



**IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS**

CL 152/2023

BETWEEN:

**In the Matter of an Application for Leave to Apply
for Judicial Review**

IN THE MATTER OF

THE KING

On the Application of

(1) FORTIS TCI LIMITED

(2) TURKS AND CAICOS UTILITIES LIMITED

APPLICANTS

AND

(1) THE ENERGY AND UTILITIES COMMISSIONER

**(2) HER EXCELLENCY, THE DEPUTY GOVERNOR OF THE TURKS AND
CAICOS ISLANDS**

RESPONDENTS



Before: Hon. Justice Chris Selochan

Appearances: For the Applicants: Mr. Conrad Griffiths KC and Mr. Devonte Smith

For the Respondents: Ms. Rhondalee Braithwaite-Knowles KC,
Ms. Clemar Hippolyte and Ms. Khadija Mac Farlane

Date Handed Down: 24th May 2024

DECISION

Background

1. At a hearing on Friday 8th March 2024 to deal with certain preliminary issues, the court set a date of Friday 15th March 2024 for a “rolled-up” hearing of the application for leave to apply for judicial review and, if leave is granted, for the hearing of the substantive application for judicial review.
2. The “rolled-up” hearing commenced on Friday 15th March 2024 and continued on Friday 19th April 2024. On Friday 24th May 2024 the Court gave an oral decision on whether leave to apply for judicial review should be granted to the Applicants. together with a summary of its reasons. The detailed reasons are reduced into writing herein.
3. The Applicants are the licensed public suppliers of electricity to essentially the entire Turks and Caicos Islands, having been so appointed under the *Electricity Ordinance CAP 14:04*. They have sought leave to bring judicial review proceedings seeking a declaration that the current Energy and Utilities Commissioner (“the Commissioner”) is subject to apparent bias and for an Order directing the Deputy

Governor to consider whether the Commissioner can continue in the post. The Application had initially sought this relief against Her Excellency the Governor of the Turks and Caicos Islands but, by consent, the Application was amended to replace the Governor with the Deputy Governor. The initial Application was dated 8th November 2023. The Amended Application was dated 18th April 2024.

4. The Commissioner, Mr. Delano Arthur, was appointed in early 2023.
5. The Applicants are seeking leave to file an application for judicial review of the following:
 - i. The continued role of the current Energy and Utilities Commissioner (Mr. Delano Arthur) where the current Commissioner is subject to apparent bias.
 - ii. The apparent failure of Her Excellency, the Deputy Governor, to take a decision based on the written request of the Applicants dated 29th September 2023 (as if addressed to the Deputy Governor as the decision maker and treated as such by the Respondent) that the Deputy Governor reconsider the continued appointment of the current Commissioner considering the apparent bias identified by the Applicants. The Applicants are unaware of any substantive response from the Deputy Governor prior to proceedings being issued.
6. The reliefs being sought in the Application for judicial review are as follows:
 - i. A Declaration that the current Commissioner, Mr. Delano Arthur, is subject to apparent bias and so should recuse himself from all matters concerning the

Applicants by reason of such apparent bias, and thereby it is impractical for the current Commissioner to continue in office.

- ii. An order of mandamus directing the Deputy Governor to consider whether the current Commissioner can continue in that post by reason of the apparent bias identified by the Applicants.

Summary of the Applicant's Submissions in support of leave being granted

7. The Applicants contend that the Commissioner is subject to apparent bias by reason of which he cannot continue in the post in relation to the Applicants. As such, this would make it de facto impossible for him to continue to hold the position of Commissioner since the Applicants are the primary public suppliers of electricity for almost the entire Turks and Caicos Islands.
8. According to the Applicants, the Commissioner has a vested financial interest in the supply of solar installations which is incompatible with his role as the Commissioner under the *Electricity Ordinance CAP 14:04* ("the Ordinance") and proposed new legislation under the *Renewable Energy and Resource Planning Bill*. More particularly they contend:
 - a. The Commissioner is a director of Ano Tech Ltd ("Ano Tech"), a TCI company which was incorporated in October 2022.
 - b. The Commissioner is a 50% owner and original subscriber of Ano Tech Limited, a Bahamian company ("Ano Tech Bahamas").

- c. 'Ano Tech' offers products, solutions and services across the entire energy value chain. The Commissioner therefore apparently had and appears to have an active and vested financial interest through a solar equipment supply and installation company or companies.
- d. The Applicants' concerns are further fueled by a Bill of Lading for solar panels supplied by the Commissioner's business in the Bahamas to a customer in the Turks and Caicos Islands, being the uncle of the Commissioner. The uncle is involved in the solar industry.
- e. It is clear that when interacting with the Applicants, the Commissioner will be involved in considering and advancing renewable energy in the TCI. This is particularly so in light of the following:
 - i. The Commissioner's role includes the approval of all electrical installations which necessarily include solar installations. *Regulations 6 and 7 of the Electricity (Supply) Regulations* (the "Regulations") provide a code by which all installations (including all solar installations) must be reviewed and approved by the Commissioner.
 - ii. The Commissioner's role and position will become increasingly important in light of new legislation about renewable energy regulations. This is highlighted by the recent *Renewable Energy and Resource Planning Bill 2023* which was gazetted on Friday 3rd November 2023.
- f. In addition, the Applicants have highlighted certain statutory functions of the Commissioner which could raise issues of apparent bias. Some of these are:

- i. Acting as a member of the Electricity Board pursuant to section 4(2)(d) of the Ordinance.
 - ii. Acting in the revocation of a public supplier's licence under section 13(2)(b) of the Ordinance.
 - iii. Issuing a certificate that it would be uneconomic for the public supplier to supply (section 17(2)(c) of the Ordinance).
 - iv. Determining maximum supply in the event of a dispute (section 18(4) of the Ordinance).
 - v. Determining compensation after entry on premises (section 45 of the Ordinance).
 - vi. Entering a public supplier's premises to test (section 62 of the Ordinance).
 - vii. Recovering reasonable expenses from the public supplier (section 66 of the Ordinance).
 - viii. The Commissioner has a duty to inspect and test electrical plant (section 56 of the Ordinance).
 - ix. The Commissioner acts as an adviser to the Governor in relation to the revocation of licences since under section 13(2)(b) a licensed supplier can assert a right to make oral representations to the Commissioner where consideration is being given to revocation of the licence.
9. According to the Applicants, since the Commissioner is appointed by the Deputy Governor (acting on the advice of Cabinet), if the Commissioner is affected by apparent bias, the Deputy Governor should act to remedy the situation.
10. The Applicants wrote to the Governor on 29th September 2023 asking the Governor to act upon the complaints raised by the Applicants and to consider removing the Commissioner. However, there was no substantive response. Having regard to the

amendment to the Application,¹ this letter and all subsequent exchanges have been treated as if written to or directed to the Second Respondent, being the Deputy Governor of the Turks and Caicos Islands.

11. As a result of the issue of apparent bias, the Applicants say that the Commissioner cannot continue in his role and the Deputy Governor needs to take steps to appoint a new Commissioner who is not subject to apparent bias.
12. According to the Applicants, there are three categories of decision which might be in question:
 - i. The decision to appoint which is arguably void if the Commissioner is subject to bias from the outset;
 - ii. The various decisions taken by the Commissioner during his appointment which are impugned if he is affected by bias; and
 - iii. The failure to take a decision about the Commissioner's continued appointment (due to what the Applicants say is a misconception on the part of the decision maker that there is bias).
13. The Applicants contend that Ano Tech Bahamas has clearly stated ambitions to enter the TCI market in the energy sector. In support of this contention, the Applicants draw reference to the affidavit of Delano Arthur (which was filed on behalf of the Respondents in these proceedings) in which he stated, inter alia, that he had suspended further entrance into the TCI market, having put this on pause in the TCI. The Applicants take this to imply that these activities can resume immediately after the Commissioner ceases in this role. Thus, they contend that the Commissioner has a current interest in a renewable interest company that will enter the TCI market as soon as the Commissioner leaves his current role.

¹ See paragraph 5 (*supra*)

14. The Applicants argue that there is material that suggests that the Commissioner clearly favours renewable energy and that while this may be consistent with Government policy it also suggests that the Commissioner is influenced by his own business interests.
15. Importantly, the Applicants have pointed to the last advice received from the Integrity Commission to the Commissioner by email dated 27th March 2023. The email was sent by the Deputy Director of the Integrity Commission and states, inter alia:

“As such, the Commission has also informed you that you should not be engaging in private business in the E&U sector, with your companies, whilst serving as the TCIG E&U Commissioner.”

The Respondents have contended that this advice was limited to the Commissioner’s role in the energy sector of the TCI. However, the Applicants construe the email as containing no such restriction and contend that the Commissioner’s continued role in the energy sector in the neighbouring Bahamas is a source of grave concern and adds to the appearance of bias.

Summary of the Respondents’ Submissions in opposition to leave

16. The Respondents’ position can be summarised as follows:
- a. Prior to the Commissioner assuming that position, he did disclose the fact that he will be transitioning from Managing Director of Ano Tech Ltd, a renewable energy firm that was seeking entrance into the TCI market.

- b. The Integrity Commission considered his disclosure and advised him that his companies are not to conduct business in the Turks and Caicos Islands in the energy and utilities sector.
- c. The Commissioner has heeded the advice of the Integrity Commission and has not done any business in the TCI as his company remains non-operational.
- d. The Commissioner continues to discharge his duties in a fair and reasonable manner and in accordance with the Ordinance.

17. The contention contained in Paragraph 16 b (supra) was a serious bone of contention between the parties at the hearing. The issue stems from the email dated 27th March 2023 from the Deputy Director of the Integrity Commission to the Commissioner. The Applicants interpret the email as restricting the Commissioner from being involved in *any* business in the energy sector whilst holding the position of Commissioner². The Respondents argue that the email was meant to deal only with business in the Turks and Caicos Islands and that the Commissioner was at liberty to conduct business in the energy sector in other jurisdictions.

18. The Respondents submit that the circumstances which relate to the Commissioner being biased would not lead a fair-minded and informed observer to conclude that there was a real possibility of bias.

19. According to the Respondents, the informed observer is not one sided and would note that the Commissioner, at the earliest opportunity and months before his appointment as Commissioner, did disclose his ownership of Ano Tech and that the Integrity Commission, which is the independent institution tasked under the Constitution with protecting good governance, had advised the Commissioner

² See paragraph 15 (supra)

that his companies ought not to conduct any business in the energy and utilities sector whilst he was employed as Commissioner. The Commissioner has followed this advice in that Ano Tech remains essentially non-operational and, as such, the Commissioner has no direct or indirect benefit to obtain through any advancement of solar or renewable energy.

20. Indeed, according to the Respondents, the Commissioner was merely supporting the mandate of the Turks and Caicos Government in moving towards renewable energy as a result of being signatories and parties to charters and agreements in existence prior to the Commissioner's appointment.

21. In addition, the Respondents contend that the Commissioner's wealth of experience in the energy industry is an advantage to him occupying the position, particularly when considering key aspects of policy as well as other decisions regarding the management of the utilities industry in the Turks and Caicos Islands. In this regard, reference was made to the case of *Gillies v Secretary of State for Work Pensions*³. In that case, the issue was whether there were grounds for thinking that a medical doctor was likely to be unconsciously biased when she was examining the medical evidence because of a predisposition to prefer the EMP Report, as against any contrary evidence, due to her involvement in providing reports as an EMP (Examining Medical Practitioner). At paragraph 23 of its judgment, the Court observed that the bringing of experience to bear when examining evidence has nothing whatever to do with bias.

22. In respect of the proposed legislation, the Respondents contend that this protects the public supplier in ways that the current legislation does not in that it would better control the use of solar energy systems, which is at present unregulated.

³ [2006] UKHL 2

23. The Respondents dismiss the Applicants' arguments that the Commissioner could resign from his position on one day and seek to enter the energy market in the TCI with his company on the following day, saying that this argument could apply to anyone employed with any organization.
24. According to the Respondents, the Applicants have therefore not met the threshold required for leave and the application should be dismissed with costs awarded to the Respondents.

The Evidence

Evidence on behalf of the Applicants

25. The Application is supported by three affidavits of Christopher Smith ("the Smith affidavits"), an attorney-at-law and senior associate with the law firm of Griffiths and Partners, which represents the Applicants. These affidavits are dated 8th November 2023 ("the first Smith affidavit"), 1st December 2023 ("the second Smith affidavit") and 13th December 2023 ("the third Smith affidavit"). In summary, these affidavits outline the Applicants' concerns about the Commissioner occupying that position.
26. At paragraphs 11 to 13 of the first Smith affidavit, the following is deposed to:

"11. It is therefore clear that when interacting with the Applicants the Commissioner will be involved in considering and advancing renewable energy in TCI. However, this is an area in which the Commissioner apparently had and appears to have an active and vested financial interest through a solar equipment

supply and installation company or companies. The website for 'Anotech' states that it offers products, solutions and services across the entire energy value chain.

12. As identified in the Notice of Application, the Commissioner's role includes the approval of all electrical installations which necessarily include solar installations (see Regulations 6 and 7 of the Electricity (Supply) Regulations (the "Regulations")).

13. The Commissioner's role and position will become increasingly important in light of new legislation about renewable energy regulations. This is highlighted by the recent Renewable Energy and Resource Planning Bill 2023 which was Gazetted as recently as Friday 3rd November 2023."

27. In the second Smith affidavit, the deponent expanded on the concerns expressed in the first affidavit by referring to examples of projects which the Applicants were required to engage with the Commissioner. At paragraph 6, reference was made to the G-15 expansion project which involved the First Applicant increasing its electricity generation capacity by purchasing a multi-fuel engine generating set known as G-15. According to the Applicants, during the process, the Commissioner expressed concern with the project cost and queried whether the same outcome could be achieved using renewable energy. At paragraph 9, the following is deposed to:

"It is therefore clear that, when interacting with the Applicants, the Commissioner will be involved in advancing renewable energy in the Turks and Caicos Islands ("TCI"). However, this is an area in which the Commissioner apparently had, and appears to have, an active and vested financial interest through a solar equipment supply company, or companies."

28. In the third Smith affidavit, a Bahamian press release dated 20th November 2023 is exhibited. The press release was in respect of the Ministry of Finance of the Bahamas signing a contract with the Commissioner's Bahamian company for the implementation of a rooftop solar photovoltaic generation system at the University of Bahamas. The contract was signed on 17th November 2023. The press release also features a photograph of a press conference following the signing of the contract in which the Commissioner is present with senior Bahamian officials, including the Financial Secretary of the Ministry of Finance, the Permanent Secretary of the Ministry of Finance and the Acting President of the University of the Bahamas.

29. The Smith affidavits also exhibit the following:

- a. The advertisement and job description for the position of Commissioner from July 2022.
- b. A press release from January 2023 announcing the appointment of the Commissioner.
- c. Company search for Ano Tech Ltd, a TCI company which was incorporated in October 2022 and of which the Commissioner is a director.
- d. Company search for Ano Tech Limited, of which the Commissioner is a 50% owner and original subscriber.
- e. A Bill of Lading for solar panels supplied by the Commissioner's business in the Bahamas to a customer in the Turks and Caicos Islands, being the uncle of the Commissioner. The uncle is involved in the solar industry.
- f. A copy of a draft legislative bill, *the Renewable Energy and Resource Planning Bill 2023*, which, according to the Applicants, shows enhanced statutory and policy functions which are under consideration for the position of Commissioner.

- According to the Applicants, this will refocus attention on the need for impartiality and the absence of apparent bias.
- g. A press release on 29th November 2023 regarding policy formulation in the renewable energy sector.

Evidence on behalf of the Respondents

30. The Respondents rely primarily on three affidavits deposed to by the Commissioner dated 12th December 2023 (“the Commissioner’s first affidavit”), 14th December 2023 (“the Commissioner’s second affidavit”) and 8th January 2024 respectively (“the Commissioner’s third affidavit”). In his affidavits the Commissioner indicated, inter alia, the following:
- a. At paragraph 8 of the Commissioner’s first affidavit, he stated that his involvement in private business, including Ano Tech Ltd, was never a concealed fact but had been disclosed in writing via email to the government’s hiring officer, Ms. Lavanda J Selver, on 21st November 2022 prior to him assuming the position of Commissioner.
 - b. At paragraph 10 of the Commissioner’s first affidavit, he indicated that on 17th February 2023, after taking up the position as Commissioner, he forwarded his email of 21st November 2022 to the Integrity Commission, provided an update on his business activities and sought guidance from the Commission on same. He was advised via email by one of its Compliance Officers, Ms. Lucy Mureithi, that his companies should not do any business in the energy and utilities sector whilst employed as the Commissioner.
 - c. At paragraph 11 of the Commissioner’s first affidavit, he stated that he had lodged a completed and confidential Declaration Form at the Integrity Commission and that he had made full and frank disclosure of all his private interests.

- d. At paragraph 14 of the Commissioner's first affidavit, the Commissioner stated that Ano Tech Ltd continues to exist but only as an incorporated company, and after the advice of the Integrity Commission, no further steps were taken to enter into the TCI and no business licence or other governmental approvals have been sought. He confirmed that his wife and he continue to be directors and owners of this company.
- e. The Commissioner also denied that he was biased in his dealings with the Applicants. In respect of the G-15 expansion project⁴, the Commissioner made the point that this project was in progress before he had been appointed as Commissioner and that in any event he had made observations about the load growth and consideration of the potential impact that would have on the increase in rates which will be passed on to the consumer.

31. In the Commissioner's second affidavit, the following three main areas were canvased:

- a. References to the TCI on his company's website (that were present even after he had been advised by the Integrity Commission not to engage in any business in the energy and utilities sector in the TCI) had remained there inadvertently and he intended to remove them. (As an aside, it is interesting to note that in the Commissioner's first affidavit he referred to the advice given by the Integrity Commission as restricting him from doing business in the energy and utilities sector but in his second affidavit he referred to the advice being restricted to not doing business in the energy and utilities sector *in the TCI*).
- b. As regards to the importation of solar equipment into the TCI, the Commissioner contended at paragraphs 5 and 6 that this took place before he was offered the job as Commissioner and was done for the benefit of his uncle,

⁴ See paragraph 27 (*supra*)

Crayton Higgs. The importation was not done for profit but to assist Mr. Higgs in sourcing and obtaining solar equipment.

- c. At paragraph 11, he stated that he does not have any financial interest in any solar company doing business within the TCI. Further he stated that the drafting of the *Renewable Energy and Resource Planning Bill* commenced around 2018, which was long before his appointment as Commissioner. At paragraph 12 he contended that the Bill is proposing a regulatory regime that will require renewable energy providers to be licensed to only use it for their own permitted purposes and to sell back any excess to the public supplier, thereby protecting the public supplier.

32. In the Commissioner's third affidavit, the Commissioner stated that his business in the Bahamas, Ano Technologies Ltd., has not engaged in any business in the energy and utilities sector in the Turks and Caicos Islands since he was appointed as the Energy and Utilities Commissioner. He further stated that he has not engaged in any business in the Energy and Utilities sector in the Turks and Caicos Islands.

33. The Respondent also relied on the affidavit of Senior Compliance Officer in the Integrity Commission, Ms. Crystal Almonte, filed on 8th January 2024, in which she indicated, inter alia, the following:

- a. The Commissioner had, via email of 15th February 2023, sought clarity on how best to avoid or manage any potential conflict of interest as it related to his private business.
- b. On 17th February 2023 the Commissioner forwarded an email dated 21st November 2022 to her which showed that he had already declared his potential conflict with the TCIG Human Resources prior to becoming Energy and Utilities Commissioner and stated that he had suspended entry into the TCI market.

- c. The Commissioner was advised by the Integrity Commission that his companies should not do any business in the energy and utilities sector in the Turks and Caicos Islands while employed as the Energy and Utilities Commissioner.
- d. The Commissioner subsequently confirmed during a follow up conversation on 31st August 2023 that none of his private businesses was currently engaged in any business activity in the TCI.

34. In addition, the Respondents relied on an affidavit filed by the Permanent Secretary in the Ministry of Home Affairs, Public Safety and Utilities, Ms. Bridgette Newman, in which she outlined the role of the Commissioner under *section 40* of the Ordinance whereby he is surrounded by a team of experts and independent consultants providing technical support. She also stated that although the Commissioner has a role in reviewing information submitted to the TCIG, the ultimate decision-making power rests with the Governor of the Turks and Caicos Islands.

Analysis of the Court

35. *Section 55(1)* of the Ordinance provides for the appointment of the Commissioner:

55(1) There shall be an Energy and Utilities Commissioner who shall be appointed by the Governor.

Section 55(3) outlines in general terms the role of the Commissioner:

55(3) The Energy and Utilities Commissioner shall have such powers and shall perform such duties as are conferred or imposed on him by this Ordinance or as

may be prescribed, and shall perform such other duties as may be assigned to him by the Governor.

36. Under *section 90(5) of the Constitution and the Public Service (Delegation of Powers) Regulations* the relevant powers of appointment, discipline and removal by the Governor under the Public Service Ordinance are delegated to the Deputy Governor.

a. The test for leave

37. In *Sharma v Brown- Antoine*⁵ the Privy Council at paragraph 14 outlined the following test for leave to claim judicial review:

“The ordinary rule is now that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy.”

38. In the Privy Council case of *The Central Bank of Trinidad and Tobago (Appellant) v Maritime Life (Caribbean) Ltd (Respondent) (Trinidad and Tobago)*⁶, Lord Stephens confirmed the low threshold for the granting of leave, saying, inter alia, at paragraph 2:

“It is well settled that the threshold for the grant of leave to apply for judicial review is low. The Court is concerned only to examine whether the applicant has an

⁵ [2006] UKPC 57

⁶ [2002] UKPC 37

arguable ground for judicial review that has a realistic prospect of success and is not subject to a discretionary bar such as delay or an alternative remedy: see governing principle (4) identified in Sharma v Brown-Antoine [2006] UKPC 57; [2007] 1 WLR 780, para 14. The low threshold would usually not be met “if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed”: see *Attorney General v Ayers-Caesar* [2019] UKPC 44 at para 2.”

39. In *Attorney General v Ayers-Caesar*⁷ Lord Sales said at para 2:

“The test to be applied is the usual test for the grant of leave for judicial review. The threshold for the grant of leave to apply for judicial review is low. The Board is concerned only to examine whether the respondent has an arguable ground for judicial review which has a realistic prospect of success: see governing principle (4) identified in Sharma v Brown-Antoine [2006] UKPC 57; [2007] 1 WLR 780, para 14. Wider questions of the public interest may have some bearing on whether leave should be granted, but the Board considers that if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage.”

40. It is clear from the authorities that leave for judicial review should not be refused once the court is satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. At this stage, the Court is not required to determine the substantive issues raised in the application for judicial review.

⁷ [2019] UKPC 44

However, if the court is confident at the leave stage that the legal position is entirely clear and to the effect that the claim could not succeed, it would usually be appropriate for the court to dispose of the matter at that stage.

b. Apparent bias

41. The test for apparent bias was outlined by Lord Hope in *Porter v Magill*⁸:

“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.”

42. Whilst the Applicants have hinted of actual bias on the part of the Commissioner, the Application is premised on the appearance of bias.

43. In *R v Secretary of State for the Environment and another, ex parte Kirkstall Valley Campaign Ltd.*⁹ it was held that the principle that a person was disqualified from participation in a decision if there was a real danger that he or she would be influenced by a pecuniary or personal interest in the outcome was of general application in public law and was not limited to judicial or quasi-judicial bodies or proceedings. Sedley J. said¹⁰, inter alia:

“Wade and Forsyth (7th edn, 1994) p 512 comment: ‘The mere fact that the power affects rights or interests is what makes it “judicial” and so subject to the

⁸ [2002] 2 AC 357 at 494

⁹ [1996] 3 All ER 304

¹⁰ At page 325, paragraphs a and b

procedures required by natural justice.’ (My emphasis.) The reference to interests as well as to rights is important. Public law is concerned not only with the vindication of positive rights, but with the redress of public wrongs wherever the court’s attention is called to them by a person or body with a sufficient interest.

I hold, therefore, that the principle that a person is disqualified from participation in a decision if there is a real danger that he or she will be influenced by a pecuniary or personal interest in the outcome, is of general application in public law and is not limited to judicial or quasi-judicial bodies or proceedings.”

44. The Applicants contend that the Commissioner is subject to apparent bias by virtue of his historic and continuous involvement in a commercial solar business which conducts or intends to conduct business in the Turks and Caicos Islands and conducts business in the Bahamas. Having regard to this, the Commissioner cannot continue in his role and the Deputy Governor should take steps to appoint a new Commissioner who is not subject to apparent bias.

45. The Applicants further contend that the common law standards of impartiality apply. They argue that this implies two obligations:

- a. The Commissioner must have no personal interest in his decision making that is more significant than a ‘negligible’ interest (*Davidson v Scottish Ministries* [2004] HRLR 948).
- b. There must be no circumstances that mean that a fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the Commissioner was biased (see by way of example *R v Williams* [2017] TCACA 3 at [11]).

46. The Applicants wrote to the Governor on 29th September 2023 outlining their grievances and calling upon her to act upon them and consider removing the Commissioner. However, to date, there has been no substantive response to their correspondence.

47. No issues of delay or there being an alternative remedy or any other bar to judicial review has been raised by the Respondents. As such, the issue which the Court has to determine at this stage is simply whether the Applicants have succeeded in establishing that it is arguable that the Commissioner is subject to apparent bias. More specifically, is it arguable that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias on the part of the Commissioner?

48. In addressing its mind to this issue, the Court examined closely the evidence which was presented on behalf of the parties and which has been summarized at paragraphs 25 to 34 herein.

49. Of particular interest was the evidence of Crystal Almonte. It is worthwhile to recite the salient aspects of her evidence as per her affidavit:

a. At paragraphs 1 and 2, she states as follows:

Paragraph 1:

'I am the Senior Compliance Officer in the Integrity Commissioner of the Turks and Caicos Islands. I was appointed to that position on 24 September 2018 after being in post as a Compliance Officer since 13 January 2024. As Senior Compliance Officer, my duties include managing, supervising and assisting personnel of the Compliance Unit in ensuring that the Commission effectively and efficiently

discharges its mandate as anti-corruption agency and institution protecting good governance.'

Paragraph 2:

'The facts and matters deposed to herein are true and correct and within my own knowledge as a Senior Compliance Officer and/or have been derived from information obtained by my investigation of the affairs, books, documents and/or papers of the Integrity Commission save and except where otherwise stated to be on information and belief, in which case I verily believe such information to be true and correct.'

- b. At paragraphs 5 to 7, she addresses the declarations made by the Commissioner to the Integrity Commission:

Paragraph 5:

"On 15 February 2023, Mr. Delano Arthur attended an orientation session for new declarants. The purpose of this session was to provide guidance to all newly appointed Specified Persons in Public Life with guidance on the Declaration process, as well as to advise on matters such as avoiding corruption and conflict of interests. After that session, he stayed behind to discuss with myself and Compliance Officer Lucy Mureithi, potential conflict in relation to his private business. He was seeking clarity on how best to avoid and/or if necessary, manage any actual or perceived conflict. We advised Mr. Arthur to put his concerns in writing so that we may address them formally.

Paragraph 6:

On 17 February 2023, Mr. Arthur emailed Compliance Officer Mureithi and I, along with an email trail dated 21 November 2022, which showed that he had in fact already declared his conflict or potential conflict with the TCIG Human Resource prior becoming Energy & Utilities Commissioner. His email to the

Integrity Commission sought clarity and guidance on how to proceed with his business venture as well as to confirm that he had suspended all further entrance into the TCI market. A true copy of that email is hereto annexed and marked "CA".

Paragraph 7:

On 10 March 2023 Mr. Arthur also lodged a completed and confidential Declaration Form at the Integrity Commission. The disclosures made on 10 March 2023 with respect to his private business were consistent with Mr. Arthur's previous disclosures to the Human Resource.

- c. At paragraphs 8 and 9, she deals with the advice given by the Integrity Commission to the Commissioner:

Paragraph 8:

On 21 March 2023, Compliance Officer Mureithi advised Mr. Arthur as follows:
"To be clear, the Integrity Commission advises yourself, and P.S. Astwood, that your companies should not do any business in the Energy and Utilities sector whilst employed as the Energy and Utilities Commissioner of the TCIG. However, while employed with TCIG as Energy and Utilities Commissioner, and only with the approval of the PS, your company may embark on business in another sector, completely unrelated to Energy and Utilities."

Paragraph 9:

On 27 March 2023, Mr. Arthur was again advised by the Integrity Commission via email from Deputy Director Richard Been, as follows:

"As such, the Commission has also informed you that you should not be engaging in private business in the E&U sector with your companies whilst serving as the TCIG E&U Commissioner."

- d. Importantly, at paragraph 11 of her affidavit, Ms. Almonte gave her interpretation of the advice provided by the Integrity Commission:

Paragraph 11:

“The Integrity Commission’s advice was therefore that:

- a) Mr. Arthur’s companies should not engage in the E&U sector (private or government) in the Turks and Caicos Islands while serving as the TCIG E&U Commissioner, and*
- b) Mr. Arthur may be allowed to do business in the Turks and Caicos Islands, outside of the E&U sector, provided that requisite approval from his Permanent Secretary is in place.*

50. Having considered the affidavit of Crystal Almonte, I make the following observations:

- a. Ms. Almonte’s contention that the Integrity Commission had advised the Commissioner that his companies should not engage in the energy and utilities sector (private or government) **in the Turks and Caicos Islands** while serving as the TCIG Energy and Utilities Commissioner does not appear to be supported by the documentation which she references as providing that advice. Indeed, the correspondences of 21st March 2023 and 27th March 2023 seem to suggest that the advice given to the Commissioner was not limited to not engaging in the energy and utilities sector in the Turks and Caicos Islands

but rather extended to his companies not engaging in any business in the energy and utilities sectors at all while holding the position of Commissioner.

- b. Ms. Almonte has no direct knowledge of what was decided by the Integrity Commission but is simply providing her interpretation of advice rendered by email to the Commissioner.

51. The concerns which the Court harbours in respect of the affidavit of Crystal Almonte are accentuated by the fact that the Commissioner continues to actively and publicly pursue his private business interests in the energy sector in the neighbouring Bahamas, notwithstanding his holding of an important public position in the energy sector of the Turks and Caicos Islands. In this regard, reference is drawn to the press release dated 20th November 2023 which was exhibited to the third Smith affidavit which shows a press conference following the Commissioner's company's signing of a contract with the Ministry of Finance of the Bahamas on 17th November 2023 for the implementation of a rooftop solar photovoltaic generation system at the University of Bahamas¹¹. The press release includes a photograph showing the Commissioner with top Bahamian officials at the press conference. As such, rather than taking a background role in his company's involvement in the energy sector in the Bahamas, the Commissioner has done quite the opposite.

52. The Court also examined the functions of the Commissioner, and in particular the following:

- a. Acting as a member of the Electricity Board pursuant to section 4(2)(d) of the Ordinance.

¹¹ See paragraph 28 (*supra*)

- b. Acting in the revocation of a public supplier's licence under section 13(2)(b) of the Ordinance.
- c. Issuing a certificate that it would be uneconomic for the public supplier to supply (section 17(2)(c) of the Ordinance).
- d. Determining maximum supply in the event of a dispute (section 18(4) of the Ordinance).
- e. Determining compensation after entry on premises (section 45 of the Ordinance).
- f. Entering a public supplier's premises to test (section 62 of the Ordinance).
- g. Recovering reasonable expenses from the public supplier (section 66 of the Ordinance).
- h. The duty to inspect and test electrical plant (section 56 of the Ordinance).
- i. Acting as adviser to the Governor in relation to the revocation of licences since under section 13(2)(b) a licensed supplier can assert a right to make oral representations to the Commissioner where consideration is being given to revocation of the licence.

53. I should point out at this stage that the Court also has concerns about certain aspects of the Applicants' application, which were brought to the attention of counsel for the Applicants during the hearing. These concerns involve the extent of the involvement of the Commissioner in influencing the formulation of policy in the energy sector as well as the steps that can be taken by the Deputy Governor to secure the removal of the Commissioner in the event that the application is successful.

54. However, I remind myself that the threshold for the grant of leave to apply for judicial review is low and that at this stage the Court is concerned only to examine whether the applicant has an arguable ground for judicial review that has a

realistic prospect of success and is not subject to a discretionary bar such as delay or an alternative remedy.

55. I remind myself further that the low threshold would usually not be met if a court were confident at the leave stage that the legal position was entirely clear and to the effect that the claim could not succeed. At this stage, based on what is before me, I am not so confident. In addition, the aspects of the Applicants' application which the Court is concerned about are arguable and can be more properly ventilated at a substantive hearing.

56. Given what has been presented thus far, I form the view that it is arguable that the fair-minded and informed observer, having considered the facts, would conclude that there is a real possibility of bias on the part of the Commissioner. More specifically, I form this view for the following reasons:

- a. The Commissioner continues to have an active and vested financial interest in solar energy and the energy sector of the Bahamas.
- b. The Commissioner's role in the Bahamas is very public.
- c. The Commissioner is a director of Ano Tech Ltd, a TCI company which has expressed an interest in entering the TCI market in the energy sector.
- d. The Commissioner has interpreted advice given to him by the Integrity Commission as permitting him to conduct business outside of the TCI in the energy sector. However, the Court is not satisfied at this stage that this is a correct interpretation. The Respondents may well want to clarify this position by way of supplemental evidence at the substantive hearing and, indeed, it may be in the interests of all for this to be done.

- e. It is arguable that the Commissioner's duties and functions¹² include matters which could affect the business interests of the Applicants as it relates to their functions in the energy sector of the Turks and Caicos Islands. These matters may involve being part of decision making processes that could affect the Applicant.
- f. It is arguable that the Commissioner has a vested interest in advancing renewable energy in the Turks and Caicos Islands with the ultimate objective of deriving personal benefits from this when he leaves his position as Commissioner.

Decision of the Court

57. In the circumstances, the decision of the Court is as follows:

Leave is granted to the Applicants to move for judicial review in respect of the following reliefs:

- a. A Declaration that the current Commissioner, Mr. Delano Arthur, is subject to apparent bias and so should recuse himself from all matters concerning the Applicants by reason of such apparent bias, and thereby it is impractical for the current Commissioner to continue in office.
- b. An order of mandamus directing the Deputy Governor to consider whether the current Commissioner can continue in that post by reason of the apparent bias identified by the Applicants.

Costs

¹² See paragraph 52 (*supra*)

58. On 24th May 2024, when the parties appeared for the ruling, the Court invited submissions on the issue of costs. Having heard both parties, the court formed the view that the issue of costs should be reserved. The costs of the application are therefore reserved.

59. The Court then proceeded to give the following Orders:

- a. The Respondents are to file any supplemental evidence on or before 10th June 2024.
- b. The Applicants are to file any evidence in reply on or before 14th June 2024.
- c. Any Supplemental Submissions to be filed on or before 18th June 2024.

60. The matter was adjourned to 20th June 2024 at 11:00 a.m. for the hearing of the substantive application.

Justice Chris Selochan

