IN THE SUPREME COURT OF BELIZE A.D. 2018
(DIVORCE)

ACTION NO. 6 of 2018
BETWEEN:-

DIANE LORI Tabony **Applicant**

AND

AUGUST HENRY Tabony **Respondent**

Before: **The Honourable Madame Justice Griffith**
Date of hearing: **14th May, 2019; 4th June, 2019 (oral ruling)**
Appearances: **Mr. Fred Lumor S.C. of Fred Lumor & Co. with Ms. Sheena Pitts, Pitts Law Firm for the Applicant; Mr. Eamon Courtenay S.C. with Ms. Stacey Castillo, Courtenay Coye LLP for the Respondent.**

DECISION

Application for Recusal of Judge – Proper grounds for application – Appearance of bias – Circumstances giving rise to appearance of bias - Pre-judgment of issues and credibility by prior decision – Fair-minded and informed observer.

Introduction

1. This is an Application for the recusal of Mdm. Justice Griffith ('the Judge'), before whom there are currently pending for hearing, actions for division of matrimonial property and for maintenance ('the current proceedings') following the dissolution of the parties' marriage in April, 2018. The Application is at the behest of Mrs. Diane Tabony, the Applicant/Petitioner of the matters respectively, and is made pursuant to section 6(7) of the Constitution of Belize which guarantees to her the right to have her matters heard before an independent and impartial tribunal. The Applicant alleges in short that her right to a fair hearing will be prejudiced on the basis that the judge in the current proceedings is the same judge who presided over her initial petition for divorce which was dismissed for want of jurisdiction. Specifically, the Application alleges that (i) the Judge incorrectly exercised her jurisdiction in the original petition in making determinations affecting the parties' matrimonial assets;

(ii) the Judge's prior decision could lead to there being two conflicting decisions of the Supreme Court in relation to the issues now to be decided in the current actions; and (iii) the Judge stands *functus officio* in respect of certain aspects of the current actions. The Respondent has objected to the Application for recusal. The Respondent's objection alleges that the grounds advanced in support of the Application are not grounds upon which an application for recusal is properly based. Instead, it is contended that the grounds raised are governed by the principles of *res judicata* and issue estoppel, as well as jurisdiction.

Issues

2. The issues for determination in this Application are as follows:-

   (i) What is the proper basis for recusal of a judge?

   (ii) (a) Has the Applicant established such a basis for recusal, and (b) is this a proper case for recusal?

Background and Submissions

3. A brief background of this matter is critical to its understanding and determination. In November, 2014 the Applicant Diane Tabony petitioned the Supreme Court for dissolution of her marriage to the Respondent August Tabony. Mr. Tabony objected *in limine* to the hearing of the divorce petition on the ground that the Court lacked the requisite jurisdiction to entertain the petition according to law. Specifically, the objection was made on the basis that Mr. Tabony was not at the material time domiciled in Belize, nor had Mrs. Tabony been resident in Belize for three (3) years immediately prior to the presentation of the petition.[1]

[1] In Belize the common law rule of the wife's domicile of dependency remains the law and the jurisdiction to entertain a divorce petition is enlarged to include residence by ***sections 147 and 148*** of the Supreme Court of Judicature Act, Cap. 91.

This objection was heard as a preliminary issue and the Court upheld the objection as to jurisdiction and the petition for dissolution was dismissed. The dismissal of the petition was reduced into a written decision[2] which is now pleaded in support of this Application for recusal. The Application identifies a number of paragraphs from that decision in support of the contention that the Applicant would not receive a fair hearing of the current matters before the Court. The facts as arose in the original petition are briefly stated as hereinafter follows.

4. The parties are American citizens married in 1986 who migrated to El Salvador in the early years of their marriage. Undisputed facts as they arose in the original petition included (i) that at the time of marriage the Respondent was already a naturalized Belizean and a businessman; (ii) the couple primarily raised their family of two daughters in El Salvador until the children left to pursue tertiary education in the United States in or around 20072008; (iii) (without any reference to ownership or entitlement) the parties acquired a condominium in Belize from as early as 1999, another in 2008 and established inter alia, a chain of gift stores which were managed by Mrs. Tabony. According to evidence presented by Mrs. Tabony in support of her case for the court having jurisdiction, the parties' marriage broke down in or around 2013, but by that time the couple had already been living in their condominium (in San Pedro, Belize), from 2008. In 2013 the parties physically separated, Mrs. Tabony says she was evicted from the matrimonial home, but she remained resident in Belize and travelled back and forth between here and El Salvador to administer the gift stores. The issues identified by the Court for determination on the preliminary objection to the original petition were as follows:-

> *"(i) What are the bases of the Court's jurisdiction in proceedings for divorce?*
> *(ii) Was August Tabony domiciled in Belize on institution of the divorce proceedings?*
> *(iii) If not, was Diane Tabony resident at the time of and ordinarily resident in Belize for three (3) years prior to the institution of the divorce proceedings?"*

[2] **August Henry Tabony v Diane Lori Tabony**, **Belize Supreme Court Action No. 282 of 2014**.

5. The parties thereupon presented evidence to the Court with a view to establishing on the one hand and rebutting on the other, support for and against findings of domicile (Mr. Tabony) and residence (Mrs. Tabony). The Court made findings of fact (as well as drew inferences from facts found), in relation to whether the evidence presented supported the contentions made in relation to domicile and residence as asserted by the parties. There was no appeal from this decision. From this decision, learned senior counsel for the Applicant has identified the following statements or findings by the Judge, as informing the Application for recusal:-

   (i) Paragraph 38(ii) that the Applicant's assertion that she insisted that the Respondent purchase the Grand Colony Home (Unit A3) and that the Grand Colony home was occupied as a primary place of abode from where she conducted her daily life does not accord with the evidence;

   (ii) Paragraph 38(vi) that the Applicant's evidence was that she has no shares in the Respondent's companies but she has been Chief Operating Officer and lead buyer of Toucan Gift Stores under a management agreement;

   (iii) Paragraphs 38(vii) and (viii) that the Applicant required permission to hold the employment and that her assertion in respect of being employed was inaccurate or if true she failed to validate her status as a lawful resident employee;

   (iv) Paragraph 38(viii) that it is also presumed that if the Applicant had been employed 'some employee from the nine gift shops she manages in Belize might have been available to attest to her continued presence and employment at the business';

   (v) Paragraph 40, that it is found that the Applicant was a frequent visitor to Belize to oversee the businesses for short periods.

6. Those paragraphs having been identified, senior counsel for the Applicant contended that (i) as the current claim is for division of the matrimonial home and other matrimonial assets and (ii) as the current claim for maintenance also concerns the matrimonial home and the Applicant's contributions towards the acquisition of matrimonial assets, the findings made by the Judge as identified above, would prejudice the fair hearing of the current claims.

Senior Counsel then referred to several assertions made by the Respondent in his affidavit responses to the current actions, which allege that the prior decision was dispositive of issues in the current actions. It is in relation to those aspects of the prior decision as extracted in paragraph 5 above, (and their effect as asserted by the Respondent), that the Applicant contends that any findings to the contrary made by the Judge in the current actions, would give rise to the possibility of two conflicting decisions arising out of the Supreme Court in relation to the same issues. Further, (in spite of an initial position that the Application was not one grounded in apparent bias) learned Senior Counsel expanded the grounds of his Application at the hearing and raised what was in effect, a submission of apparent bias.

7. It was submitted that by reason of the findings in the earlier decision, the Judge has already pre-judged the issues which arise for determination in the current actions. As a result, the Applicant apprehends that the Judge already has an unfavourable view of aspects of her case and she will not receive a fair trial. Additionally, learned senior counsel urged the Court to consider the right to a fair trial not only in terms of bias, but also in the wider context of the rules and principles of natural justice, insofar as they are no less applicable to a court than any other tribunal. With respect to this wider context, the principle particularly urged upon the Court is that no one should be a judge in their own cause. The submission as understood by the Court, is that having made the earlier decision, the Judge is in a position of essentially having to defend that earlier decision and in that way is to be viewed as having an interest to serve. Senior Counsel supported his submissions with reference to several cases, namely ***Buckland v Palmer***[3] and ***de Lasala v de Lasala***[4] in relation to the point that it would be inimical to the administration of justice for there to be inconsistent decisions on the same issue arising out of the same Court. In relation to the requirement for the wider principles of natural justice to be observed by the Court, senior counsel for the Applicant justifiably did not go beyond well-established sources of law.

[3] [1984] 3 All ER 554 per Donaldson MR @ 558
[4] [1979] 2 All ER 1148 per Lord Diplock @ 1155

He also included a classic reference from ***Wiseman v Borneman***[5] wherein Lord Morris of Borth-y-Gest eschewed a rigid and mechanical application of the rules of natural justice.

8. As regards employing rigid and defined rules of natural justice and the grounding of his Application, senior counsel expressed a preference to steer clear of existing grounds, but at the same time was of the view that the matter did raise issues of bias in the manner generally arising in matters of recusal. In fact, it was submitted that the Judge's prior decision vis-a-vis the issues now to be decided in the current actions, amounted to a basis for automatic disqualification, as the Judge has already pre-determined the issues. The case of **Berry (Linton) v DPP *et anor***[6] was cited in support of this submission for automatic disqualification based on pre-judgment of the issues. Additionally, other authorities cited by learned senior counsel in support of the submission in relation to pre-judgment included **Ellis v Ministry of Defence**[7] and **R v Leeds Crown Court ex parte Barlow**[8]. These cases will be examined in the Court's discussion and analysis to follow. Learned senior counsel finally submits as the Court understands it, that the Court went beyond the scope of its jurisdiction in the original divorce action and made findings of fact on issues pertaining to ownership of matrimonial property.

9. Further, that consequent upon its decision rejecting jurisdiction, those findings in respect of issues pertaining to matrimonial property were also without jurisdiction and as such of no effect. Notwithstanding being of no effect, having pronounced upon such issues, the Court is at risk of making new or different findings which on the one hand would be contrary to the administration of justice; but more so on the other hand, the risk of prejudgment would deprive the Applicant of a fair trial. Learned senior counsel for the Respondent rejects all of the arguments advanced on behalf of the Applicant. Firstly, it is contended that the Application misses the mark as it is not based upon accepted grounds for recusal.

[5] [1971] AC 297
[6] (1992) 48 WIR 193
[7] [1985] ICR 257
[8] [1989] RTR 246

The accepted grounds are submitted as automatic disqualification or bias, the latter being actual or apparent. It was contended that the instant case is not one that attracts automatic disqualification and the Applicant had failed to satisfy the test for apparent bias. There was no issue of actual bias raised. Learned senior counsel for the Respondent submits that the test for apparent bias is that laid out in **Porter et anor v McGill**[9] (modifying the previously accepted standard in **R v Gough**[10]**)**. First, the test requires the reviewer to ascertain the circumstances giving rise to the allegation of bias and thereafter, to determine whether those circumstances '*would lead a fair minded and informed observer to conclude that there was a real possibility…, that the tribunal was biased*.[11]'

10. Learned senior counsel for the Respondent in effect submits that the circumstances in the instant case (that the Court has in prior proceedings made findings adverse to the Applicant in the current proceedings), should not automatically give rise to an allegation of bias. Rather, as illustrated by **Secretary of State for the Home Department v AF (No.2)**[12] the particular circumstances must be examined, as there are routine examples of trial courts having to consider afresh, matters those courts had decided before (for example upon remittance for trial following successful appeal). With respect to the other arguments made on behalf of the Applicant (concerning the Court's wrongful exercise of its jurisdiction in deciding matters not properly before it in the original petition, and in relation to the potential of the court rendering two inconsistent decisions on the same issue), senior counsel for the Respondent's primary submission was that these arguments were improperly raised in an application for recusal. Senior counsel nonetheless proffered a response by means of distinguishing all the cases relied upon on these points as being inapplicable to the case at bar.

11. The response need not be considered, as the Court is of the similar view that the arguments on jurisdiction and inconsistent decisions take the question of recusal no further.

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[9] [2002]! All ER 465
[10] [1993] 2All ER 724 per Lord Goff – test based on a 'real danger of bias'.
[11] Ibid @ para 102
[12] [2008] EWCA Civ 117

Instead, they raise issues of *res judicata* or issue estoppel which the parties are free to pursue in the substantive hearing. At the conclusion of submissions and during the course of the Court's deliberation, Counsel were respectively invited by the Court to consider two specific authorities which had not been addressed within the concluded arguments. Both sides availed themselves of the opportunity to present views as invited by the Court, in respect of the authorities **Livesey v New South Wales Bar Association**[13] and **R v Watson; Ex parte Armstrong**.[14] Learned senior counsel for the Applicant's further submissions arising from the Court's referral to the above two cases, reiterated as his main argument, the assertion of pre-judgment by the Judge of live issues in the current proceedings. Further authorities were cited illustrating the argument of pre-judgment, most particularly, **Sengupta v Holmes et al**.[15]

12. Senior counsel's further submissions cited a number of statements by Laws LJ in ***Sengupta***. Firstly, that it would be unthinkable for a judge at first instance who '*roundly concluded on the facts – after hearing disputed if not hotly disputed evidence – that one of the parties lacks all merit…*', to sit on an appeal of the party whom he had already found lacking in merit. A further statement by Laws LJ, was that the judge would have '*committed himself to a view of the facts which he himself had the responsibility to decide.*'[16] Also, it was stated that the apprehension of bias in the circumstance of pre-judgment means an apprehension '*that the judge will approach the case with a closed mind*'[17]. Learned senior counsel for the Applicant submits that this is the danger apparent in the case at bar. To the contrary, senior counsel for the Respondent in his submissions as invited by the Court contends that the evidence required to support a finding of pre-judgment must be compelling, (as demonstrated in ***Livesey*** itself), and that there is no such evidence of pre-judgment in this case.

[13] [1985] LRC (Const) 1107
[14] (1976) 36 CLR 248
[15] [2002] EWCA Civ. 1104
[16] Ibid @ para. 32
[17] Ibid @ para 31.

It was also submitted that the instant case is not akin to the example of ***Ex parte Armstrong***, in which there was in effect a prejudgment of credibility before the determination of the same proceedings, which is not the situation before the court.

Discussion and Analysis

Issue (i) – Proper basis for recusal

13. It is firstly recognized that the process which the Court has been asked to engage in by way of determining this Application for recusal brings to bear considerations greater than the Applicant's interests and individual perception of fairness. The Application for recusal speaks to the wider issue of public confidence in the judiciary, which itself is fundamental to the proper administration of justice. Confidence in the judiciary is engendered when the public and litigants are satisfied that (more so than the final decision), the process by which that decision is arrived at is fair and transparent. Any perception that a decision maker was less than impartial in rendering his or her decision, is bound to undermine public trust in the courts resulting in a negative impact on the administration of justice as a whole. The Application for recusal must therefore be apprehended and considered within this context, along with careful regard to the submissions and authorities submitted by Senior Counsel on behalf of their respective clients.

14. The subject of judicial recusal subsists as part of the wider overarching doctrine of natural justice. This notwithstanding, it occupies that space in a distinct and established context, but it would be fair to say, that jurisprudence in the area is still emerging. Senior counsel for the Applicant seeks to advance the Application on the basis that the area of law is still developing, and thus urged the Court not to confine its consideration of the Application to the pre-defined grounds as submitted by senior counsel for the Respondent. In spite of this urging however, the Court finds that there are three established bases for an application for recusal, which are all related to and concern the issue of bias[18]. The existing bases as correctly identified by senior counsel for the Respondent are (i) automatic disqualification (where the judge has an interest to be served in the outcome),

[18] Judicial Recusal: Principles, Process and Problems - Grant Hammond, 2009 @ pg 15 et seq.

(ii) actual bias, or (iii) apparent bias. With respect to senior counsel for the Applicant's urging that the Court not restrict itself to these existing grounds, it is perhaps not unforeseen, that as the area continues to develop, there might be an expansion of the current grounds; or that in other jurisdictions the grounds for recusal are differently termed or considered[19]. However, in the case at bar, there is nothing about the current circumstances which need take the court outside the established grounds, and the substance of the Applicant's arguments can be squarely subsumed within one of these three bases.

15. With respect to the said grounds, it is immediately acknowledged that the Application has not been based on any allegation of actual bias, therefore nothing need further be said in this regard. Senior Counsel for the Applicant however, did advance the ground of automatic disqualification, triggered by the existence of the Court's prior decision on jurisdiction in the original divorce petition. The submission is made within the context that a person cannot be a judge in their own cause. The submission is understood to mean that the Court's prior decision somehow gives rise to the Judge having an interest to serve. The Court is in agreement with learned senior counsel for the Respondent that this ground of automatic disqualification is not at all triggered in the instant case. Automatic disqualification firstly applies where it can be said that the judge has an interest in the *outcome* of the matter before the court[20]. This ground is usefully illustrated with reference to **Pinochet (No.2)**[21], which acknowledged the established position that a judge having a pecuniary interest in a matter before him would be liable to automatic disqualification from hearing the case[22]. This case also recognized case that interests other than pecuniary interests could give rise to automatic disqualification. In this case, it was a connection of Lord Hoffman to one of the parties of the appeal (Amnesty International) that was found to have given rise to his automatic disqualification and a quashing of the decision of which he was a part.

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[19] Judicial Recusal *supra* @ pg 16
[20] Locabail (UK) Ltd. v Bayfield Properties Ltd [2000] QB 451
[21] **R v Bow Street Metropolitan Stipendary Magistrate et al, Ex parte Pinochet Ugarte (No. 2)**, [2000] 1 A.C. 119
[22] Ibid @ pg 133

16. The circumstances of **Pinochet (No.2)** case are regarded as unique. The appellant, the former head of state of Chile (Augusto Pinochet) had appealed the issue of his extradition warrant from the United Kingdom to Spain, to answer for crimes against humanity alleged to have been committed under his regime. Given its subject matter (the scale of the human rights atrocities alleged against Pinochet in Chile), the case had generated an unprecedented degree of public interest (locally and internationally); and Amnesty International, upon its application to intervene, had become a party to the appeal. Amnesty International's role and status in human rights violations would have been well established. Lord Hoffman's connection was not to Amnesty International, but to Amnesty International Charitable Trust. He was not employed by that company but held an unpaid position in it, and the company carried out charitable work not connected to Amnesty International's direct causes or functions. The challenge to the decision (in which Lord Hoffman had not written a separate opinion), was on the basis of apparent bias. However, Lord Browne-Wilkinson on behalf of the House[23], found that the circumstances of the case fell within the category of the judge sitting in his own cause. The cause therein not arising from a pecuniary interest, but from what was adjudged to be a commitment to a cause. In the instant case, as stated above, the Court's understanding of the submission in respect of automatic disqualification, is that the Judge will be sitting in her own cause, given the existence of the prior decision.

17. In **JSC BTA Bank v Ablyazov**[24] however, Rix LJ made reference to High Court of Australia decision ***Ex parte Lewin: Re Ward***[25] in which it was observed that '*no judicial officer has a vested interest in any one of his decisions…*'. This statement was made in the midst of a discussion on apparent bias, however, the statement is applicable at large. The fact that a judicial officer has made a prior ruling does not give rise to any interest to protect in relation to any subsequent decision.

[23] Pinochet *supra* @ 133
[24] [2012] EWCA Civ 1551 @ para 64
[25] *[1964] NSWR 446 @ 455*

The notion to the contrary was clearly dispelled in **Berry v Director of Public Prosecutions et anor**[26], which was cited by learned senior counsel for the Applicant. This case will be further examined below, but at this juncture, reference is made to the words of Rattray P, in relation to a submission that the involvement of two justices of appeal in dismissing a criminal appeal, should have automatically disqualified them from the appeal panel tasked to determine whether the appellant should be retried or entirely acquitted, after his further appeal was upheld by the Privy Council. Rattray P had this to say[27] (emphasis mine):-

> *"In order for the appellant to succeed on this point it would have to be assumed that the two judges of appeal in the subsequent reference common to both panels were likely to be seen by the reasonable by-stander to be so affected by personal pique and so offended by the correction of the Judicial Committee of the Privy Council that they would have achieved a mindset so opposed to the appellant as to cause them to arrive at the decision in the exercise of their discretion most unfavourable to the appellant. Such a conclusion does not find favour with me…The objective of the submissions of Dr. Barnett for the appellant is to lead to a conclusion that two Court of Appeal judges in their determination of the question as to whether to acquit or to order a new trial had an interest to serve, that interest being the upholding of the previous decision in the original appeal..."*

18. After refusing to accept that the appeal justices could be said to have borne a personal interest (in the manner so described) in the issue then to be decided after the panel's dismissal of the appellant's appeal was quashed, Rattray P went on to properly identify the bias being advocated in terms that *'…The bias which they would have had was by virtue of pre-judgment.*' In the circumstances, the Court rejects the contention that there is any question of automatic disqualification arising in the instant case by reason of its prior decision declining jurisdiction in the original divorce petition. Instead, what falls to be considered in relation to the issue of pre-judgment as raised on behalf of the Applicant, is the ground of apparent bias.

[26] (1992) 48 WIR 193
[27] Berry v DPP *supra* @ pgs 198-199

In his initial submissions, learned senior counsel for the Applicant was particular to state that the application was not one based on apparent bias. There was some departure from this position in oral submissions but there was still a reluctance to commit to this position as a basis for the Application. The court is of the view that this vacillation is unnecessary. As will be seen upon examination of authorities, the complaint alleged of pre-judgment arising by virtue of a court's earlier decision is one which without fail has been treated within the ambit of apparent bias. The submissions made on behalf of the Applicant can properly and will therefore be treated with reference to the ground of apparent bias.

Issues (ii) & (iii) – Is this a proper case for recusal?

19. As can be seen from the authorities, there is an established test which must be satisfied in order to establish an appearance of bias in relation to a decision maker. The test has gone through some evolution but as submitted by learned senior counsel for the Respondent, is that set out in **Porter v McGill**[28] as follows:-

> *"…whether the relevant circumstances, as ascertained by the court, would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal had been biased"*

In applying this test, the Court must first ascertain the relevant circumstances which are said to give rise to the allegation of bias. Thereafter, the perspective to behold of whether there is a real possibility of bias, is that of a fair minded and informed observer. In this case therefore, the Court must first conduct an inquiry to ascertain whether the circumstances said to give rise to the appearance of bias do exist; and thereafter, assess the real possibility for bias, from the eyes of the fair minded and informed observer. Before embarking upon the application of the test, one must understand the meaning of bias. In general terms, bias has been defined as *'a leaning, inclination, bent or predisposition towards one side or another of a particular argument. In its application to judicial proceedings, it represents a predisposition to decide an issue or cause in a way that does not leave the judicial mind perfectly open to conviction.*

[28] [2001] UKHL 67. The test previously applied to establish bias arose from ***R v Gough***[28], which was expressed in terms of whether there was from the circumstances, a real danger of bias.

Bias is a condition or state of mind, an attitude or point of view, that sways or colours judgement and renders a judge unable to exercise his or her functions impartially in a particular case.'[29]

20. In relation to the first arm of the test, i.e. the relevant circumstances as ascertained by the Court, the allegation is one of prejudgment arising from the Court's earlier decision dismissing jurisdiction in the parties' original divorce petition. In one sense the investigation as to the circumstances said to give rise to the perception of bias is uncomplicated, as there has in fact been a prior decision of this court involving the parties on an issue arising from their marriage. The more precise question however, is whether the prior decision on jurisdiction does in fact give rise to prejudgment of any issues which arise for determination in the current proceedings. This question requires the Court to forensically examine exactly what was then decided vis-à-vis what is now to be decided. In relation to how this examination is to be done, the Court finds the authorities of **Livesey v New South Wales Bar Association**[30] and **Linton Berry v Director of Public Prosecutions**[31] to be most instructive. They are not instructive in terms of the applicability of their respective facts, but in respect of the approaches employed by the courts in determining the issue of prejudgment. The Court will also consider the discussion on appearance of bias in **Sengupta v Holmes et al**[32] which concerns the UK process for appeal to the Court of Appeal by a single judge and thereafter reconsideration by a panel.

21. In ***Livesey,*** the appellant was brought up by his Bar Council for disbarment based on several allegations of misconduct. One such allegation involved a Ms. Bacon, a former law student who had been refused admission to the Bar on the basis of her role in dishonestly partaking in arrangements to stand as surety for a defendant who subsequently absconded. Two members of the Australian Court of Appeal which upheld the refusal to admit Ms. Bacon to the Bar, had strongly expressed their finding that she was not a fit and proper person to be admitted and was lacking in credit as a result of her role in

[29] Commentary on Bangalore Principles of Judicial Conduct, para. 57 (citing Supreme Court of Canada's ***R v S [1997] 3 S.C.R. 484 @ para 106)***.
[30] *Supra* fn 13
[31] *Supra* fn 14
[32] *Supra* fn 15.

standing surety for the defendant who absconded. The appellant was the attorney-at-law who represented the defendant who had absconded, and this incident formed part of the complaints made against him. Two of the members of the Court of Appeal which had refused Ms. Bacon's application for admission to the Bar, were members of the Court of Appeal hearing the complaint for disbarment of the appellant. The appellant's counsel prior to the hearing, sought the recusal of those two Lord Justices who had refused Ms. Bacon's admission, on the basis that they had strongly expressed their views on her lack of credit and credibility and it was intended that she to be called as a witness in the appellant's case. The request for recusal was refused and the appellant was disbarred. The appellant appealed on the basis of the appearance of bias on the part of the two Lord Justices, as Ms. Bacon had been pre-judged by them on credibility and credit. The appeal was allowed.

22. These facts are of course not applicable to the instant case, but what is of relevance to this case is the approach applied by the court in arriving at its decision. The following points are extracted as most useful for this Court's consideration herein:-

(i) It is not in the mind of the judge whether there is to be a real possibility of bias, it is the view of the 'informed observer';

(ii) If the judge apprehends there to be such a possibility of bias, it is not a matter of discretion, the judge is disqualified;

(iii) Whilst the appearance of bias is to be avoided it would be an abdication of judicial function not to sit and that can also give rise to procedural abuse - @pg 1111

(iv) In determining whether or not there was prejudgment, the court examined the prior decision involving the refusal of Ms. Bacon's admission to the bar, including the statements and findings of the two Lord Justices. Thereafter, the court examined the case against the appellant and the relevance of the evidence of Ms. Bacon to that case.

(v) It is important to note that the existence of necessity and always present eventuality of the 'extraordinary case,' prevent there being any inflexible rule of what circumstance will or will not amount to perception requiring recusal. Each case must be determined on its own facts - @ pg 1115;

(vi) A fair minded observer might entertain a reasonable apprehension of bias by reason of prejudgment if a judge sits to hear a case at first instance after he has, in a previous case expressed clear views either about a question of fact which constitutes a live and significant issue in the subsequent case, or about the credit of a witness whose evidence is of significance on such a question of fact;

(vii) Further to (vi) above, the critical point of this decision is @ pg 1116 where the court determined a central issue in the main charge against the appellant to be - whether or not the money lodged by Ms. Bacon was her own money. Two members of the court hearing the charge had already found in a previous case that it was not;

(viii) In like manner, it was also determined to be a central issue in the main charge against the appellant, whether if the money was not that of Ms. Bacon, whether the appellant knew that to be so. Again, two of the three members of the court sitting to decide this issue had already found in the prior case that he did so know. Ms. Bacon was a critical witness in the case for the appellant and the two members had expressed their views as to her lack of credibility and credit in strong terms;

Having regard to the above, the question as to whether a fair minded observer might have reasonably apprehended the possibility of bias against the appellant by reason of pre-judgment was answered in the affirmative.

23. In ***Berry v DPP***, the appellant's conviction for murder was upheld by the Court of Appeal of Jamaica. His appeal to the Privy Council was successful but the case was remitted to the Court of Appeal to determine whether a retrial should be ordered or a verdict of acquittal entered.

Two members of the Court of Appeal which upheld the appellant's conviction were on the panel to determine the question of retrial or acquittal as remitted by the Privy Council. The appellant objected unsuccessfully to the two members sitting, the matter was heard and the panel ordered a retrial. The appellant moved the Constitutional Court for breach of his constitutional right to trial by an independent and impartial tribunal. His motion was dismissed, he appealed to the Court of Appeal on that dismissal, and this appeal was also dismissed. It is the dismissal of that appeal against the refusal of the two judges to recuse themselves, which is the subject matter of **Berry**. The appellant's argument was that the two justices had already prejudged the issue of his guilt and as such could not be seen to be objective in deciding whether to order a retrial. Much like ***Livesey***, it is the approach of the Court of Appeal in determining the appearance of bias that the Court finds instructive and of relevance to the case at bar. Per Rattray P, (referring to the ***Gough*** test, but this case predates ***Porter v McGill***):-

> *"To determine the answers to these questions, it is necessary to see whether any live or significant issues have to be decided in the subsequent reference which arose in the original appeal for decision and can be said to have been pre-judged…"*[33]

Also:-

> *"Can it be said that the issues to be determined by the Court of Appeal in the subsequent appeal are the same as those to be determined by the Court of Appeal in the original appeal?"*[34]

24. The answer to these questions was shortly thereafter stated[35]:-

> *"It is clear therefore that the issues to be considered by the Court of Appeal in the subsequent reference did not coincide with the matters relevant for consideration in the original appeal. <u>In deciding the subsequent reference there were no issues which had been pre-judged in the original appeal</u>."*

One point to be noted in that decision is where it was alleged that the Court of Appeal in the original appeal had expressed that there was no merit to the appellant's grounds of appeal and the Privy Council had expressed that the case was a strong one.

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[33] Berry v DPP *supra* @ pg 199d
[34] Ibid @ pg 199f
[35] Ibid @ pg 201e-f

These two expressions by the respective courts were acknowledged as being factors relevant to the issue of the reference before the court (retrial vs acquittal) but did not amount to an adjudication of guilt, which was the substance of the appellant's complaint of prejudgment. In that regard therefore the issue of pre-judgment was negatived and expressed in the following terms[36]:-

> *"In my view therefore, there was no prior adjudication in the original appeal on any issue in the subsequent reference or on the factors the totality of which the Court of Appeal had to take into account in deciding whether to acquit or order a new trial"*

25. Brief reference is now made to English decision **Sengupta et anor v Holmes et al.[37]** which reviewed a line of authorities concerning the process of granting leave to appeal to the English Court of Appeal. This case, and the authorities reviewed, concern the process whereby a single judge of the Court of Appeal considers an application for leave to appeal (on paper), and if refused, that application for leave may be reconsidered by a panel of appellate judges in an oral hearing. The context of the determination of an appearance of bias arose with reference to the same judge who refused the application for leave (on paper), either sitting as part of the panel upon reconsideration of the application for leave, or as part of the panel in the substantive appeal where leave was subsequently granted. The issue was whether the initial judge should be viewed as having prejudged the issues in refusing leave to appeal, thereby giving rise to disqualification from the reconsidered hearing or substantive appeal on the grounds of an appearance of bias. The nature of the apparent bias on the basis of prejudgment as described therein is helpful to understanding the thrust of the Application in the case at bar. The apprehension was expressed in terms that the judge would approach the case with a closed mind, or having prejudged the issue, that the judge would be unable to revisit the issue with an open mind.

[36] Berry *supra* @ pg 202a-d
[37] Sengupta *supra* fn 15

It was also expressed therein[38] and specifically commended unto the Court in this case, that the judge would have already *'…committed himself to a view of the facts which he himself had the responsibility to decide.'*

26. Aside from the nature of the apparent bias occurring as described above, ***Sengupta*** also gives the example of the appearance of bias arising where the judge expresses a preliminary view or having made a preliminary decision '*expresses himself in such vituperative language that any reasonable person will regard him as disqualified from taking a fair view of the case if he is called upon to revisit it;*'[39] as well as:-

> *"If a judge has presided at a first instance trial and roundly concluded on the facts – after hearing disputed, perhaps hotly disputed, evidence – that one of the parties lacks all merit, everyone would accept that it would be unthinkable that he should sit on that party's appeal."*[40]

These instances were described as being outside the ordinary cases, whilst the case before the court was considered as very much an ordinary case, where '*the judge in question has not himself had to resolve the cases' factual merits, and has not expressed himself incontinently*.'[41] In the final analysis the take away from this line of cases, is that the refusal of leave to appeal from the outset was not final - indeed it is the law that there may be a reconsideration on oral hearing – and as such, could be considered at best a preliminary view on material available to the judge. In such circumstances it was expressed to be perfectly acceptable for a judge to change his or her mind after hearing full argument. It was found that an apprehension of bias in such circumstance would not arise from the perception of a fair minded and informed observer, were the judge refusing leave sit on the panel at a reconsideration hearing or on the substantive appeal.

27. From the above cases, there is a definitive approach to be employed by this Court in determining the issue of prejudgment as alleged by the Applicant.

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[38] Sengupta *supra* @ paras. 32-34
[39] Ibid
[40] Ibid
[41] Sengupta *supra* @ para. 35

The nature of the bias of prejudgment understood in the sense alleged in this case, is best illustrated by ***Sengupta v Holmes et al***, wherein it was stated that the apprehension is that the judge will approach the case with a closed mind, or be unable to revisit an issue with an open mind. There were also two examples given of the circumstances in which such an apprehension might be justified. The first is where the judge expresses him or herself intemperately with respect to the proceedings or parties thereto; or, where the judge made findings in relation to the evidence or the credibility of parties/witnesses and expressed them in such strong terms that it would be unthinkable for that judge to sit on such issues again. These circumstances will for convenience be briefly coined 'behaviour' and 'strong views'. The latter circumstance would of course have to be relevant in respect of issues which are 'live' in the subsequent proceedings. The Court refers to **R v Leeds Crown Court ex parte Barlow**[42] (cited by senior counsel for the Applicant) as an illustration of intemperate behavior, which resulted in the quashing of a decision made by a Crown Court judge on basis of an appearance of bias. The judge therein was accused (inter alia) of hostility towards the defendant and his witness in a traffic matter; interrupting the defendant during examination; descending into the arena and hostilely questioning the defendant. None of this behavior was exhibited towards the prosecutor or prosecution witnesses.

28. An application for judicial review on the basis of breach of natural justice by the appearance of bias was successful and the conviction quashed. May LJ therein acknowledged that the judge's behavior (as alleged) in that case was as such that any reasonable observer sitting in court would conclude that justice was not seen to be done on that day. In relation to the point of prior findings expressed in strong terms, **Livesey**[43] itself is an illustration of such, as well as **R v Watson, Ex p. Armstrong.**[44] In the latter case, during the course of hearing an interlocutory injunction in family proceedings, the judge expressed a view to the effect that in light of the proceedings thus far, he regarded both parties (husband and wife) with equal disfavor in relation to their credibility.

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[42] [1989] RTR 246 @ 248
[43] See para 20-21 *supra*
[44] Ex parte Armstrong *supra* fn 14

As a consequence, he intimated that any evidence put forward by them at the trial would have to be corroborated. The proceedings which included sizeable financial claims, were highly contentious. Upon refusal of the judge upon an application by the wife, to recuse himself (in Australia, for prohibition), the application was renewed before the High Court of Australia. The judge's remarks regarding credibility were not the only basis for the application, however the point of illustration being made concerns that issue only.

29. The test for appearance of bias was expressed in more or less similar terms (as that in ***Porter v McGill***[45]), namely *'…whether it has been established that it might reasonably be suspected by fair-minded persons that the learned judge might not resolve the questions before him with a fair and unprejudiced mind.'*[46] It was pointed out that the remarks on which the wife's submission was founded were made during argument in an interlocutory proceeding, where it is not uncommon for judges to express tentative or exploratory views or formulate propositions to be tested.[47] However, it was also pointed out that a fair-minded observer would have been justified in thinking that the remarks of the trial judge were not of that tentative or exploratory description. The judge's statements regarding the parties' lack of credibility were repeated, (even after he was asked to refrain from hearing the matter), as well as supported by reasons. It was determined that the judge was not, at that interlocutory stage (not having seen or heard from the parties in oral evidence), entitled to hold much less advance a view in relation to the parties' credibility – but a reasonable observer would have been justified in thinking that he had done so. Further, whilst it was accepted that there were some matters in respect of which a judge was entitled to have preconceived notions and still be entitled to sit, the credit of an essential witness where the case might turn on credibility, was not one of such matters.[48] In the circumstances, the order of prohibition preventing the judge from hearing the matter any further was granted.

[45] Porter v McGill supra, fn 9
[46] Ibid, @ para. 19
[47] *Ibid.*
[48] Ex p Armstrong @ para 19.

30. With reference to these circumstances of intemperate behavior or strong views as illustrated by the above cases, learned senior counsel for the Applicant has not advanced his Application on either such basis. Instead, learned senior counsel asserts that the Judge has expressed 'clear and definitive' opinions on the evidence. On the other hand, learned senior counsel for the Respondent contends that the Applicant has not and cannot attribute intemperance or strong views to the Judge herein in the dismissal of the original petition, and as such the application for recusal should be refused. In relation to the nature of prejudgment alleged in this manner, the Court finds that this is indeed not a case in which there has been any intemperance or strong views expressed (as illustrated by the above cases), by the Judge in the prior matter. Any case to be made out for recusal on the basis of prejudgment cannot therefore be entertained in relation to the alleged circumstances of intemperate behavior of or strong views expressed by the judge. The question is whether or not such instances are the only circumstances in which prejudgment falls to be considered as giving rise to an appearance of bias. In this regard, the Court takes a closer look at the approaches extracted from both ***Livesey*** and ***Berry v DPP***[49]. The approaches in these cases saw the courts deliberately examine the matters alleged to give rise to prejudgment, relative to the issues to be determined in the later proceedings. The Court will therefore assess what issues can be said to have been prejudged in like manner, in the instant case.

31. Senior counsel for the Applicant contends that the Applicant's credibility and issues in relation to her ownership and contributions to matrimonial property have been prejudged. In the dismissal of the original petition for want of jurisdiction, the Court made two overall determinations, both assisted by several findings of fact and inferences drawn from facts. The first was that August Tabony was not domiciled in Belize; the second, that Diane Tabony had not been ordinarily resident in Belize for three years prior to the presentation of the divorce petition. In relation to the Court's conclusion that Mr. Tabony was not domiciled in Belize, the following findings of fact were made or arose in the following manner:-

[49] Livesey *supra* fn 13 & para 20; Berry *supra* fn 26 & para 22

(i) It was Mrs. Tabony who alleged that the Respondent was domiciled in Belize. This was found not to be the case, hence there was a finding adverse to Mrs. Tabony. However, this finding was based not on a rejection of her credibility but on the Court declining to draw the inferences asked, from facts which were largely not contested by the parties. At paragraph 27 the relevant facts relied on were not in dispute or were admitted in cross examination; at para 28, the disputed facts stated therein arose from the Judge's view on the sufficiency of the evidence to support the facts or inferences from facts alleged. This determination did not amount to any determination in relation to Mrs. Tabony's credibility;

(ii) With respect to the question of prejudgment of a live issue, the Court did make a pronouncement on the extent of Mr. Tabony's residence in Belize which could be relevant to the question of the parties' acquisition of matrimonial property but not directly so;

(iii) There was a finding in relation to Mr. Tabony maintaining a bank account at Belize Bank International as a non-resident. This finding would currently arise in respect of the issue of determination of the existence of property forming part of the matrimonial pool – however, this was not a fact that would be adverse to Mrs. Tabony .

(iv) At para 29 the Court speaks to there being very little evidence of August Tabony residing in Belize. It was found that the Grand Colony unit showed little sign of day to day occupation and it did not depict evidence of occupation of a calibre which would be indicative of the quality of residence necessary to establish domicile.

32. In relation to the Court's determination regarding Mrs. Tabony's residence for three years prior to the presentation of the divorce petition, the following facts/inferences were found/drawn out of the evidence presented:-

(i) Mrs. Tabony asserted that after the children left home (El Salvador) in 2007/8 it was she who insisted that the Respondent purchase the Grand Colony home and it was there that the couple's primary place of abode was, and from which she conducted her daily life.

The Court found that this position as asserted did not accord with the evidence[50]. Albeit put in that mild way, the Court nonetheless rejected the assertions of fact put forward by Mrs. Tabony as being inconsistent with the physical evidence presented. The effect of the court's finding is that Mrs. Tabony's evidence was rejected in relation to having lived primarily from the Grand Colony home.

(ii) Further, the evidence to the contrary came from Mrs. Tabony's own witnesses, documentary evidence she herself put forward and evidence she failed to put forward in circumstances which the Court found ought to have been readily available, had her assertion as to residence been true. The effect again is that the Court rejected Mrs. Tabony's evidence in relation her claim of where she primarily resided.

(iii) The Court indeed stated that Mrs. Tabony was an employee of the gift stores. However, this was not a finding made by the Court after consideration of evidence. This was the evidence that was put forward by Mrs. Tabony herself[51].

Having regard to the above findings arising out of the original divorce petition, the question is, to what extent if any, do these findings give rise to any prejudgment of issues which would arise for consideration in the current proceedings.

33. In the current proceedings, the live issues include an assertion by the Applicant that the Grand Colony home is *the* matrimonial home and she makes a claim of ownership based on her contribution to its acquisition. By virtue of the written law[52], contribution includes more than direct financial contribution. The parties' actual place of residence and quality of residence would be relevant to the Applicant's bid to establish the Grand Colony home as *the* matrimonial home and her entitlement to ownership thereof. Additionally, the nature and quality of the Applicant's work in the business (including in what capacity), would also be relevant to the acquisition of that and other property. Having already made findings of fact/drawn inferences to the effect that the parties did not primarily reside at the Grand Colony home during the relevant period, it can be said that the Court has

[50] Action No. 282 of 2014 para. 38(ii)
[51] Ibid. Paras 27(vii) and 38(vi)
[52] Supreme Court of Judicature Act, Cap. 91 s. 148A(5)

prejudged the issue having regard to the evidence that was presented to it at that time. On the flip side, the Grand Colony home is but one in tens of properties alleged by the Applicant to form part of the matrimonial assets. It is possible for spouses to have more than one matrimonial home, but it is the Applicant's case that the Grand Colony home was *the* (as distinct from *a)* matrimonial home during a particular time, and the Court in the original petition, declined to draw such an inference in favour of Mrs. Tabony.

34. Further, the physical evidence from which the Court was asked to draw inferences favourable to a finding of residence included actions or matters which would touch and concern how the parties conducted their lives in terms of their movements between Belize and El Salvador. Again, the Judge in the original petition, declined to accept the facts or inferences asserted by Mrs. Tabony and as such, no matter how mildly put, these were material findings adverse to Mrs. Tabony in those regards[53]. The Court therefore finds that there has been prejudgment arising from the original divorce action, in terms of Mrs. Tabony's credibility and facts surrounding how the parties carried out their lives in Belize during a specific time of their marriage. The issue of credibility and findings of facts in this regard are important issues which arise for determination in the current proceedings. That being the case, the question arises as to whether the fair minded and informed observer would consider these circumstances of prejudgment to give rise to an appearance of bias. This question must bear in mind (i) who is the fair minded and informed observer and (ii) whether it is necessarily the case that the prejudgment described will give rise to an appearance of bias.

35. The question of who the fair minded and informed observer is has been the subject of much judicial discussion and debate. The first point to note is that the fair minded and informed observer ('the observer') is distinguished from the well-known and accepted 'reasonable man.' The observer is considered to be more informed than the reasonable man for the purposes of determining the issue of appearance of bias. In **Livesey**[54]– the observer is deemed to appreciate the presumed impartiality of the judge;

[53] The matters as alleged in paras 27 and 38 of Action No. 284 of 2014.
[54] Livesey supra @ pg 1115

however will not reject the possibility of bias by reason of prejudgment. The observer also has no knowledge of the character or integrity of any particular judge. In **Sengupta v Holmes et al**[55] the court accepted submissions to the effect that the fictitious bystander would be more informed than the reasonable man, insofar as it relates to the former being a person not wholly uninformed and uninstructed about the law in general. However, that person could not be equated with a fully informed bystander accustomed to practicing law before the relevant court therein. It was accepted that the latter would entertain no apprehension of bias in the circumstance of prejudgment before the court in that instance.

36. In ***Sengupta,*** the nature of the fictitious 'fair minded lay observer' was further described by Laws LJ (with reference to authorities cited in Australian case *Southern Equities Corp Ltd v Bond*)[56] in terms that (emphasis mine):-

> *"…Such person is not a lawyer. Yet neither is he or she a person wholly uninformed and uninstructed about the law in general or the issue to be decided. Being reasonable and fair-minded, the bystander, before making a decision important to the parties and the community, would ordinarily be taken to have sought to be informed on at least the most basic considerations relevant to arriving at a conclusion founded on a fair understanding of all the relevant circumstances. The bystander would be taken to know commonplace things, such as the fact that adjudicators sometimes say, or do, things that they might later wish they had not, without necessarily disqualifying themselves from continuing to exercise their powers…The fictitious bystander will also be aware of the strong professional pressures on adjudicators (reinforced by the facilities of appeal and review) to uphold traditions of integrity and impartiality…Finally, a reasonable member of the public is neither complacent nor unduly sensitive or suspicious."*

Laws LJ also went on to quote further from *Southern Equities* as follows[57]:-

> *"Judges are accustomed to defining standards of behavior by reference to what would be done by a reasonable person. Most judges would claim to be reasonable people, and to be able to make such judgments on behalf of the community of which they are representatives.*

[55] Sengupta supra @ paras. 9-10
[56] Sengupta @ para 10; *Southern Equities [2000] SASC 450*
[57] Ibid.

However, when one is required to assess the perceptions of a fair-minded lay observer, the judge is cast in a much more difficult role. Admittedly, the observer is observing a professional judge. But the judge deciding an apprehended bias claim is not and never can be a lay observer. In order to determine the likely attitude of fair-minded lay observer, the judge must be clothed with the mantle of someone the judge is not. One must avoid the natural temptation to view the judicial conduct, state of knowledge, association or interest in question through the eyes of a professional judge. An apprehension of bias by pre-judgment is based on a perception of human weakness. Given the double use of 'might' in the current formulation of the test…one must be particularly careful not to attribute to the lay observer judicial qualities of discernment, detachment and objectivity which judges take for granted in each other".

37. The judicial interpretations of the fair-minded and informed observer are far more extensive than briefly referred to above.[58] It is not however, considered necessary to examine further authorities in this regard. It suffices to say that the Court's understanding is that (i) the judicial officer charged with considering whether or not circumstances might give rise to an appearance of bias does not do so with reference to his or her opinion or assessment of their own capacity for fairness; (ii) the perspective however is not that merely of an uninformed observer or reasonable man; (iii) the fair minded and informed observer is seized of the relevant circumstances and is aware of the duty of judges to be fair and impartial, but would have no knowledge of any particular judge's capacity or standards. With that being said, the Court considers whether the fair minded and informed observer might find an appearance of bias in the circumstances at bar. It has already been found that the prior decision on jurisdiction, albeit adverse to Mrs. Tabony, does not raise any complaint of intemperance by the Judge (qua ***R v Leeds Crown Court ex p Barlow***), or strong views as expressed in ***Livesey*** or ***Ex parte Armstrong.*** It must also be acknowledged that the mere fact of a prior adverse decision is not of itself, a basis for a finding of apparent bias.

[58] Eg, see further authorities cited in "Recusing Yourself from Hearing a Case" Hon. Mr. Justice David Hayton (JCCJ) @ pg 9 -12, including Chief Justice, Trinidad & Tobago in *Panday v Virgil Mag. App. No. 75 of 2006*.

In **Locabail v Bayfield Properties Ltd.**[59] their Lordships, the Lord Chief Justice, Master of the Rolls and Vice Chancellor, identified a non-exhaustive list of circumstances which would not ordinarily give rise to (then termed), a real danger of bias. This list included prior judicial decisions. However, their Lordships went further to identify the following as being thought to give rise to a real danger of bias:-

> *"…or, if in a case where the credibility of any individual were an issue to be decided by the judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the judge had expressed views, particularly in the course of the hearing in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind…*
>
> *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…"*

38. These circumstances have already been identified earlier in this judgment[60] and dubbed (for convenience only) 'intemperance' and 'strong views'. They are repeated at this juncture to demonstrate that they belong to a non-exhaustive list of circumstances identified as capable or not capable of giving rise to a real danger of bias. However, the Lord Justices issued an important caution which preceded their identification of those circumstances, in the following terms:-

> "*It would be dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. Everything will depend on the facts, which may include the nature of the issue to be decided."*

As far as this Court is concerned, in the same way that a prior adverse decision or views expressed in proceedings need not give rise to a real possibility of bias with nothing more, the fact that in this case it cannot be said that the Judge expressed strong views or made a finding as to Mrs. Tabony's credibility in outspoken or compromising terms, does not automatically mean that there is no consideration to be had in respect of there being a real possibility of bias.

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[59] [2000] QB 451 @ para 25
[60] Supra paras 27-29

As cautioned, each case must be determined on its own facts, and with particular reference to the case at bar, the nature of the issues to be decided.

39. With this in mind, the case at bar is regarded in the following manner:-

(i) Unlike ***Sengupta v Holmes et al***, the prior decision dismissing the original divorce petition represented a final disposition of the issues in that case as opposed to an interlocutory issue in continuing proceedings. It is therefore not the situation in which a judge was merely expressing preliminary views as one is entitled to do.

(ii) Notwithstanding a final decision was rendered, the current proceedings are directly related to those proceedings, as opposed to being entirely new and unconnected. Albeit the legal issues are different, the parties and subject matter arise from the same (now continuing) matrimonial cause, namely – the dissolution of the parties' marriage;

(iii) Unlike ***Linton Berry v Director of Public Prosecutions***, there are issues to be decided in the current cases (division of matrimonial property), which will *include* consideration by the Court of the *same* evidence in respect of which findings were made in the original petition. The legal issue in respect of the consideration will be different, however it is a fact that the Applicant's assertions on the same evidence would have already been rejected by this Court;

(iv) Evidence to be considered in the current proceedings will turn on the credibility of Mrs. Tabony, which albeit not intemperately expressed by the Judge, has already been rejected, in respect of evidence material to the current proceedings.

40. In **Locabail v Bayfield et al**[61] the Lord Justices found that it would usually be clear whether or not the need for recusal arose in any given circumstance and this was so stated. The instant case is however not considered to be a case that is clear one way or the other. The authorities in relation to prejudgment speak to a judge's actions within a fairly narrow context of either inappropriate behavior of the judge or the manner in which the prior findings were expressed by the judge.

[61] Locabail *supra* @ para 25

The case at bar does not fall within either established example but there is nonetheless prejudgment arising from the dismissed petition, of live issues pertaining to the matrimonial home and the way the parties' lives were ordered within a specific period; as well as adverse findings in relation to the credibility of Mrs. Tabony. All of this was based on evidence that will arise for determination in the current proceedings. In the circumstances, the Court heeds the warning which was issued by the Lord Justices in ***Locabail***, as stated in the following terms:-

> *"In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal…"*[62]

The Court also heeds that which was earlier extracted from **Livesey**[63] to the effect that once found that there is a real possibility of bias, recusal is not a matter of discretion.

Conclusion

41. The Application for Recusal has been fully considered with grateful thanks to both senior counsel and their accompanying junior counsel, for their comprehensive submissions and very relevant authorities. After filtering the Application, the gravamen of the complaint before the Court is determined to be that of an appearance of bias, arising from the Court's prejudgment of evidence and credibility of the Applicant, in its prior decision in Action No. 282 of 2014. The wider context of the Application as it relates to the importance of impartiality as a means of maintaining public confidence in the Judiciary is appreciated. This context as balanced by the equally important duty of judicial officers to sit and dispose of assigned cases in order, inter alia, to safeguard proper use of judicial time and resources, and discourage abuse by litigants by means of 'forum shopping' is also appreciated. In applying the accepted test laid out in **Porter v McGill**[64], the Court has identified the specific circumstances of complaint which allege the appearance of bias by means of prejudgment in its prior decision of **Tabony v Tabony Belize Supreme Court**

[62] Locabail *supra* @ para 25
[63] *Supra*, para 22
[64] Porter supra @ pg. 466

Action No. 282 of 2014 and has found that the circumstances of prejudgment do exist[65]. In furtherance of the accepted test, the Court has also found that the fair-minded and informed observer (as judicially described) might consider that there is a real possibility that the Court herein, would not be able to judge the evidence of Mrs. Tabony fairly, having regard to its earlier decision, which was based on evidence that is material to the issues arising for decision in the current proceedings.

In the circumstances:-

(i) The Application for Recusal is granted;

(ii) Counsel have agreed that costs of the Application will be costs in the cause;

(iii) Directions will be given at an appointed date and time for the further progress of the matter before a Court differently constituted.

Dated this 19th day of June, 2019.

_____
Shona O. Griffith
Supreme Court Judge.

[65] Supra @ paras 31-34