IN THE SUPREME COURT

THE TURKS AND CAICOS ISLANDS

ACTION NO. CL-7/2021

IN THE MATTER OF THE TURKS AND CAICOS ISLANDS CONSTITUTION, SECTIONS 1, 6, 7, 16 – 17, 19 AND 21; AND

IN THE MATTER OF LITIGATION BETWEEN BERYN DUNCANSON AND RBC BANK IN THE SUPREME COURT IN ACTION CL-198/2012 AND IN APPEAL NO. CL/AP-14/2018 CURRENTLY BEFORE THE COURT OF APPEAL (BERYN DUNCANSON vs RYAN BLAIN, ET AL) AND ALL RELATED ACTIONS AND MATTERS ETC.

BETWEEN:

BERYN DUNCANSON

APPLICANT

AND

THE PRESIDENT OF THE COURT OF APPEAL

1st RESPONDENT

AND

THE ATTORNEY GENERAL

2nd RESPONDENT

LISTED JUDGE'S STATEMENT IN RECUSAL APPLICATION

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1. I make this statement in a recusal application being urged upon me by Mr. Beryn Duncanson in this matter. Mr. Duncanson is the applicant and a litigant in person. The respondents are represented by Ms. Clemar Hippolyte, Principal Crown Counsel in the Attorney General's Chambers. Mr. Duncanson's substantive application is brought by way of notice of originating

motion and seeks declaratory and other relief against the respondents under various sections of the TCI Constitution. He says I should recuse myself for bias and he invites me to do so.

2. The matter initially came before me on 1st June 2021. At that time Mr. Duncanson's case for recusal was comprised in a letter to the Registrar dated 28th May 2021 (attached). I did not think the letter made anywhere near a proper case for recusal and I instructed the Registrar to let the listing stand so I could hear Mr. Duncanson on any application he might wish to make. At that hearing Mr. Duncanson confirmed that he wished to make a formal recusal application and I gave directions for such, including the preparation, filing and exchange of skeleton arguments and case and statute law references.

3. In accordance with those directions, Mr. Duncanson's skeleton argument was filed on 7th June. However, on the morning of the hearing he filed a supplemental skeleton raising a point *in limine*, paired with a second affidavit. In that affidavit Mr. Duncanson virtually accuses me of personal animus towards him, and he gives examples of incidents he relies on as bearing that out. It therefore seems the best way of approaching this statement would be by reference to that affidavit and supplemental skeleton.

4. As Mr. Duncanson kindly brought to my attention, the practice of a hearing judge faced with a recusal application giving a statement such as this was recently endorsed by the Chancellor of the English Court of Appeal, Sir Terrence Etherton in *Resolution Chemicals Limited v. H Lundbeck A/S* [2013] EWCA 1515, para 42 and followed Patten LJ's admonition in *Re L-B (Children)* [2010] EWCA Civ 1118, para 22. As a judge of this court, I am to find the practice of the superior courts of England highly persuasive and I do so by adopting this approach.

5. Generally, my recollection is that I first came to know Mr. Duncanson in the late 1990s when he was a trainee attorney at Savory & Co. and then an Associate Attorney at that firm. My impression of him was as a bright, young TCIslander attorney with a very promising future. I always thought he should be supported and encouraged, and I had believed that in my interactions with him then and in subsequent years, those sentiments would have come through. At paragraph 10 of his affidavit Mr. Duncanson mentions that our acquaintance goes back some twenty years or more and that sounds about right.

6. Turning now to the specifics of Mr. Duncanson's affidavit, my first comment is that the subheading "Recent & Pending Litigation between ourselves" is misleading. There has never been any litigation between Mr. Duncanson and me. As is clear from the narrative of his paragraph 2, the litigation he refers to was or is pending between clients of his and mine, and clients of his firm and clients of other lawyers in my Firm, Miller Simons O'Sullivan (MSO'S).

7. It should also be clear from the context of my correspondence at page 12 of the exhibit to Mr. Duncanson's affidavit that the references he complains of are references to his clients' behavior in the litigation and not to him personally. Besides, although the language I used might have been stern, it is not uncommon in the hurly-burly of everyday practice, and I feel sure that in the totality of the exchange Mr. Duncanson would have given as good as he got.

8. Until now, I was wholly unaware of Action No. CL-12/2019; *In the Matter of Tasso Holdings Ltd.* and my Firm's involvement in it. Having now spoken with Mr. Jonathan Katan QC, I can confirm that he has carriage of this file for former clients of Mr. Duncanson. I do not know who referred these clients to MSO'S and I do not accept that lawyers at MSO'S are in any way especially motivated to sue Mr. Duncanson, if and whenever possible, as he alleges. Lawyers at MSO'S are focused on their professional duty to give sound legal advice and to represent their client's interests to the best of their abilities within the confines of the law as they find it. Lawyers at MSO'S do not allow their judgments to be clouded by personal considerations and they do not engage in personal vendettas.

9. As to paragraphs 3 and 4 of Mr. Duncanson's affidavit, I have never heard Mr. O'Sullivan mention any involvement of Mr. Duncanson in triggering the Emerald Cay investigation and charge, so I assume he is either as unaware of it as I am, or he does not consider it to be of any significance in the sequence of events. At any rate Mr. O'Sullivan was acquitted by a jury following a full trial on the merits. We MSO'S are happy with that outcome, and we are not interested in who may or may not have played a role in setting those events into motion.

10. With regards to paragraphs 6 to 9 of Mr. Duncanson's Affidavit, I well remember the conversation to which he refers, though I do not recall declining his instructions with the words "I will not use my political capital in that way." Since my unsuccessful run for the Leadership of the Progressive National Party (PNP) some ten years ago, I have disengaged entirely from active politics, and I have refocused my attention and my efforts on my career in the law. I therefore do not regard myself as having any "political capital" in the sense that Mr. Duncanson suggests. I do not see any need to comment further on what appears to be a speculative discussion of Mr. Duncanson's personal views on the matter of my "political capital", his comments on my present appointment or re-appointment, and on recommendations he says he made to a former Chief Justice for the establishment of a roll of recorders.

11. I also well remember the case of professional misconduct brought against Mr. Duncanson by the Bar Council that he recounts at paragraph 10 of his Affidavit. I prosecuted that case for the Bar Council before then Chief Justice Christopher Gardner. It was a professional engagement in which I had, and took no personal interest, and it certainly engendered no ill will in me towards Mr. Duncanson. Indeed, I recall being scolded by the Chief Justice for not pressing my points vigorously enough, and for "mitigating" instead of "prosecuting".

12. As I recollect, Mr. Duncanson was acquitted before the Court of Appeal for want of evidence of intent, which the Court was persuaded by his counsel, Dr. Lloyd Barnette was an essential ingredient of the charge against him. I feel sure that the assistance I rendered to Mr. Duncanson and as relates at paragraph 5 of his affidavit is more indicative of my disposition towards him than the hostility he describes.

13. For the sake of completeness, I would add that I have never had anything to do with the management or content of the TCI-LII website. I was therefore completely unaware that reports of the judgments involving this professional misconduct charge against Mr. Duncanson had been published there until it was brought to my attention recently by Mr.

Duncanson himself. I told him at the time, and I repeat now that I was not the source of the material.

14. At this stage, so that the matter may be progressed I believe it is only necessary for me to say that I am entirely satisfied, as I am, that there is nothing in Mr. Duncanson's second affidavit, or otherwise disclosed in this statement that might adversely affect my judgment of the merits of Mr. Duncanson's substantive Constitutional motions. I am also at this stage not convinced that a fair-minded informed observer would consider there was any real possibility of bias on the test formulated by Lord Hope in *Porter v. McGill* (HL (E)) 2002 AC 357, p. 494, para 103. I have therefore determined I will hear Mr. Duncanson on his full recusal application, and I will instruct the Registrar to list the matter before me in the usual course and inform counsel accordingly.

21/06/2021

Sgd.

Mr Justice Carlos W. Simons, QC

Supreme Court Judge