent bias – Whether learned judge erred in refusing recusal application – Whether fair-minded informed observer would conclude that there was real possibility of bias – Whether power of attorney confers right of audience – Rule 26.2(2) of Civil Procedure Rules 2000 – Right to be heard – Whether appellant given reasonable opportunity to make representations – Whether supporting affidavit must be made by applicant himself – Whether judge erred in exercise of his discretion*

These appeals arise from various interlocutory orders made by the learned judge in the High Court.

These appeals raise three main issues for determination by this Court. The first is whether the learned judge erred in refusing the recusal applications filed in SKBHCVAP2019/0028 ("Appeal No. 28 of 2019"), SKBHCVAP2019/0029 ("Appeal No. 29 of 2019"), SKBHCVAP2019/0030 ("Appeal No. 30 of 2019"), SKBHCVAP2019/0031 ("Appeal No. 31 of 2019"), SKBHCVAP2019/0032 ("Appeal No. 32 of 2019") and SKBHCVAP2019/0033 ("Appeal No. 33 of 2019"). The first recusal application was based on the alleged apparent bias of the judge. Mr. Paul Bilzerian ("Paul") complained that he appeared as an attorney in fact for his sons Adam and Dan Bilzerian (respectively "Adam" and "Dan") and, as director of the relevant companies, as he was entitled to do, but was denied a fair hearing by the judge in the proceedings in the court below. The second recusal application was made in response to the judge's direction that the parties should consider an authority from the Irish Supreme Court on rights of audience under a power of attorney. Both recusal applications were dismissed.

The second issue raised in these appeals ("Appeals Nos. 29 to 33") is whether the judge erred in concluding that the power of attorney granted to Paul, by his sons, could not confer a right of audience. As a consequence, the judge ordered that Paul was prohibited from representing Adam and Dan in civil proceedings in the court below.

The final issue for the court's determination concerns the judge's exercise of discretion in SKBHCVAP2020/0003 ("Appeal No. 3 of 2020"), SKBHCVAP2019/0044 ("Appeal No. 44 of 2019"), and SKBHCVAP2019/0040 ("Appeal No. 40 of 2019"). In Appeal No. 3 of 2020, the judge made an unless order that unless the appellants are represented by an attorney-at-law on the next adjourned date, the claim will be struck out without further order of the court. The appellants complained that they were not given a reasonable opportunity to make representations in breach of rule 26.2(2) of the Civil Procedure Rules 2000 ("CPR"); that the judge erred in making an order in breach of Adam's right to represent himself as a litigant in person and the second and third appellants' right to be represented by a director under rule 22.3(1) of the CPR; and that there was no evidential basis for the judge to make an unless order.

The appellant in Appeal No. 40 of 2019 contended that the judge erred in dismissing the appellant's set aside application ("the set aside application") on the basis that it was made by Paul, not Adam, the party to the proceedings, and further that the affidavit was defective as it was sworn by Paul and not Adam. The accompanying stay application ("the stay application") was dismissed accordingly. The appellant also complained that in relation to Appeal No. 40, the judge erred in not holding an oral hearing to determine the set aside application.

In relation to Appeal No. 44 of 2019, the appellants advanced two grounds in support of the appeal, namely that the learned judge failed to exercise his discretion to reconsider a previous order that he had made on 17<sup>th</sup> October 2019 ("the previous order") which had not yet been perfected and that he erred in striking out the defence for non-compliance with that order.

**Held:** dismissing Appeal No. 3 of 2020, Appeal Nos. 28 to 33 of 2019 and Appeal No. 44 of 2019; allowing Appeal No. 40 of 2019 and making the orders set out in paragraph 68(5) and (6) of the judgment, that:

1. The test for apparent bias is well-settled. Essentially, 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. Having reviewed the complaints made by Paul and the explanations offered by the learned judge in his decision on the recusal applications as well as considering the context of the state of the proceedings in the various matters and the right and powers of the judge to case manage these matters, it is unlikely that a fair-minded and informed observer would come to the conclusion that there was a real possibility that the learned judge was biased against Paul or those he purported to represent.

**Porter v Magill** [2002] 2 AC 357 applied; **Keston Riley v The Attorney General and Director of Public Prosecutions** [2020] ECSCJ No. 313 (delivered 17<sup>th</sup> September 2020) followed; **Vance Amory v Thomas Sharpe, QC et al** Saint Christopher and Nevis High Court Civil Appeal No. HCVAP2009/0013 (delivered 27<sup>th</sup> August 2012, unreported) followed; **Walsh v Ward and others** (2015) 87 WIR 101 applied.

2. The only persons at common law who have rights of audience are duly admitted legal practitioners or the litigants in person subject to the specific provisions of Part 22 of the CPR. Parts 22 and 27 cannot be relied on to show that our procedural rules provide for representation of a litigant otherwise than by a legal practitioner. Part 22 deals with specific situations where third parties may represent parties, none of which applies in the circumstances of this case. Similarly, rule 27.4 allows a representative of a party to attend a case management conference or pre-trial review but this person attends in addition to and not in place of the legal practitioner, where the party is represented by one. Further, rule 63.4 which is applicable to these facts does not refer to allowing the party to act through an agent. It follows then that the judge correctly concluded that Paul has no right of audience on behalf of Adam and Dan in the proceedings below.

Parts 22, 27 and rule 63.4 of the **Civil Procedure Rules 2000** considered; **In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Coffey and others** [2013] IESC 11 applied.

3. In relation to Appeal No. 3 of 2020, when the order is read as a whole, it is evident that the judge intended to give the appellants the opportunity to make representations why the claim should not be struck out for failure to have legal representation at the adjourned hearing. This is clear from the fact that the judge gave the appellants the opportunity to file submissions in respect of the proposed strike out order prior to the next hearing date on which the order would take effect, if there were non-compliance. This was sufficient to protect their fundamental right to be treated fairly as it is the striking out rather than the unless order that was likely to affect them.

Rule 26.2(2) of the **Civil Procedure Rules 2000** considered.

4. In so far as it concerns Appeal No. 40 of 2019, a review of the set aside and stay applications show that they were both made and signed by Adam. It also reveals that the affidavits in support were made by Paul who indicated that he is not a party to the proceedings but is duly authorised by Adam, that the matters sworn to are within his personal knowledge and stated why Adam was not present at trial. Furthermore, there is no requirement by the relevant rules of the CPR that a supporting affidavit must be made by the applicant himself. It is quite evident that the judge incorrectly read the papers before him and based on this misapprehension, incorrectly exercised his discretion on the applications.

Rule 11.9 of the **Civil Procedure Rules 2000** considered; **Dufour and others v Helenair Corporation Ltd and others** (1996) 52 WIR 188 followed.

5. A judge's decision to hear an application on paper is the exercise of a case management power with which an appellate court is normally reluctant to interfere unless it is shown that the judge exceeded the generous ambit within which reasonable disagreement is possible and is therefore blatantly wrong. In the circumstances of this case, there was nothing to either application which gave rise to the complaints which merited an oral hearing.

**Dufour and others v Helenair Corporation Ltd and others** (1996) 52 WIR 188 followed.

6. There is no proper basis on which this Court could set aside the judge's decision striking out the second appellant's defence. A judge is entitled to reverse his decision before it is perfected based on a carefully considered change of mind. In the instant appeal, this Court is unconvinced that the judge did not exercise his discretion to reconsider the previous order. Instead, he did in fact exercise his discretion in that he refused to change his mind; a decision which is well within the scope of his discretion. In circumstances where Paul failed to establish his authority to represent the second appellant in court proceedings pursuant to rule 22.3 of the CPR at the adjourned hearing, nothing necessitated the judge inviting the parties to address him on the exercise of his discretion to reconsider the previous order. Further, if the learned judge exercised his discretion to refuse the application for reconsideration of the said order, there was nothing precluding him from proceeding to strike out.

**Re L and B (children) (care proceedings: power to revise judgment)** [2013] 2 All ER 294 applied.

7. It is well established that every person against or in respect of whom a court of competent jurisdiction makes an order must obey that order unless and until it has been discharged. Accordingly, where the court signals, as in this case, that it would

make a strike out order at the next hearing if certain conditions were not complied with, the litigant has the choice and opportunity to meet those conditions or to make representations as to why the consequences should not follow. The lack of success of the appellants' course of action in directing the court's attention to rule 22.3 of the CPR in response to the original order does not render the judge's decision incorrect.

**Isaacs v Robertson** (1984) 43 WIR 126 applied.

## JUDGMENT

[1] **CARRINGTON JA [Ag]:** These are a series of appeals from various interlocutory orders made by Ventose J ("the learned judge" or "the judge") in the High Court, for which leave was given to appeal by this Court by orders dated 12<sup>th</sup> July 2019. It was further ordered that the appeals be heard together. The following is a summary of the various appeals that were heard by the Court:

- (i) Appeal No. 3 of 2020 is from the Order made by the learned judge on 30<sup>th</sup> January 2020 that 'Unless both Mr. Adam Bilzerian and the Second and Third Claimants (Appellants herein) are represented by an attorney-at-law on the next adjourned date, the Statement of Claim shall be struck out without further order of the Court.' The learned judge made this order against the background that Mr. Paul Bilzerian, who is not a duly admitted legal practitioner, had been purporting to represent Mr. Adam Bilzerian in the proceedings and his finding that the way in which Mr. Paul Bilzerian had been conducting matters before the court amounted to an abuse of the court's process. The appellants' grounds of appeal are that the learned judge erred by failing to give the appellants a reasonable opportunity to make representations with respect to the proposed order in breach of rule 26.2(2) of the **Civil Procedure Rules 2000** ("CPR"); he erred in law in making an order in breach of Mr. Adam Bilzerian's right to represent himself as a litigant in person and the second and third appellants' rights to be represented by a director under CPR Part 22.3(1); and that

the learned judge erred in the exercise of his discretion as there was no evidential basis which justified his making an unless order.

- (ii) Appeal No. 28 of 2019 lies from the order dated 25<sup>th</sup> July 2019 of the learned judge's refusal to recuse himself. The learned judge made this order against the background of his finding that, 'Mr. Paul Bilzerian is using the recusal application, among his usual armoury of weapons, in his quest to frustrate litigants, delay or stall the hearing of applications and the trial in the various matters before the court' and that 'Mr. Paul Bilzerian is purporting to act as a litigant in person when he is not a party to any of the proceedings...'. The appellants' grounds of appeal are that the learned judge misdirected himself in applying the legal test for bias because he made findings of fact in the absence of evidence supporting those findings or having mischaracterized the evidence relied upon in support of his findings; he failed to take into consideration the appellants' complaint that on multiple occasions he failed to acknowledge representations made by Mr. Paul Bilzerian and failed to give reasons why there was no such acknowledgment; and that he failed to consider that a fair-minded and informed observer would have inferred that he made the orders out of a sense of retaliation and aggression.
- (iii) Appeal Nos. 29, 30, 32, and 33 of 2019 lie from the same order of the learned judge refusing to recuse himself and his orders that Mr. Paul Bilzerian is prohibited from representing Mr. Adam Bilzerian in person in the proceedings before the High Court. The learned judge made this order against the background of his finding that 'Mr. Paul Bilzerian is using the recusal application, among his usual armoury of weapons, in his quest to frustrate litigants, delay or stall the hearing of applications and the trial in the various matters before the court' and that 'Mr. Paul Bilzerian is purporting to act as a litigant in person when he is not a party to any of the proceedings...' and his conclusion that

the right of a litigant to represent himself does not extend to his being represented by anyone else, other than a qualified legal practitioner. The appellants' grounds of appeal are that the learned judge misdirected himself in applying the legal test for bias because he made findings of fact in the absence of evidence supporting those findings or having mischaracterized the evidence relied upon in support of his findings; he failed to take into consideration the appellants' complaint that on multiple occasions he failed to acknowledge representations made by Mr. Paul Bilzerian and failed to give reasons why there was no such acknowledgment; that he failed to consider that a fair-minded and informed observer would have inferred that he made the orders out of a sense of retaliation and aggression; that he abused his discretion in ordering the parties to make submissions on the question as to whether Adam Bilzerian can be represented in person by Mr. Paul Bilzerian; and that he misdirected himself in law in holding that Mr. Paul Bilzerian could not represent Adam Bilzerian under a power of attorney.

- (iv) Appeal No. 31 of 2019 also lies from the same order made by the learned judge's refusal to recuse himself on the same basis as in Appeal Nos. 29, 30, 32 and 33 of 2019 save that this was in respect of the representation by Mr. Paul Bilzerian of Dan Bilzerian. The grounds of appeal are the same as in Appeal Nos. 29 and 30 of 2019.
- (v) Appeal No. 40 of 2019 is from the judge's refusal by order dated 14<sup>th</sup> October 2019 to set aside a judgment given in a party's absence; to stay execution of the judgment pending the decision on the application to set aside that judgment; to direct the Registrar of Lands to execute and deliver a memorandum of mortgage in accordance with that judgment within 7 days; and to prohibit the defendant from making any application or taking any steps in the proceedings without first obtaining permission of the court unless he files and serves evidence

that he had complied with costs orders made by the court within 7 days of the date of the judgment. The orders were made on the background of the judge's findings that the application was not made by a party to the proceedings, Adam Bilzerian, but by Mr. Paul Bilzerian and that the affidavit was not sworn by Adam Bilzerian but by Mr. Paul Bilzerian. The grounds of appeal are that the learned judge misdirected himself in law in finding that the application was defective because it was not made by Adam Bilzerian but by Mr. Paul Bilzerian as there was no evidence to support this finding; that there is no restriction as to who may submit evidence on a party's behalf; that he failed to determine beforehand an application to strike out the affidavit filed in opposition to the application to set aside the judgment; and that he erred in not holding an oral hearing to determine the application to set aside the judgment.

- (vi) Appeal No. 44 of 2019 lies from the order dated 31<sup>st</sup> October 2019 of the learned judge striking out the second defendant's defence. The grounds of the appeal are that the learned judge erred in failing to exercise his discretion to reconsider a previous order that had not yet been perfected when invited to do so; and he erred in making the strike out order for purported non-compliance with that unperfected order immediately after he refused the request for reconsideration.

- [2] I propose to deal with the various issues raised in these appeals under the following heads: (i) the Refusal of Recusal Appeals, being Appeal Nos. 28-33 of 2019; (ii) the Rights of Audience Appeals, being Appeal Nos. 29-33 of 2019; and (iii) the Strike Out Appeals, being Appeal Nos. 3 of 2020, and Appeal Nos. 40 and 44 of 2019. The Refusal of Recusal Appeals are now to a large extent academic as the learned judge has since left the bench. However, the issue is of such importance to the administration of justice in the jurisdiction that the Court believes that it should nevertheless let its views on the matter be known.

## **Refusal of Recusal Appeals**

### **The procedural and factual backgrounds**

- [3] Mr. Paul Bilzerian (“PB” or “Paul”) is the father of Adam and Dan Bilzerian (respectively “Adam” and “Dan”) and a director of International Investing & Consulting Ltd (“IIC”), Lemon Grove Company Limited (“Lemon Grove”), Caribbean Building Systems (St. Kitts) Ltd (“CBS”) and Keyapaha International Ltd. (“Keyapaha”) (collectively, the “Companies”). PB appeared in several proceedings in the High Court of Justice during the course of 2019 on behalf of Adam, Dan and the Companies as attorney in fact for Adam or Dan and as director of the relevant Company. His complaint is that the learned judge failed to give him a fair hearing while dealing with the substantive applications that were before the court on each occasion and was therefore biased. PB thereafter made an application, on 13<sup>th</sup> March 2019, for the learned Judge to recuse himself.
- [4] A second application for the learned judge to recuse himself was made on 24<sup>th</sup> May 2019 in response to his direction that the parties should consider an authority from the Irish Supreme Court on rights of audience under a power of attorney reported at [2013] IESC 11 (“the Irish Decision”).
- [5] The learned judge considered and dismissed both applications for recusal on 25<sup>th</sup> July 2019 and further made orders prohibiting PB from representing Adam or Dan in proceedings before the court. The learned judge subsequently provided written reasons for dismissing these applications. He first dealt with the issue of PB’s right of audience before the court as attorney in fact of Adam and Dan and as representative of the Companies and outlined the factual background to the recusal applications.
- [6] In **Stephen First et al v Gregory Gilpin-Payne et al** (“Appeal No. 28 of 2019”), PB filed a notice in April 2017 that II IIC will be acting in person through him as its director. Thereafter, counsel was given permission to come off the record. The matter was listed for trial directions initially in November 2018 and then in December

2018 and eventually in March 2019 when directions were given, after which the first recusal application was filed.

- [7] **Adam Bilzerian v Zachary Getz et al** (“Appeal No. 29 of 2019”) was a claim by Adam for damages for breach of contract. The statement of claim was struck out in October 2015 with costs to the defendants who applied in October 2017 for a judgment summons to enforce the costs order. On the applications of the claimant, represented by PB, the judgment summons was adjourned on two occasions to July 2019, during which period the first recusal application was filed.
  
- [8] In **Adam Bilzerian v Kevin Horstwood** (“Appeal No. 30 of 2019”), an application was filed on behalf of the claimant in March 2019 to set a trial date for the claim. Before this could be heard, the first recusal application was filed.
  
- [9] **Dan Bilzerian et al v Laura Getz et al** (“Appeal No. 31 of 2019”) was a claim for orders in respect of alleged unlawful deprivation of water. In April 2017, PB filed his power of attorney and the then legal practitioner representing Dan applied successfully to come off the record. The matter was set down for status hearing in March 2019 but the first recusal application was filed before the date of this hearing.
  
- [10] **Adam Bilzerian et al v Terrence V. Byron et al** (“Appeal No. 32 of 2019”) concerned a claim against the defendants for damages for, *inter alia*, breach of fiduciary duty, interference with contractual relations, fraudulent and negligent misrepresentations. PB appeared in these proceedings on behalf of Adam and as director of Lemon Grove and CBS. During the course of 2017, there was an exchange of interlocutory applications among the parties which included, requests for default judgment by the claimants and applications to strike out the statement of claim by the defendants, with applications to strike out those applications by the claimants. The matters came up for case management before the learned judge in February 2019 and he gave directions for submissions on the defendants’ applications (the claimants having withdrawn theirs) and also on the issue of

whether PB's power of attorney should have been stamped. These matters were to be heard in late March 2019; but, on 11<sup>th</sup> March 2019, the claimant filed the first recusal application for the learned judge to recuse himself from all matters in which he represented his sons or the Companies. On 24<sup>th</sup> May 2019, PB filed the second recusal application after the learned judge had made further directions for submissions on whether PB could act for Adam in those proceedings and for the parties to consider the Irish Decision.

- [11] **Gerald Lou Weiner et al v Adam Bilzerian** ("Appeal No. 33 of 2019") was a claim by Gerald Lou Weiner and Kathleen Weiner ("the Weiners") against Adam for specific performance of a 2010 agreement. The Weiners were successful in the trial held in November 2017. After the trial, applications were made by Adam to set aside the judgment and for a stay of execution and by the Weiners for enforcement of the judgment and an Unless Order. Directions were given by the learned judge in relation to the Unless Order and Set Aside Application in February 2019 and subsequently PB, on behalf of Adam, filed the first recusal application.

### **The Recusal Applications**

- [12] The first recusal application was grounded on allegations of bias on the part of the learned judge. The complaints in relation to Appeal No. 31 of 2019 are that: (i) PB had been waiting outside the courtroom and the matter was not called but when he was eventually allowed into the courtroom, he realised that counsel for the Getz parties had already made submissions; and (ii) the learned judge had no interest in anything PB had to say or whether he had even been given a chance to attend the hearing. The matter was adjourned. In his written ruling, the learned judge indicated that the matter had in fact been called but PB did not appear; PB was allowed to address the court but focused on matters that were not before the court; and the court granted the adjournment requested by PB.
- [13] In relation to Appeal No. 33 of 2019, PB complains that: (i) he informed the learned judge that no amended notice of hearing had been issued, changing the time of the

hearing (from 2pm to 9am on the same day) and that he had not been notified of what was to be heard by the court whereas counsel for the claimants were aware of these changes; (ii) the learned judge did not seem troubled by this and addressed the matters not mentioned in the notice of hearing and set an extremely aggressive briefing schedule 'none of which he was prepared to address'; and that it was clearly evident that the learned judge once again had no interest in anything he had to say. In his written ruling, the learned judge indicated that PB failed to note that the hearing was to give directions on the matters before the court and that the court did not deal with any substantive matters on that date; that PB did not object, at the hearing, to the timetable ordered by the court; that PB was given the adjournment that he sought and the court merely adjourned the proceedings to allow the parties to make written submissions; PB accepted that his office had been informed of the change of time; that since the notice of hearing did not specify the matters to be heard, these would be heard on paper; and that he explained the order to PB who responded that he understood.

- [14] In relation to Appeal No. 32 of 2019, PB complains that he was advised by the court office that no notice of hearing was issued or served in relation to the matter and submitted to the court at the hearing that another matter involving the same parties should take priority in scheduling for trial. He complains that: (i) the learned judge ignored his submissions and dealt with the matter, fixing another extremely aggressive briefing schedule, including the making of submissions on whether the power of attorney granted to PB was valid, even though it had been so found by the Court of Appeal in another matter; and (ii) it was clearly evident that the learned judge had no interest in anything he had to say or ensuring that his son was afforded a proper hearing. In his ruling, the judge indicated that notwithstanding any late notice, this was only a directions hearing and no substantive matter was dealt with and PB actively participated in the hearing by withdrawing some of the applications that he had previously made. The learned judge further stated that he was not familiar with the other matter which PB indicated should be given priority and did not have the file for that matter and further that PB did not properly explain the relationship between

that matter and the matter before him. The court heard PB on the issue of priority but proceeded to deal with the matter before it, including the issue of the stamping of the power of attorney which arose at the hearing.

[15] In relation to Appeal No. 28 of 2019, PB complains that a notice of hearing to give trial directions was issued in October 2018 but not served on the defendants, for one of which, IIC, he acted in the proceedings in his capacity as director of that company, until 20<sup>th</sup> November 2018 for a hearing due to take place on 29<sup>th</sup> November 2018; that on 4<sup>th</sup> December 2018, the appellants were served with a notice of hearing for 18<sup>th</sup> December 2018 even though he had filed a notice that he was unavailable on that date; that the defendants filed a notice to cancel the hearing on 18<sup>th</sup> December which was listed for 7<sup>th</sup> March 2019 but on that date the court indicated that it would proceed with trial directions notwithstanding his objections. In his written ruling, the learned judge states that the initial notice for the hearing in November 2018 had been signed as received by all parties but as the defendants were absent on that date, the matter was adjourned to 18<sup>th</sup> December 2018. When the matter came on 7<sup>th</sup> March 2019, PB attended on behalf of IIC and did not object to the court giving directions.

[16] In relation to the first recusal application, in Appeal No. 29 of 2019, PB made no specific allegations concerning the conduct of the learned judge and in his written ruling, the judge noted that no hearing took place on this application prior to the filing of the first recusal application. In relation to Appeal No. 30 of 2019, PB makes no specific allegations concerning the conduct of the learned judge.

[17] In the second recusal application, PB complains that after the first recusal application had been filed, (i) the learned judge ‘launched a relentless retaliatory attack’ by ordering parties to 7 cases to file affidavits and submissions in opposition to the first recusal application and further ordered parties to file affidavits and submissions on the issue whether PB could represent Adam and Dan through the power of attorney giving the impression that he personally created the issue whether a power of attorney could be used for PB to appear on behalf of Adam or Dan in the hope of

disqualifying PB and demanded proof that PB was a director of the Companies; (ii) the learned judge conducted “ex parte” hearings in instances where he was well aware that PB was out of the jurisdiction and could not appear, for example in Appeal No. 29 of 2019, the court held a status hearing on 28<sup>th</sup> March 2019 even though PB had filed a notice of unavailability on 12<sup>th</sup> March 2019 and reminded the learned judge on 26<sup>th</sup> March 2019 that he would be unavailable. The appellants assert that it was inappropriate for the learned judge to: (i) conduct the hearing in the circumstances where there was no objection from the other parties to re-scheduling the hearing and no urgency; and (ii) to make any order(s) until after the first recusal application had been determined.

### **The fresh evidence**

[18] After leave to appeal had been granted, the appellants were granted permission by this Court in its judgment dated 21<sup>st</sup> July 2020 to adduce fresh evidence on the appeal, namely the written ruling by the learned judge in proceedings SKBHCV2015/0154 (**Weiner and Weiner v Bilzerian**, i.e. the same proceedings that give rise to Appeal No. 33 of 2019) given on 14<sup>th</sup> October 2019, i.e. after he had disposed of the recusal applications; orders made by the learned judge on 31<sup>st</sup> October 2019 in proceedings SKBHCV2016/0082, **Stephen First et al v Gregory Gilpin-Payne et al** (proceedings which gave rise to Appeal No. 28 of 2019); and the order made by the learned judge on 30<sup>th</sup> January 2020 in proceedings SKBHCV2017/0072, **Adam Bilzerian et al v Terrence V. Byron et al** (proceedings which gave rise to Appeal No. 32 of 2019). The application to adduce this evidence was sought on the basis that they further evidenced apparent bias on the part of the learned judge.

[19] In the judgment that forms the additional evidence in relation to Appeal No. 33 of 2019, the learned judge refused applications made by the claimant therein for a stay of execution or to set aside a judgment given in his absence. He held that the application was not signed by the defendant, Adam, but by Paul as his attorney in fact and the affidavit in support was not sworn the Adam but by Paul.

[20] In the judgment that forms the additional evidence in relation to Appeal No. 28 of 2019, the appellant complains that the learned judge struck out the defence of the second defendant because it was not represented by a lawyer, but by Paul, its director.

[21] The complaint in relation to the order that forms the additional evidence in relation to Appeal No. 32 of 1019 is that the learned judge ordered that the claim would be struck out without further order unless the claimants were represented by attorneys-at-law on the next adjourned date notwithstanding that Paul was the director of the two corporate claimants and no application had been made for an unless order by the defendants. There is a further complaint that the learned judge recorded that Paul's representation of Adam amounts to an abuse of process without giving Paul an opportunity to be heard on that issue.

#### **The law on recusal**

[22] The legal principles concerning recusal were re-stated by the Caribbean Court of Justice ("CCJ") in **Walsh v Ward and others**.<sup>1</sup> The allegation there, as here, was in relation to conduct of two members of the bench towards the advocate of the party rather than the party itself and of open and manifest hostility by these judges, who even sought legal advice concerning commencing proceedings against him, towards the advocate involved. There was also complaint about the decision-making process. Counsel invited the members of the bench with whom he had a concern to recuse themselves from a hearing in the matter concerning leave to appeal to the CCJ and they did not respond. He further alleged that at the hearing of the leave application, he was neither acknowledged nor heard by the court. The advocate involved thereafter requested and then applied for an Order that the two members of the bench should recuse themselves from hearing the appeal in **Walsh v Ward**, a separate matter, on the basis of apparent bias. The panel refused the recusal application.

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<sup>1</sup> (2015) 87 WIR 101.

[23] Byron P., in delivering the judgment of the CCJ, stated at paragraph 95 that the test for bias:

“...is aimed at preserving confidence in the administration of justice and not at censure of the judge. If an objective bystander thought that there was a real (as opposed to a fanciful) possibility a judge might be biased, justice delivery is compromised. ...What is at stake is not the integrity of the judicial officer but that of the administration of justice. It is important to stress that for a judge to recuse herself or be asked to do so, does not reflect negatively on the probity or competence of the judge.”

[24] He continued at paragraph 96, that the matters raised by counsel could be divided into two categories, conduct of the judges in court and matters that took place outside court and stated that:

“As to the former, it must be said that judicial decisions and rulings that could form the basis of an appeal would ordinarily be insufficient to constitute a valid ground for recusal. Moreover, judges are human and ‘expressions of impatience, dissatisfaction, annoyance, and even anger that are within the bounds of what imperfect men and women, even after having been confirmed as...judges, sometimes display’ may rarely rise to a level that could successfully ground an application to recuse. If, on the other hand, it is evident that there is animosity on the part of the judge towards someone involved in a case, including counsel, then that would constitute grounds for recusal.”

He further stated that there is a presumption of impartiality of judges but this is rebuttable and is only one factor that the informed observer will consider.

### **Bias**

[25] The test for bias is well established. In **Vance Amory v Thomas Sharpe, QC et al**<sup>2</sup> at paragraphs 8 *et seq.* and again more recently in **Keston Riley v The Attorney General and Director of Public Prosecutions**,<sup>3</sup> this Court outlined the relevant legal principles concerning bias. I summarise these as follows:

- (i) Bias is an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve.

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<sup>2</sup> Saint Christopher and Nevis High Court Civil Appeal No. HCVAP2009/013 (delivered 27<sup>th</sup> August 2012, unreported).

<sup>3</sup> [2020] ECSCJ No. 313 (delivered 17<sup>th</sup> September 2020).

- (ii) Actual bias may arise from a variety of causes, such as a desire to decide a case one way or the other regardless of the legal merits.
- (iii) Pre-determination, which arises when a judge reaches a final conclusion before he or she is in possession of all the relevant evidence and arguments, is sometimes treated as a specie of bias but there are conceptual differences between them.
- (iv) Because of difficulties of proof, findings of actual bias or pre-determination are rare. Apparent bias or apparent pre-determination is the more common basis for attacking judicial decisions.
- (v) The test for apparent bias is that stated by Lord Hope in **Porter v Magill**<sup>4</sup> – ‘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’. The observer is meant to be fair minded, waiting until he/she understands both sides of the argument before reaching a decision and so his/her approach should not be confused with that of the complainant as he/she requires objective justification of the complaint. The observer is also informed meaning that he/she will take a balanced approach to information given to him/her and put it into its overall context appreciating that context forms an important part of the material to be considered before reaching a decision.
- (vi) The allegation of apparent bias must be decided on the facts and circumstances of the individual case including the nature of the issue to be decided, the relevant circumstances being those apparent to the court upon investigation and not only the circumstances available to the

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<sup>4</sup> [2002] 2 AC 357.

hypothetical observer at the original hearing. The circumstances must be considered cumulatively.

(vii) The test for apparent bias involved a two-stage process. Firstly, the court must ascertain all the circumstances bearing on the suggestion that the tribunal was biased. Secondly, the court should ask itself whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased. It is the appearance that the facts capable of being known to the public gives rise to that matters, and not what is in the mind of the particular judge who is under scrutiny.

(viii) An appellate court is well able to assume the vantage point of a fair minded and informed observer, a person who is expected to be neither complacent nor unduly sensitive, with knowledge of all the relevant circumstances. It must itself make an assessment of all the relevant circumstances and then decide whether there is a real possibility of bias.

[26] In **Lesage v The Mauritius Commercial Bank Ltd**,<sup>5</sup> to which this Court was referred, the Privy Council endorsed at paragraph 49 the statement from **Gillies v Secretary of State for Work and Pensions (Scotland)**<sup>6</sup> that, ‘the fair-minded and informed observer can be assumed to have access to all the facts that are capable of being known by members of the public generally, bearing in mind that it is the appearance that these facts give rise to that matters, not what is in the mind of the particular judge...who is under scrutiny’.

[27] Mr. Elliot-Hamilton, who appeared for the appellants in all the appeals, submitted that the essence of the complaint was that the learned judge had refused to hear Paul, who was making representations to the court which the court did not address

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<sup>5</sup> [2012] UKPC 41.

<sup>6</sup> [2006] UKHL 2.

or indicate if he accepted. Counsel referred this Court to various incidents as indicators of apparent bias on the part of the learned judge which he submitted should be considered cumulatively. These included the fact that after the first recusal application had been filed, the learned judge for the first time raised the issue of the effectiveness of the power of attorney given to Paul and went on to give directions for submissions on whether Paul could be heard on behalf of Adam and Dan and the companies; that there was increased hostility from the judge against Paul as evidenced by the orders made in relation to Paul's appearances, especially the Order in **Weiner v Bilzerian** where he dismissed the application on incorrect grounds as Adam had actually signed the application and Paul merely gave the evidence in support (Appeal No. 33 of 2019); that these errors included the errors made by the learned judge in concluding that Paul could not represent Adam and Dan, by virtue of CPR Part 27.4 or the companies of which he was a director, by virtue of CPR Part 22.3 and that it was Paul, rather than Adam, who had made the previous recusal applications or that it was Paul who was guilty of seeking to delay the proceedings to which the learned judge referred in his ruling; that the learned judge made assertions of fact in his rulings without properly considering the reasons given by Paul for his various applications for adjournment. Mr. Elliot-Hamilton submitted that these matters show that the learned judge had closed his mind to representations from Paul and may have pre-determined the issue of his representation of the parties and touch and concern whether Paul was being fairly treated.

- [28] The transcripts of the various hearings before the learned judge do not form part of the Record of the various appeals. We are therefore left to consider the evidence from Paul, the ruling of the judge in which he provided further information concerning the matter, as well as all other surrounding circumstances including the fresh evidence that provide context to what was happening in the proceedings below as we consider relevant to determine whether objectively the appellants have established that a fair minded observer would have concluded that there was a real possibility that the judge was biased.

- [29] Ms. Dyer, who appeared for the respondents in Appeal No. 33 of 2019, submitted that one of the relevant circumstances was that Paul, who in any event was allowed by the learned judge to make representations to the court on behalf of his sons and the companies, had no right to be heard on behalf of Adam or Dan. She further submitted that there was evidential basis for the learned judge's references to previous recusal applications in the affidavit filed on behalf of the Weiners in response to the Recusal Application. Ms. Dyer also submitted that the fact that the learned judge may have errors of law in his findings is not by itself indicative of bias.
- [30] Ms. O'Brien who appeared for the 1<sup>st</sup> and 3<sup>rd</sup> respondents in Appeal No. 29 of 2019 reminded the Court that the fair minded observer is not unduly sensitive and the informed observer would be aware of the court's case management role with the result that the court should not be criticised for raising the issue of Paul's representation of the parties.

### **Discussion and analysis**

- [31] In **Keston Riley** at paragraphs 12 *et seq.*, this Court considered the law concerning the circumstances in which a judge should recuse himself from a matter. It is clear that not every criticism of a judge should lead to his recusal but where there is doubt about his impartiality, it is appropriate that he be recused. The court has to be astute to guard against manipulation by litigants of the composition of the court hearing the matter by the raising of unreasonable or unsubstantiated recusal demands. Real or apparent bias on the part of the judge will always form a valid basis for recusal even if the motive for making the recusal application is purely tactical, such as forum shopping. In **Walsh v Ward**, the CCJ held that real or apparent bias against counsel for a party is a sufficient basis for recusal.
- [32] In the court below, the learned judge clearly had a concern about the state of the various proceedings which he was required to case manage either in relation to pre-trial or post trial matters and the standing of Paul to represent either individual or

corporate parties. Case management concerns the allocation of court resources with the objective at arriving at the optimal administration of justice both in the individual case before the court and overall. The question for determination, however, is does an objective consideration of all the circumstances cumulatively show that the learned judge went too far in carrying out his case management role so that there was a real possibility that he closed his mind to hearing both sides of the argument before making his rulings? In other words, was there evidence of animosity towards Paul or could any shortcomings on the part of the judge be explained as errors in the exercise of his duties that could be corrected on appeal or attributed to normal human failings of annoyance or occasional loss of even temper. As Baptiste JA indicated at paragraph 21 of **Keston Riley**, this calls for an intense focus on the essential facts and context of each of the cases.

[33] Having reviewed the complaints made by Paul and the explanations offered by the learned judge in his ruling on the recusal applications as well as considering the context of the state of the proceedings in the various matters and the right and powers of the judge to case manage these matters, I have come to the conclusion that a fair minded and informed observer is unlikely to come to the conclusion that there was a real possibility that the learned judge was biased.

[34] With respect to the 27<sup>th</sup> February 2019 hearing, there is no real evidence that it was the fault of the judge that the matter was not called as Paul alleges and if the judge was not familiar with Paul it is equally not impugnable that he mistook a lay person for the litigant rather than a representative of the litigant. If, as Paul states, the learned judge told him that the matter for which he had notice was not being heard, it was for Paul to establish his right to be informed of the matter that was being heard. I do not consider that he has done so.

[35] With respect to the 28<sup>th</sup> February 2019 hearing, it was for the court office to deal with the administrative matters concerning the service of accurate notices of hearing and not the judge. The respondents' evidence was that Paul admitted that the notice

of the hearing had been left at his office and in any event he attended the hearing and addressed the court on the issue of the priority to be given to another matter. He claims that the learned judge ignored his objection and disregarded his request for priority of a matter that was not listed for case management on that day. There is a qualitative distinction between ignoring representations and disregarding them in the sense of refusing to accede to them. A judge is entitled to do the latter as his role is that of an arbiter between the positions advanced by each litigant as well as an impartial determinant of where the proper course of action for the proper administration of justice lies. A judge should give reasons for his decision but the extent of this obligation is commensurate with the nature of the matter before him. Paul's evidence is that the judge proceeded to address matters that he was not prepared to address. If these were in relation to matters that were listed for hearing that day, it severely weakens Paul's case of apparent bias based on a refusal to listen to him if he admitted that he was not prepared for the matters. It begs the question: what was the judge then supposed to listen to? I do not find in the circumstances that objectively it has been made out that Paul (or Adam, the actual litigant) failed to have notice of the hearing or the opportunity to be heard at the hearing.

- [36] The next complaint concerned the hearing on 7<sup>th</sup> March 2019 where Paul states that the learned judge again disregarded his request to set down another matter, which was not listed before the judge that day, for hearing as a priority. The objective informed observer could well conclude that a judge cannot be expected to deal with a matter that is not before him and that this in itself does not evidence that he had either pre-determined the matter or had closed his mind to what Paul was saying.
- [37] The other hearing on 7<sup>th</sup> March 2019 is described by Paul as being the most troubling interaction that he had with the judge. The matter listed for hearing was an application for an order cancelling a hearing that was listed for 18<sup>th</sup> December 2018, some three months previously. In these proceedings, Paul represented IIC. The real or at least a substantial part of the complaint is about what happened during the

previous year in the matter as allegations are made of short service of the notice of hearing for trial directions by the court office and hearsay evidence was given that a hearing took place on 29<sup>th</sup> November 2019 in the absence of the other defendant who was sitting outside the courtroom but the matter was not called. Neither IIC nor Paul were affected by this as in any event Paul was not in the jurisdiction on that date. It appears that no substantive hearing took place on 29<sup>th</sup> November 2019 as the Defendants were served with another notice of hearing on 4<sup>th</sup> December 2019 for the hearing to take place on 18<sup>th</sup> December 2019. The defendants applied for an order cancelling the hearing as IIC had previously filed a notice of unavailability for that date and this application was listed for 7<sup>th</sup> March 2019. Paul states that on that date, the learned judge, instead of dealing with the application to cancel, indicated that he would proceed with making trial directions. Paul's evidence is that he made submissions to the court why trial directions should not be given at that hearing but the learned judge ignored them and proceeded to give the directions. In my judgment, a fair minded and informed observer could not conclude that there was a real possibility of bias from the foregoing. By the listing of the application to cancel in March 2019, any defects of service of notices of hearing or disregard of the notice of unavailability from 2018 were rendered moot. Paul's own evidence is that the judge did indicate that he proposed to give trial directions at the hearing on 7<sup>th</sup> March 2019 and that Paul was given the opportunity to make representations why this should not be done. That these submissions were not upheld is not the point. The point is that Paul was allowed the opportunity to make them and the judge was entitled to determine where the interests of justice lay. It cannot be said in those circumstances that it was more likely than not that the judge had adopted a closed mind to the position of Paul or those he represented.

- [38] The second Recusal Application is premised on the 'relentless retaliatory attack' by the learned judge to the first Recusal Application, characterised by Paul's perception that he ordered counsel to file affidavits and submissions in opposition to the first Recusal Application. This, however, is not completely accurate. His Order of 9<sup>th</sup> May 2019, in the proceedings giving rise to Appeal No. 33 of 2019, was that the

defendant (i.e. represented by Paul) should file and serve submissions on the first Recusal Application by 14<sup>th</sup> June 2019 and that the claimants may file and serve submissions and authorities if necessary on or before 28<sup>th</sup> June 2019. In Appeal No. 32 of 2019, the learned judge made orders on 27<sup>th</sup> March 2019 that the defendants shall file and serve an affidavit in response to the (first) Recusal Application within 28 days and shall file and serve submissions and authorities by 28<sup>th</sup> June 2019. Orders in the same terms were made on 9<sup>th</sup> May 2019 in the proceedings giving rise to Appeal Nos. 28, 29, 30, and 31 of 2019. None of the orders mandated that the respondents should oppose rather than respond to the Recusal Application.

[39] Apart from the perceived retaliatory attack by the learned judge on the first Recusal Application, Paul also took issue in the second Recusal Application with the directions from the learned judge to the parties to file submission on the issue of Paul's authority to represent Dan and Adam in the various proceedings and to consider the Irish Decision. Paul felt that this evidenced bias or apparent bias as the learned judge 'personally created the issue of whether a power of attorney could be used for Bilzerian to appear on behalf of Applicant or his brother in the hope of disqualifying Bilzerian; he then conducted research on the issue ... and then ordered counsel to use it to support [his] efforts to disqualify Bilzerian'. Paul further took issue with the fact that the judge demanded proof that the companies he was representing had authorised Paul to conduct the proceedings on their behalf on the basis that the judge would deny permission under CPR Part 22.3 because of his bias. Paul also took issue with learned judge's refusal to adjourn a hearing set for 28<sup>th</sup> March 2019 on the ground of his unavailability notwithstanding that counsel for the other parties had not objected to the adjournment and the fact that the learned judge had proceeded to deal with the matter notwithstanding that the first Recusal Application had already been filed.

[40] In my judgment, a fair minded and informed observer would consider as part of the context of the recusal applications, the fact that our system of justice is adversarial and that a recusal application potentially affects not only the applicant but also the

other parties to the substantive proceedings as all are equally entitled to the benefit of an impartial tribunal for the determination of their dispute. The invitation to the other parties to file evidence and submissions on the issue, which was wrongly labelled by Paul as evidence and submissions in opposition to, rather than in response to, his application, does not give rise to the real possibility that the judge was biased. To the contrary, it appears to be more consistent with an attempt by the judge to be fair and even handed in the process by seeking the views of all the affected persons.

- [41] The learned judge was clearly troubled by the issue of Paul's representation of Adam and Dan through the power of attorney and of the companies. In the former case, rightly so. In the latter case, there was room for a valid concern even if a proper response could have satisfied the judge. The invitation to the parties to address him on this issue also appears to be contrary to the possibility of his being biased. Paul has to meet a high threshold if he invites this Court to conclude that where a judge asks a question, this indicates that he has closed his mind to the range of possible responses. The informed observer would be aware of the provisions of CPR Part 22.3 which requires the court to give permission for a company to be recognised by a duly authorised director. It was not therefore inappropriate that the learned judge should ask the question whether Paul was so authorised as this was the premise on which any application to him to exercise his discretion to give permission would be based. It has been established in decisions such as **Mitchell & Hobbs (UK) Ltd. v Mill**<sup>7</sup> that such authorisation cannot be granted by a director acting singly but must be done by the board. I do not see that a fair-minded observer with knowledge that this issue was relevant to the grant of permission for Paul to represent the companies could conclude that there was a real possibility that the judge would be biased if the application for permission were to be made before him.

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<sup>7</sup> [1996] 2 BCLC 102.

- [42] In the guidance given by the CCJ, on the procedure for recusal applications, at paragraph 101 of its judgment in **Walsh v Ward**, the court stated that the recusal application should be heard and determined prior to the hearing of the underlying substantive proceeding. In the proceedings below that gave rise to Appeal No. 29 of 2019, Paul had filed the first Recusal Application on 13<sup>th</sup> March 2019. Paul's case is that the learned judge nevertheless conducted an ex parte hearing on 28<sup>th</sup> March 2019 and issued an eight-part order. However, the notice of hearing was for the scheduling of a status hearing on the matter and the order made was not in relation to any substantive disposition of the proceedings but for directions for submissions on the rights of audience and submissions and evidence on the first Recusal Application and included a specific order that Paul be served personally with a copy of the order.
- [43] The fair minded and informed observer would be presumed to be aware that the Civil Procedure Rules require the court to manage cases actively and that it is the obligation of the parties, which term is defined in the Rules as including legal practitioners on record, to assist the court in attaining the overriding objective. With this in mind, it is unlikely that the fair-minded observer would conclude that there was a real possibility of bias against Paul or the party he was representing if the learned judge proceeded with the status hearing in his absence. If he was required to travel so that he could not be present, it was incumbent upon him make the appropriate arrangements for someone to appear for the party he represented. The grant of an adjournment is at the discretion of the court, taking into account the overriding objective. Agreement among the parties does not necessarily result in the grant of the adjournment and the appearance of bias does not result without more from a judge exercising his discretion not to adjourn a status hearing especially where the orders made did not deal with the substantive proceeding.
- [44] The fair-minded observer must also consider the guidance from **Walsh v Ward** as part of the context. The complaints are all in relation to matters done in court by a judge for whom there is a presumption of impartiality. The orders were all directed

to issues arising in the proceedings even if they may have reflected on Paul. Even complaints about continuous delays in the proceedings can be reasonably explained by frustration on the part of the judge in not having proceedings that had been filed several years earlier completely disposed of. The various records of appeal show the filings of notices of unavailability by Paul, which are not contemplated by the CPR and which practice, if adopted, would hold a court hostage to the expediency of the advocate, a practice that the CPR were meant to bring to an end. To the simple question whether, on the whole, the facts and circumstances show that there was a real possibility of bias by the learned judge against Paul or those he purported to represent, I would answer no.

- [45] For the above reasons I would uphold the learned judge's refusal to recuse himself from the proceedings giving rise to Appeal Nos. 28-33 of 2019.

#### **Rights of audience**

- [46] Appeal Nos. 29-33 of 2019 further deal with issue of Paul's standing to represent Adam and Dan in proceedings in the High Court giving rise to these appeals. The relevant factual background is that in each case Adam or Dan had previously been represented by a legal practitioner and that notices pursuant to CPR 63.4 had been filed. Rule 63.4 deals with the situation where a party who had been previously represented by a legal practitioner decides to act in person. Paul filed these CPR 63.4 notices purportedly in pursuance of powers of attorney granted to him by Adam and Dan under which he was authorised to act for them in any lawful way with respect to claims brought by or against them in the Federation of Saint Christopher and Nevis. Paul was not a party to any of these proceedings but the judge found that he had exercised 'a surprisingly unrestricted right of audience before the High Court of Saint Christopher and Nevis and had acted to all intents and purposes as if he were a person qualified to practice and admitted to practice as an Attorney-at-law in Saint Christopher and Nevis'.

[47] On 28<sup>th</sup> March 2019, in the proceedings giving rise to Appeal No. 29 of 2019, the learned judge ordered the parties to file submissions and authorities on whether Adam or Dan, respectively can be represented in person by Paul in civil proceedings under the CPR including CPR 63.4, within 28 days of the date of his order. The parties were also directed to consider the decision of the Irish Supreme Court in **In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Coffey and others**.<sup>8</sup> Orders in similar terms were made on 9<sup>th</sup> May 2019 in the proceedings giving rise to Appeal Nos. 30, 31 and 33; and on 28<sup>th</sup> February 2019 in proceedings giving rise to Appeal No. 32 of 2019.

[48] In his order dated 25<sup>th</sup> July 2019, the learned judge made an order prohibiting Paul from representing Adam and Dan in person in proceedings before the High Court. In his written ruling, he noted that in earlier appeals (SKBHCVAP2016/19 and 21) the Court of Appeal had noted that, '[t]here is an issue of Paul Bilzerian's role in the trial. He is not a party to the proceedings, he is not a lawyer or witness in the case. His role is to advise the lawyer who is to advocate the matter'. He found that the power of attorney, no matter how broadly drafted, cannot confer a right on the agent to act in person for the party to the litigation and referred, in support of his finding, to the dicta of Lord Tenterden CJ in **Collier v Hicks**<sup>9</sup> and of the Irish Supreme Court in **Coffey's Case** respectively that 'no one can demand to take part in the proceedings as an advocate contrary to the regulations of the court...' and that 'the fundamental rule is that the only persons who enjoy a right of audience before our courts are the parties themselves, when not legally represented, a solicitor duly and properly instructed by a party and counsel duly instructed by a solicitor to appear for a party'. In **Coffey's Case**, there was also reference to the judgment in **Abse and others v Smith and others**<sup>10</sup> where the Master of the Rolls explained that the limitation of rights of audience to qualified persons was 'not introduced in the interests of the lawyers concerned, but in the public interest'.

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<sup>8</sup> [2013] IESC 11.

<sup>9</sup> (1831) 2 B. & Ad. 663.

<sup>10</sup> [1986] 2 WLR 322.

[49] Mr. Elliot-Hamilton seeks to distinguish the decision in **Coffey’s Case** both on the facts and as a matter of law on the basis that the court there was relying upon principles of common law and rules of procedure, which were different from the rules of procedure used in our courts. He relied on the provisions of CPR Part 22 and 27 to show that our procedural rules provide for representation of a litigant otherwise than by a legal practitioner. Part 22, however, deals with specific situations where third parties may represent parties, i.e. in claims by or against partnerships, persons in their business names or corporations. None of these three situations applies in the instant case. Part 27.4 allows a representative of a party to attend a case management conference or pre-trial review but this person attends in place of the litigant and in addition to but not in the place of the legal practitioner, where the party is represented by a legal practitioner. Rule 63.4 of the CPR deals with the situation in these proceedings, where a party who was previously represented by a legal practitioner decides to act in person. It does not refer to allowing that party to act through an agent.

[50] I find that the principle from **Coffey’s Case** that the rights of audience are governed by the common law applies in this jurisdiction in a situation, such as the present, where neither the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**<sup>11</sup> (the “Supreme Court Act”) nor the CPR addresses the particular situation of an agent purporting to act as advocate for a party who purports to be acting in person. This is the clear basis on which Paul should be prohibited from appearing for his sons through the power of attorney. In my judgment, the learned judge correctly found that Paul has no right of audience on behalf of Adam and Dan in the various proceedings before the High Court. No distinction can be drawn here between rights of audience in proceedings in chambers or in open court. The only persons at common law who have rights of audience are duly admitted legal practitioners or the litigants in person, subject to the specific provisions in CPR Part 22. I would therefore dismiss this ground of appeal in Appeal Nos. 29-33 of 2019.

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<sup>11</sup> Cap. 3:11 of the Laws of Saint Christopher and Nevis.

### **The Strike Out Appeals**

- [51] Appeal No. 3 of 2020 is from an unless order made by the learned judge on 30<sup>th</sup> January 2020 that unless Adam, Lemon Grove and CBS (the claimants in the proceedings) were represented by an Attorney-at-law on the next adjourned date, the statement of claim would be struck out without further order. The background to this order is that two of the defendants had applied in May 2017 to strike out the statement of claim. The order recites that the court below heard submissions from counsel for these defendants and evidence from Paul. The learned judge also noted that the order was made because of his previous order (i.e. of 25<sup>th</sup> July 2019) prohibiting Paul from representing Adam and the way in which Paul had been conducting matters before the court amounting to an abuse of the court's processes. The learned judge made further orders for the claimants to file response evidence on the substantive strike out applications and submissions in respect of his unless order. The hearing of the applications was adjourned to 12<sup>th</sup> March 2020.
- [52] The appellants submit, and I accept, that the recordal of appearances on the order show that Paul had not purported to represent Adam at that hearing. The first ground of appeal advanced is that the learned judge, contrary to CPR 26.2(2) did not give the appellants a reasonable opportunity to make representations before he made the unless order. Here again, this Court is at a disadvantage in that no transcript of this hearing has been provided in the record of appeal. Mr. Elliot-Hamilton submits that Paul was not informed of the facts upon which the learned judge had come to the conclusion that the manner in which Paul had been conducting matters amounted to an abuse of process. As no submissions were filed in response contradicting this statement and the court's order did not specifically refer to this, I accept the submission. CPR26.2(2) requires the court to allow a party likely to be affected by a proposed order to be made on the court's initiative a reasonable opportunity to make representations. In the instant case, it is not absolutely clear whether the learned judge was indicating that absent legal representation, he would grant the order being sought by the defendants for strike out or that he would strike out on his own initiative.

[53] I am prepared to assume that the defendants did not seek strike out on that ground since their applications had been filed since 2017 so that the order was being made on the judge's own initiative. In such a case, the question that arises is whether the party likely to be affected must be given the opportunity to make representations before an unless order is made or is it sufficient that the opportunity is given before it takes effect? In the instant case, the learned judge did give the claimants the opportunity to file submissions in respect of the proposed strike out order prior to the next hearing date on which the order would take effect if the claimants were not represented by legal practitioners. One has to assume that the learned judge meant to deal with the submissions on paper prior to the hearing or else he would have found himself in a difficult position if, for example, Adam turned up in person at that hearing without a legal practitioner. The claimants of course would have had the benefit of the judge's thinking in relation to any proposed strike out as was expressed in his order by the time they were to prepare their submissions in relation thereto. In my judgment, when the order is read as a whole, it seems clear that the learned judge intended to give the appellants the opportunity to make representations why the claim should not be struck out for their failure to have legal representation at the adjourned hearing. I believe that this sufficiently protected their fundamental right to be treated fairly as it is the strike out rather than the making of the unless order that was likely to affect them.

[54] The second and third grounds of appeal, namely that the learned judge erred in law in making orders in breach of the claimants rights to represent themselves (in the case of the companies through a duly authorised director or officer) are premature in that the learned judge did not make the order for strike out and did give the claimants the opportunity to make submissions in that regard. I agree, however, with Mr. Elliot-Hamilton's submission that any such order would have been in breach of Adam's right to appear as a litigant in person. The position with the companies is more complicated as the court is entitled to be satisfied under CPR22.3(1) that the

director representing the company is duly authorised and nothing on the record shows that this had been done.

[55] The fourth ground of appeal challenges the learned judge's exercise of his discretion to make the unless order on the basis that there were no facts before him which justified the making of such an order. In the absence of a transcript and/or evidence from Paul, this court is left in the unsatisfactory position of having only Mr. Elliot-Hamilton's submissions as to what actually transpired during a hearing in which he was obviously not present in court. I am reluctant to uphold this ground of appeal in these circumstances especially where the order itself states that it was made on the basis of prior abuse of court processes and that Paul was heard on the issue.

[56] For the foregoing reasons, I would dismiss Appeal No. 3 of 2020.

[57] In the proceedings below giving rise to Appeal No. 40 of 2019, the learned judge had made case management orders that the appellant's set aside and stay of execution applications would be dealt with on submissions and authorities received by the court by 28<sup>th</sup> March 2019 and on paper. The learned judge ruled that the set aside application must fail because it was made by Paul and not by Adam, the party to the proceedings and that the affidavit was sworn by Paul and not by Adam. The stay of execution application was dismissed accordingly.

[58] The first and second grounds of appeal concern whether the learned judge misdirected himself on the law by finding the application defective because it was made by Paul and because the supporting affidavit was made by Paul. I have reviewed both notices of application and each case, the application states that it is made by Adam and is signed by Adam in person. The draft orders similarly state that the application is made by Adam. The affidavits in support of these applications are made by Paul who states in each case that he is not a party to the proceedings but is authorised by Adam to make the affidavit on his behalf and the matters therein are within his personal knowledge. The set aside affidavit also states that the

applicant, i.e. Adam, was not present at the trial and gives the reasons why he was not present. It appears therefore that the learned judge read incorrectly the papers that were before him and based on this incorrect understanding, exercised his discretion on the set aside and stay applications by failing to take into consideration what was actually before him and taking into consideration things that were not before him. As a result, his decision was therefore blatantly wrong.<sup>12</sup> I also agree with Mr. Elliot-Hamilton's submission that the learned judge erred further in that under CPR 11.9, there is no requirement that the supporting affidavit must be made by the applicant himself. I would therefore allow the appeal on these grounds and direct that the stay and set aside applications be listed for directions in the High Court.

[59] My finding on these first two grounds largely renders moot ground 3 of the appeal, that the learned judge erred in not dealing with Adam's application to strike out the affidavit filed by the claimants in opposition to his set aside Application before dealing with that application. The normal rule is that applications are to be dealt with in the order in which they are filed but this rule must yield to common sense where needed so that the appropriate course of action in the proceedings below would have been to deal with the strike out of the affidavit in opposition as part and parcel of dealing with the set aside application.

[60] With respect to ground 4 concerning the judge's discretion to hear the matter on papers, this is a case management decision on the part of the judge with which this Court is normally reluctant to interfere unless it has been shown to be based on error of principle or unreasonable exercise of the discretion of the judge and thereby blatantly wrong.<sup>13</sup> The appellant's submission is that once the applications objecting to the contents of the affidavit and for an extension of time to file submissions had been filed, the judge should have held an oral hearing to determine the evidential objections. The application to strike the affidavit was based on the ground that the

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<sup>12</sup> See: *Dufour and others v Helenair Corporation Ltd and others* (1996) 52 WIR 188.

<sup>13</sup> *Ibid.*

affidavit did not contain facts within the knowledge of the deponent but only argument. The application to extend time was so that the court could deal first with Adam's application to strike the affidavit of the claimant. I find that there was nothing in either application that demanded an oral hearing. The latter application was entirely dependent on the former which from its grounds could have been dealt with on paper by the judge in the course of the substantive application to set aside the judgment. This ground therefore fails.

[61] Appeal No. 44 of 2019 lies from the order of the learned judge dated 31<sup>st</sup> October 2019 striking out the defence of IIC in the proceedings below. The appellants advance two grounds in support of the appeal, namely that the learned judge failed to exercise his discretion to reconsider a previous order that he had made on 17<sup>th</sup> October 2019 which had not yet been perfected and that he erred in striking out the defence for non-compliance with that order.

[62] The impugned order was made as part of trial directions for the proceedings below. The claimants and defendants had filed applications for extensions of time to comply with orders for the filing of witness statements, which were granted. The order does not state the reason why IIC's defence was struck out but does recite that the court noted that IIC had not complied with its order to be represented by an Attorney-at-law at that hearing. Among the documents forming part of the record was a "Notice of Filing" by IIC which contained a document headed 'Certified Copy of Resolutions by the Shareholder of [IIC]' dated 15<sup>th</sup> March 2017. This document stated that the shareholder had passed a resolution appointing Paul as director with immediate effect 'for the purpose of managing all the Company's litigation and dispute resolution'. The document also states that the shareholder, Dr. Dennis Merchant ("Dr. Merchant") and Paul were the directors of IIC. I expect that this document was filed to evidence Paul's authorisation to represent IIC at the directions hearing. It does not, however, do so for the following reasons. Firstly, it is a shareholder resolution. A shareholder can elect a director but a shareholder does not normally have a role in the management of the affairs of the company which would entitle

him to allocate corporate responsibilities to a specific director. This is part of the remit of the board of directors. If the bylaws of IIC allocated this role to the shareholder, it should have been put in evidence. Secondly, the document shows that there was another director, Dr. Merchant, who in any event did not take part in the relevant resolution. As it is unlikely, in the absence of proof of the bylaws of the company, that one of two directors can form a quorum to make decisions for the company, I am not satisfied that this document can be used to evidence more than the election of Paul to the office of director by the sole shareholder.

- [63] The appellants' case is that on 17<sup>th</sup> October 2019, the learned judge made an order on his own initiative that IIC should be represented by legal practitioner at the adjourned hearing on 31<sup>st</sup> October 2019, failing which the defence would be struck out. This order was not perfected by the next hearing date on 31<sup>st</sup> October 2019, when IIC was again represented by Paul. At that hearing, Paul directed the learned judge's attention to CPR22.3 but the learned judge nevertheless struck out the defence. The appellants submit that the learned judge disregarded CPR 22.3. I expect that the notice with which I dealt in the preceding paragraph was referred to in the course of that argument. However, for the reasons given, that notice was not sufficient, in my judgment, to demonstrate on a balance of probabilities that Paul was authorised to represent IIC at the hearing. The other difficulty that the appellants face is that the court had made an order, which they sought to set aside under the court's jurisdiction to reverse its previous decision before it is perfected. This jurisdiction was considered by the UK Supreme Court in **Re L and B (children) (care proceedings: power to revise judgment)**<sup>14</sup> where their Lordships held that a judge is entitled to reverse his decision before it is perfected based on a carefully considered change of mind. The appellants had various options open to them, they could have: (i) retained a legal practitioner for the hearing to make submissions on Paul's authority under CPR Part 22.3; (ii) sought leave to appeal the order; (iii) sought relief from sanctions; or (iv) invoked the inherent jurisdiction as they did. The last was probably the riskiest option for them as they would have needed to

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<sup>14</sup> [2013] 2 All ER 294.

persuade the judge that the overriding objective required the change of order. The learned judge was not so persuaded.

[64] In light of the foregoing, I am not prepared to accede to ground 1 of the appeal. I am not convinced that the learned judge did not exercise his discretion. I find it more likely that he did exercise the discretion and refused to change his mind, which falls within the scope of that discretion. As Paul did not establish his authority pursuant to CPR 22.3, on which on the appellant's case he did address the court on 31<sup>st</sup> October 2019, I fail to see why the learned judge would have needed to invite the parties to address him on the exercise of his discretion to reconsider his order. No basis for such reconsideration had been established so I do not find that the discretion was exercised in any manner that should be set aside on appeal.

[65] The appellants submit that reconsideration was necessary as the original order was made without the benefit of any representations from them. I am of the view that this is expecting too much. If the court signaled that it would make a strike out order at the next hearing if certain conditions were not met, the litigant has the choice and opportunity to meet those conditions or to make representations to the court why the consequences should not follow or even to seek permission to appeal that order. That appears to satisfy the requirements of dealing with the matter justly in accordance with the overriding objective. The court expects that its orders will be obeyed, even if they are ultimately found to be incorrect. In **Isaacs v Robertson**,<sup>15</sup> the Privy Council agreed with this Court's citation of the following passage from the judgment in **Hadkinson v Hadkinson**,<sup>16</sup> '[i]t is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void'. The appellants were not successful in the course of action that they took in

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<sup>15</sup> (1984) 43 WIR 126.

<sup>16</sup> [1952] P 285 at p. 288.

response to the order of 17<sup>th</sup> October 2019. This does not mean that the court below was incorrect in its decision.

[66] The appellants also do not succeed on ground 2 of the appeal. If the learned judge exercised his discretion to refuse the application for reconsideration of the unless order, there was nothing to stop him from proceeding to strike out. He did not have to then re-consider his decision not to re-consider.

[67] Mr. Elliot-Hamilton advanced two further arguments which strictly are not foreshadowed in the grounds of appeal, namely that: (i) the parties should have had notice under CPR 26.2(4)(b) before the judge made the unless order on 17<sup>th</sup> October 2019 as this was made on his own initiative; and (ii) the strike out order was disproportionate in the circumstances. With respect to the notice, my view is that the adjournment of the hearing for 14 days before the strike order could possibly take effect was sufficient compliance with CPR 26.2(4)(b) as I believe that the proper construction of that rule is that it takes effect with respect to substantive orders and not merely the indication of an intention to make such an order. Its purpose is to allow parties likely to be affected the opportunity to make representations in their interest. I am satisfied that IIC had such opportunity in the instant case. With respect to the second point, I accept the submission that striking out is a sanction of the last resort. However, this was a matter that commenced in 2016 and by October 2019, it was clear that the judge was not satisfied of Paul's authority to represent IIC. The onus was on IIC at all times to satisfy him of such authority and as trial directions were being contemplated, IIC had the further onus of seeking permission for Paul to represent it at the trial. In my view, IIC has not established that the strike out was disproportionate in the circumstances when effectively the court was of the view that it was not represented in the proceedings.

### **Disposition**

[68] For the foregoing reasons, I propose to order as follows:

- (1) Appeal No. 3 of 2020 is dismissed.
- (2) Appeal Nos. 28, 29, 30, 31, 32 and 33 of 2019 are dismissed.
- (3) Appeal No. 40 of 2019 is allowed.
- (4) Appeal No. 44 of 2019 is dismissed.
- (5) The set aside and stay applications which gave rise to Appeal No. 40 shall be listed for directions before the High Court.
- (6) As this court had not been addressed on the issue of costs of the appeals and in the relevant applications in the court below, I order that the parties shall, if so minded, file written submissions on the incidence and quantum of costs within 21 days of the delivery of this judgment and these issues shall be determined by the Court on paper.

[69] I wish to thank all counsel for their helpful written submissions and excellent oral arguments on this appeal and to express my regret for the delay in the finalisation of this judgment.

### **Postscript**

[70] On rendering the judgment, it was brought to the attention of the Court that the unless order dated 17<sup>th</sup> October 2019 in Appeal No. 44 was the subject of an appeal in Appeal No. 41 before a differently constituted panel. The appeal was allowed, the unless order was set aside and the matter was remitted to the court below. The

Court's order subsequently allowing the appeal in relation to the said unless order therefore renders the discussion in Appeal No. 44 academic. Likewise, the discussions in relation to the recusal appeals are also academic since the learned judge in those matters has since demitted office.

I concur.  
**Louise Esther Blenman**  
Justice of Appeal

I concur.  
Mario Michel  
Justice of Appeal

**By the Court**

**Chief Registrar**