IN THE SUPREME COURT

TURKS AND CAICOS ISLANDS

CL 150 of 2022

BETWEEN:

DUNCANSON & CO. (BERVYN DUNCANSON DBA)

Plaintiff

And

(1) EAST WIND DEVELOPMENT COMPANY LTD
(2) WILLIAM DEAN REEVES
(3) RICHARDSON ARTHUR
(4) JEFFREY HERMAN
(5) RONNIE MOORE
(6) JOHN FLEMING
(7) WILLIAM MADDOX
(8) WB CORPORATE MANAGEMENT LTD
(9) SAUNDERS & CO. (NORMAN SAUNDERS JR, DBA)

Defendants

CL 97 of 2022

BERVYN DUNCANSON (DBA DUNCANSON & CO.)

Appellant

And

(1) THE REGISTRAR OF LANDS
(2) THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS
Respondents

(3) EAST WIND DEVELOPMENT COMPANY LTD.

Interested Party/

Registered Proprietor

REASONS

Before: **The Honourable Justice Chris Selochan**

Appearances: **Mr. Beryn Duncanson for the Plaintiff**

Mr. Conrad Griffiths KC instructed by Mr. Smith of Griffiths and Partners for the 1st to 7th Defendants

Ms. Clemar Hippolyte of the Attorney General's Chambers for the Respondents

No appearance by the 8th and 9th Defendants in CL-150/22

Hearing Date: **July 31st, 2023**

Venue: **Court Room #1, Supreme Court, Providenciales**

Handed Down: **July 31st, 2023 and 28th September 2023**

BACKGROUND

1. By application filed on 24th July 2023, the Plaintiff brought a Motion ("the motion") for the Recusal of this judge from these matters (being CL 150/2022 and CL 97/2022) as well as all other matters in which the Plaintiff is involved.

2. The motion seeks three reliefs which are worded as follows:

a. That the named Justice Mr. Chris Selochan do give immediate disclosure of all the full details of his history with and relations to those persons natural/and/or corporate and organizations identified in Applicant's counsel's letter dated 20th June 2023, in comportment with binding precedent within this territory, all of which precedent stems from the hallmark UK case of *Resolution Chemicals Ltd. vs H. Lunbeck A/S [2013] EWCA Civ 1515.*

b. That the named Justice Mr. Chris Selochan do hereby recuse himself from these matters and generally on all matters where either personally involving or being represented by Attorney Beryn Duncanson.

c. That the costs of this application be costs to the Applicant should the opposing parties resist the recusal, or otherwise in the cause.

3. The following are the stated grounds of the motion:

a. There were and still are live issues as to an application for Judicial Review having been made as to the Applicant's complaints of the learned judge's appointment having been backdated in the terms of the press release from the Court as reported in the TCI Sun online 'newspaper' on or about the 6th June 2023; as well as on the basis that his assignment to this instant case, without any prior consultation with Applicant as counsel, deviates as a matter of reasonableness from the spirit of those directions made by the Court of Appeal on the 7th June 2023 in Action CL-150/2022 (Duncanson & Co. v East Wind Development Co. Ltd et ors).

b. That in all the circumstances of the manner of the learned judge's appointment and assignment to this case, informs the Applicant's increasing apprehension of the real possibility of bias of the Judge towards this Applicant and his instant cases, as with all his other clients' cases.

c. That considering the learned judge's Written Reasons dated 29th June 2023 in the aforementioned action CL-150/2022, refusing to adjourn sine die pending determination of the aforesaid Judicial Review – *in which Judicial Review this Applicant is also a party/Applicant thereto* – there is all the appearance of a real possibility of bias which now informs the Applicant's increasing apprehension.

d. That the appearance of bias engendered by the learned judge's refusal to adjourn pending determination of the outcome of the Applicant's Judicial Review is only enhanced by the learned judge's refusal thus far to give any disclosure as to his possible historical connections to those persons and entities

identified in Applicant's letter as counsel of 20th June 2023, which connections would raise the additional specter of his having either/or both a pecuniary and/or a personal interest indirectly in this matter in terms of the outcome of this application and the underlying substantive case. See *Resolution Chemicals Ltd vs H Lunbeck A/S* (ibid).

e. In the interim, and before any determination of these recusal issues the learned justice has already refused to adjourn *sine die* the aforementioned Action CL-150/2022 pending a determination of the aforesaid Judicial Review. That such a decision is unprecedented within the TCI, but moreso is manifestly inconsistent with the applicable common law principles.

f. That the Applicant's apprehensions as to bias are worsened all the more by the realization upon reviewing press reports of the learned judge's *curriculum vitae,* that the learned judge has no prior experience whatsoever of judging before last month's arrival to these islands, and that with the substantial sums in this case which the Applicant hopes to establish in his claim against the subject defendants, that the learned judge being appointed in the fashion that he was done and now being forced upon this Applicant for determination of a multi-million dollar claim, without any experience in adjudicating whatsoever, fuels the Applicant's reasonable apprehension of a manifest appearance of bias against him.

g. Those further grounds identified in further affidavits to be filed in the main action and herein in support of the recusal.

h. Sections 6(8) and 7 of the TCI Constitution, invoking the Applicant's right to enforcement of his fundamental rights s 21. Such further and other grounds as counsel may advise and this Honourable Court permit.

4. The letter dated 20th June 2023 ("the letter") referred to at paragraph 3 in ground d. (supra) was sent by counsel for the Plaintiff and addressed to the Honourable Chief Justice and the Registrar of the Supreme Court. It stated inter alia that, in respect of the judicial review application challenging my appointment as well as my assignment to these matters, the Plaintiff will require "an eminent Constitutional Jurist of global Commonwealth stature to deal with said Judicial Review, such jurist necessarily required to be found wholly outside the Caribbean and Africa so as to ensure independence from taint". The letter further referred to a hearing of the Court of Appeal in respect of the Plaintiff's challenge of the decision of the previous judge assigned to these matters not to recuse himself, claiming that the Court of Appeal had made certain directions on Wednesday 7th June 2023 "which when properly considered in all the words used required transfer to another judge, but that did not entitle the Registry to now foist upon the Applicants a wholly unknown new judge to try our multi-million dollar contract dispute." The letter, without any basis or justification, then proceeded to request that I provide full disclosure in respect of the following questions which I will quote verbatim:

i. *Where and on what date is the Gazetted Notice of the subject judge's instrument of appointment, as none can be found. Who, which counsel in the A-G's Chambers or otherwise being particular with exact identity/ties, and when, did said person draft the purported instrument and Notice of Appointment of new judge Mr Christopher Selochan? Said instrument purportedly dated 13th February 2023.*

ii. When, and where, was the instrument of appointment of appointment by former Governor Dakin actually signed? [Whereas Governor Dakin has been gone from these shores well over 2 months now].

iii. We shall require the AG's Chambers, who are hereby put on notice hereby, to arrange sworn evidence by affidavit as to all these facts.

iv. Which persons now currently living in, or in any manner working from or invested in the Turks & Caicos Islands within the last 20 years, does the newbie judge Mr. Selochan have connections to either as friends, or as professional or connections through any charitable or other association [in which case also state the name of said charity or charities or other type of organization].

v. Is the newbie judge Mr Selochan currently now, or ever, had any Masonic membership or association? Or any friendship or other association to either the Registrar, the Chief Justice, or Justice Anthony Gruchot?

vi. Does the newbie judge have personal friendship and/or family connection or other social or professional association with fellow Trinidadians formerly or currently within the TCI Court system, such as to the Registrar Mr Narendra Lalbeharry, or to the Court of Appeal Justice Mr Stanley John [all Trnidadians]?

vii. Has the newbie judge any current or former clients in his law chambers in Trinidad or any other contract or legal connection to any one of the following persons or entities: i. East Wind Development Co. Ltd; ii. Mr Dean Reeves; ii. Mr Richardson Arthur; iii. Mr Keith Burant and/or Meridian Trust and/or Meridian Mortgage Corporation; iv. Lord

Michael Ashcroft; iv. Belize Bank v. British Caribbean Bank; vi. RBC; vii. Mr. Indar Mahase of Trinidad [formerly of RBC]; vii. FCIB bank; ix. Scotiabank; x. Mr Justice Sir Elliott Mottley [and/or any of the Mottley family]; ix. Madam Chief Justice Margaret Ramsey-Hale [now of Cayman]?

viii. Such further disclosure deemed further necessary from the new judge in coming days [without prejudice to generality, and without prejudice to the applicant and all clients' objections herein].

5. The motion follows the decision given by this court on 29th June, 2023 in which I refused to adjourn the proceedings in these matters sine die pending the determination of a judicial review action brought by the Plaintiff and some of his clients which sought to challenge my appointment as a judge of the Supreme Court of the Turks and Caicos Islands as well as the decision to list these matters before me.

6. The Defendants have contended that the motion constitutes an abuse of the process of this court for the reason, inter alia, that the issue of my recusal had already been considered by me in my decision of 29th June 2023 referred to at paragraph 5 (supra).

7. The application to have the motion dismissed as an abuse of the process of this court ('the application") was heard on 27th July 2023, the date which had initially been set aside for the hearing of these matters.

8. On 31st July 2023, I gave an oral decision on the application in which I dismissed the motion as an abuse of the process of this court. My decision was accompanied by a summary of my reasons. After hearing submissions from the parties, I granted the Plaintiff leave to appeal this decision as well my decision of 23rd June 2023 not to adjourn the proceedings sine die. However, I refused to grant a stay of the proceedings in the matters pending the determination of the appeals, the Plaintiff having failed to provide good reasons why a stay should be granted. I also ordered that the Plaintiff pay the Defendants' costs and entertained submissions on whether costs should be ordered on an indemnity basis.

9. I will now proceed to give my detailed reasons for my Order to dismiss the motion as an abuse of process as well as to give my decision, accompanied by reasons, on whether the Plaintiff should pay the Defendants' costs on an indemnity basis. I will begin by examining the motion brought by the Plaintiff for the recusal of this judge as well as the Submissions made in support of it and the Submissions made on behalf of the Defendants that the motion amounts to an abuse of the process of this court and should be dismissed.

THE MOTION

10. In addition to the grounds outlined in paragraph 3 (supra), Counsel for the Plaintiff, Mr. Beryn Duncanson, has submitted that this court cannot proceed any further with these matters since directions were given by me in another matter in which he is counsel in respect of a general recusal application. He contends that this Court therefore cannot proceed with these matters until the application in that other matter has been determined, since the application in that matter was for me to recuse myself generally from all matters in which he is involved.

11. Counsel for the Defendants, Mr. Conrad Griffiths KC, has responded that this argument fails to take into account the fact that the issue of my recusal in these matters has already been considered by this court in my reasons dated 29th June 2023 in which I refused to adjourn the proceedings in these matters sine die pending the determination of a judicial review action brought by the Plaintiff.

12. It is therefore necessary at this point to examine the reasons which I had given on 29th June 2023, and in this regard, I refer to paragraphs 14 to 25:

a. Recusal

14. *It is noteworthy that the Plaintiff's application did not take the form of a recusal application, although certain elements of the oral submission by counsel for the Plaintiff contained traces of same. I will therefore deal briefly with the issue of recusal.*

15. *In* ***Mengiste and another v Endowment Fund for the Rehabilitation of Tigray and others; Chubbs v Endowment Fund for the Rehabilitation of Tigray and others***[1]*, Arden LJ said at paragraph 2:*

    "Judicial recusal occurs when a judge decides that it is not appropriate for him to hear a case listed to be heard by him. A judge may recuse himself when a party applies to him to do so. A judge must step down in circumstances where there appears to be bias or, as it is put, "apparent bias". Judicial recusal is not then a matter of discretion."

16. *In* ***Porter and another v Magill***[2]*, it was held that the test for apparent bias was 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.*

17. *In his submission, counsel for the Plaintiff has merely raised the possibility of a previous professional affinity between the Registrar of the Supreme Court and me as well as between a Court of Appeal judge and me because of our shared nationality. The issues raised by counsel in no way cross the threshold of 'apparent bias', but rather amount to mere speculation, and the recusal of this judge therefore does not arise.*

18. *I wish to add that I am mindful of my obligation to make voluntary disclosure of any matter which may amount to a conflict of interest. At this time, no such matter arises.*

b. The date of appointment of this judge

[1] ***[2013] EWCA Civ 1003***
[2] ***[2002] 1 All ER 465***

19. *Counsel for the Plaintiff has raised the issue of the date of my appointment, drawing reference to a media report which suggested a particular appointment date in February of 2023.*

20. *However, the appointment was published in* ***The Gazette (Vol. 174 No. 34) dated 9th June 2023 as G.N. 387*** *as taking effect from 1st June 2023. There is no ambiguity here and this is the source from which any information with respect to the date of my appointment should be obtained, rather than a media report.*

c. What the Court of Appeal directed

21. *Having addressed the issues of recusal and my judicial appointment, I shall now examine the directive of the Court of Appeal, which is critical to the determination of this application.*

22. *Attached to the letter submitted to the Court by counsel for the Plaintiff on 21st June 2023 is a Note of the Recording in CL/AP/08/23 of Wednesday 7th June 2023, being the hearing of the appeal in the recusal application in respect of the former presiding judge. I have examined what was said by the Court of Appeal on 7th June 2023 and provide the following extract:*

The Registrar: Duncanson & Co. Appellants and East Wind Development Company Limited and Others.

The President: Thank you very much, gentlemen and lady.

This is really the decision of the Court on this matter. The Court has not been able to reach a decision overnight. Accordingly, the Court will grant a temporary stay pending its decision or until the matter is transferred to another Judge whichever comes first. Counsel shall forthwith seek to have the matter transferred to another Judge. The substantive proceedings concern a breach of contract, with possible limitation and fraud issues, manifestly capable of being handled by another judge. ***Mr. Duncanson has represented to the Court that he consents to any other judge hearing the matter. In fact, the most recent appointment which took effect on the 1st of June has been designated by the C[hief] J[ustice] as a General Jurisduction Judge and he or any of the other judge can hear the matter subject to their calendars.*** (Emphasis mine).

We wish to stress that this decision has no implications for the disposition of the matter, the cause, and the merits. That is the decision of the court.

Mr. Duncanson: My Lord, much obliged. In the circumstances, my Lord, there is a question of costs that I would like Your Lordships to address your mind to.

The President: We can't address costs until we…

23. *The Court of Appeal had therefore unambiguously listed me as an option to hear these matters and no objection was taken by counsel for the Plaintiff at that time. Counsel for the Plaintiff would therefore have been aware since that time that there was a possibility that these matters would be assigned to me.*

24. *I have also examined the official Order of the Court of Appeal dated 9th June 2023. The second limb of this Order provides as follows:*

Pending this Court's ruling on the Notice of Motion for a Stay, the matters before the Supreme Court in Action No. CL-150/2022 and in Action No. CL-97/2022 may be transferred to any other Judge of the Supreme Court.

25. Again, the Order is unambiguous and at the time it was made in court on 7th June 2023, I had already been appointed as a judge of the Supreme Court of the Turks and Caicos Islands.

13. At paragraphs 14 to 25 of my reasons dated 29th June 2023 in respect of the application to adjourn sine die, I had therefore addressed the possibility of apparent bias and dismissed it as mere speculation. I had also addressed the issues raised in respect of the date of my appointment as well as revisited what the Court of Appeal had suggested in respect of the judge who should have conduct of the matters. The motion in effect raises these issues which I had already addressed in respect of the application to adjourn sine die.

14. Essentially therefore, the Plaintiff is asking me to revisit matters which this court had already directed its mind to and addressed in its judgment of 29th June, 2023. Quite apart from this being a waste of judicial time as well as a wastage of the time and resources of the parties in this matter and their respective counsel, to entertain such a request would set a dangerous precedent whereby an attorney or party who wishes to have his matter heard before another judge can simply file an action

challenging the judge's neutrality and expect the matter to be ground to a halt. This form of strategic maneuvering and 'forum shopping' is to be deprecated.

15. I pause at this point to refer to the decision in ***Resolution Chemicals Ltd. v H. Lunbeck A/S***[3], which counsel for the Plaintiff has held out as being authority obligating me to make certain voluntary disclosures in these matters. I refer firstly to paragraph 16 of the decision:

> *" In advance of the hearing of the recusal application the judge noted the following observations of Pattern LJ in In re L-B (Children) [2011] 1 FLR 889, para 22:*
>
> *"Where a judge is faced with an application that he should recuse himself on the ground of apparent bias, it is in my judgment incumbent on him to explain in* ***sufficient detail the scale and content of the professional or other relationship which is being challenged on the application."***
>
> *The parties are not in the position of being able to cross-examine the judge about it and he is likely to be the only source of the relevant information. Without this, it becomes difficult if not impossible properly to apply the informed bystander test set out by Lord Hope in his speech in Helow v Home Secretary [2008] 1 WLR 2416."*

[3] ***[2013] EWCA Civ 1515***

16. At paragraph 42 of ***Resolution Chemicals Ltd. v H. Lunbeck (supra)***, the court addressed the information to be provided by the judge where he is faced with an application to recuse himself on the ground of apparent bias:

> *"Such information, however, should not go beyond what is strictly necessary for a fair adjudication of the recusal application. I consider that the judge in the present case went well beyond what is necessary. The consequences of an excessively wide factual discourse is to enlarge the opportunity for speculative arguments about the inferences to be drawn and the consequences that follow from the facts disclosed…"*

17. It is clear to me that the decision in ***Resolution Chemicals Ltd. v H. Lunbeck A/S*** is authority for the proposition that it would be good practice for a judge to make relevant disclosures where there is a specific allegation of bias or, put another way, a prima facie case has been made out for apparent bias. Thus, for example, in that case, the allegation was that the claimant wanted to produce as an expert witness an individual who had been the judge's research supervisor at university.

18. At paragraph 35 of ***Resolution Chemicals Ltd. V H. Lunbeck,*** the court outlined the test for apparent bias:

> *"The test for apparent bias is whether the fair minded and informed observer, having considered the facts, would conclude that there is a real possibility that the*

tribunal was biased. Porter v McGill [2002] AC 357 para 103 (Lord Hope of Craighead).

19. However, in these matters, there is no specific allegation of apparent bias. The only thing resembling a specific allegation of apparent bias is in respect to this court giving a decision in the application to adjourn these matters sine die, which did not go in the Plaintiff's favour. This, of course, clearly cannot be considered apparent bias and if every matter in which a judge gives a decision which goes against a party is construed as the judge exhibiting bias, the litigation process would ground to a halt. The onus is therefore on the litigant making the allegation of bias to make and set out a case for bias.

20. The Plaintiff in his motion has failed to put forward anything to suggest that a fair -minded and informed observer, having considered the facts, would conclude that there is a real possibility that this court was biased.

21. I pause to reiterate that I had also gone on to state the following at paragraph 18 of my reasons dated 29th June 2023 in respect of the application to adjourn sine die:

> *"I wish to add that I am mindful of my obligation to make voluntary disclosure of any matter which may amount to a conflict of interest. At this time, no such matter arises."*

22. I continue to be mindful of my obligation to make voluntary disclosure of any matter which comes to my attention that may amount to a conflict of interest and thus far, no such matter has arisen.

23. I now go on to consider whether this application constitutes an abuse of process.

IS THE MOTION AN ABUSE OF THE PROCESS OF THIS COURT?

24. I begin by examining the principles of res judicata, which seeks to ensure that a judge's ruling on the outcome of a matter should be final and that once a case has been adjudicated upon by a court of competent jurisdiction, the parties to that litigation are prevented from litigating it again. In ***Henderson v Henderson***[4]**,** Justice Wigram V-C stated at pages 114-115:

> *" ..I believe I state the rule of the court correctly, when I say that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligent, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special-case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but every point which*

[4] ***(1983) 3 Hare 100***

properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

25. In ***Phipson on Evidence (16th Edition)***[5], the following is stated under the rubric '*Res judicata estoppels*':

> *"A final adjudication of a legal dispute is conclusive as between the parties to the litigation and their privies as to the matters necessarily determined, and the conclusions on these matters cannot be challenged in subsequent litigation between them. This principle applies absolutely to a conclusion that a cause of action does not exist, but it will not apply to other issues necessarily determined if there are special circumstances."*

26. The Court has an inherent power to prevent misuse of its procedure. In ***Hunter v Chief Constable of the West Midlands Police***[6], Lord Diplock said that the circumstances under which abuse of process can arise are very varied and should not be limited to fixed categories, and that where there is such an abuse, the court has a duty, and not a discretion, to prevent it:

> *"My Lords, this is a case about abuse of process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.* ***The circumstances in which abuse of process can arise are very varied****: those which give rise to the instant appeal must surely be unique.* ***It would, in my view, be most unwise if this House were to use this***

[5] ***at 44-23 (page 1347)***
[6] ***[1982] AC 529 at 536***

> ***occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."*** (Emphasis mine).

27. In ***Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*** [7], Lord Sumption compared the concepts of res judicata and abuse of process:

> *"Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation."*

28. The concept of abuse of process can be said to be wider in scope than res judicata.

29. The real issue is thus whether the motion is merely a disguised reincarnation of a previous application which has already been properly adjudicated upon by this Court and therefore constitutes duplicative litigation. If this is indeed the case, the Court has a duty to exercise its inherent power to dismiss the motion as an abuse of the process of the court.

30. Counsel for the Plaintiff has argued that there is a distinction to be drawn between the motion and the application to adjourn sine die, saying that the motion raises

[7] ***[2014] AC 160 at paragraph 25***

constitutional issues and, quoting authority, contending that these issues can be raised at any time and ought to be addressed.

31. However, when one examines the motion, there is but a mere mention of the Defendant's constitutional rights without any elaboration on how same were allegedly infringed.

32. The Plaintiff has also failed to raise a prima facie case of apparent bias, but instead merely raises speculative questions about, for example, the possibility of this judge's affiliation to certain persons because of shared nationalities.

33. In respect of the issue of apparent bias, I am also guided by paragraphs 22 to 25 of the ruling of the Court of Appeal in ***Locabail (UK) Ltd v Bayfield Properties Ltd and another***[8] where the principles which dictate whether a judge should recuse himself from a matter were examined:

> *"22. We also find great persuasive force in three extracts from Australian authority. In Re JRL, ex p CJL (1986) 161 CLR 342 at 352 Mason J, sitting in the High Court of Australia, said:*
>
> ***'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage***

[8] ***[2000] 1 All ER 65***

parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.' (Emphasis mine).

23. In Re Ebner, Ebner v Official Trustee in Bankruptcy (1999) 161 ALR 557 at 568 (para 37) the Federal Court asked:

'Why is it to be assumed that the confidence of fair-minded people in the administration of justice would be shaken by the existence of a direct pecuniary interest of no tangible value, but not by the waste of resources and the delays brought about by setting aside a judgment on the ground that the judge is disqualified for having such an interest?'

24. In the Clenae case [1999] VSCA 35 Callaway JA observed (para 89(e)):

'As a general rule, it is the duty of a judicial officer to hear and determine the cases allocated to him or her by his or her head of jurisdiction. Subject to certain limited exceptions, a judge or magistrate should not accede to an unfounded disqualification application.' (Emphasis mine).

25. 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. ***We cannot, however, conceive of circumstances in which an objection could be soundly based on the religion, ethnic or national origin, gender, age, class, means or sexual orientation of the judge. Nor, at any rate ordinarily, could an objection be soundly based on the judge's social or educational or service or employment background or history, nor that of any member of the judge's family; or previous political associations; or membership of social or sporting or charitable bodies; or Masonic associations; or previous judicial decisions; or extra-curricular utterances (whether in textbooks, lectures, speeches, articles, interviews, reports or responses to consultation papers);*** *or previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or membership of the same Inn, circuit, local Law Society or chambers (KFTCIC v Icori Estero SpA (Court of Appeal of Paris, 28 June 1991, International Arbitration Report. Vol 6 #8 8/91)). By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; 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 (see Vakauta v Kelly (1989) 167 CLR 568); or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. ***The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.*** *In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be."* (Emphasis mine).

34. The motion also proceeds, at Ground 6, to challenge the competence of the presiding judge which, quite apart from bearing no relevance to a recusal application, is an attack on the administration of justice as well as on the integrity and competence of the Judicial Service Commission which is the independent body responsible for appointing judges in the Turks and Caicos Islands.

35. The court also notes the timing of the motion. This matter had been adjourned for hearing to 27th July 2023. This adjournment date took into account, inter alia, what the Plaintiff had represented to be his onerous court schedule. Indeed, the court had previously declined to hear counsel for the First Defendant on the issue of whether the restriction imposed by the Registrar of Lands on the lands of the First Defendant should be removed, since all matters were to be heard on 27th July 2023.

36. The decision of the court on the application to adjourn sine die was given since 29th June 2023 accompanied by reasons, and more detailed written reasons were provided about one week later. It was therefore open to the Plaintiff to file the motion well before the hearing of the matters on 27th July 2023, and no good reason has been advanced as to why the motion was not filed before. Indeed, if the motion had been filed shortly after the delivery of the decision of this court on 29th June 2023, it could have been dealt with well before the hearing on 27th July 2023, thereby saving valuable judicial time.

37. The Court considers the motion for recusal filed on 24th July 2023 to be one which seeks to re-litigate issues which have already been recently determined by this court. The motion is therefore a clear case of duplicative litigation.

38. The timing of the filing of the motion is also of grave concern to this court, since it appears to have been strategically filed to delay the hearing of the matters on 27th July 2023 with the expectation that the court would be constrained to restrict itself to giving directions on the motion on that date, and knowing that the Court proceeds on vacation from 1st August 2023 until the latter part of September 2023.

39. In all of the circumstances, this Court finds that the motion for recusal represents a flagrant abuse of the process of this court.

40. The motion for recusal is therefore dismissed as an abuse of the process of the Court.

THE ISSUE OF COSTS ON AN INDEMNITY BASIS

41. On the date that the oral decision was handed down, the court ordered that the Plaintiff, having been unsuccessful in this application, pay the First to Seventh Defendants' costs.

42. Counsel for the First to Seventh Defendants asked the court to award costs on an indemnity basis. The court was not minded to make such an Order at that time and instead, after entertaining brief oral submissions, invited the parties to make further Submissions on the issue in writing if they so desired.

43. I will now address the issue of how I propose to award costs.

44. The Court has a discretion to award costs on an indemnity basis. *Order 62(4)* of the ***Turks and Caicos Islands Civil Rules 2000*** provides:

The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where –

(a) an order is made that the cost of one party to proceedings be paid by another party to those proceedings, or
(b) an order is made for the payment of cost out of any fund, or
(c) no order is required, unless it appears to the Court to be appropriate to order costs to be taxed on an indemnity basis.

45. In ***Three Rivers District Council v Bank of England***[9], Tomlinson J, at paragraph 14, distinguished between costs being assessed on a standard basis and on an indemnity basis:

> *"…The significance of costs being ordered to be paid on an indemnity as opposed to the standard basis is that, although the beneficiary of such an order will still only be paid costs which have been reasonably incurred, there is no requirement of proportionality and in cases of doubt on assessment it is for the payer to show that the costs were not reasonably incurred. Whilst an indemnity costs order does carry at least some stigma the purpose of such an order is not to punish the paying party*

[9] ***[2006] All ER (D) 175 (Apr)***

but to give a more fair result for the party in whose favour a costs order is made: - see Petrotrade Inc v. Texaco Ltd (Note) [2002] 1 WLR 947, per Lord Woolf MR, at p.949 and Victor Kermit Kiam II v. MGN Ltd [2002] EWCA Civ 66 at paragraph 12 per Simon Brown LJ…"

46. In ***Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (a firm)***[10] the Court of Appeal recognised that in respect of whether an order for indemnity costs should be made, every case would depend on its facts, and that an indemnity costs order would be made where there was some conduct or some circumstance which takes the case out of the norm. Woolf LCJ said, inter alia, at paragraphs 31 and 32:

[31] "…An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation. I give as an example a situation where a party is involved in proceedings as a test case although, so far as that party is concerned, he has no other interest than the issue that arises in that case, but is drawn into expensive litigation. If he is successful, a court may well say that an indemnity order was appropriate, although it could not be suggested that anyone's conduct in the case had been unreasonable. Equally there may be situations where the nature of the litigation means that the parties could not be expected to conduct the litigation in a proportionate manner. Again

[10] ***[2002] EWCA Civ 879***

the conduct would not be unreasonable and it seems to me that the court would be entitled to take into account that sort of situation in deciding that an indemnity order was appropriate.

[32] I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. ***This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement****…"* (Emphasis mine).

47. In ***Three Rivers District Council v Bank of England*** (supra), Tomlinson J, at paragraph 25, outlined the following factors which should be taken into account when considering whether or not to make an indemnity costs order:

(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide.

(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.

(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails.

(6) A fortiori, where the claim includes allegations of dishonesty, let alone allegations of conduct meriting an award to the Claimant of exemplary damages, and those allegations are pursued aggressively inter alia by hostile cross examination.

(7) Where the unsuccessful allegations are the subject of extensive publicity, especially where it has been courted by the unsuccessful claimant, that is a further ground.

(8) The following circumstances take a case out of the norm and justify an order for indemnity costs, particularly when taken in combination with the fact that a defendant has discontinued only at a very late stage in proceedings;

> *(a) Where the claimant advances and aggressively pursues serious and wide ranging allegations of dishonesty or impropriety over an extended period of time;*

(b) Where the claimant advances and aggressively pursues such allegations, despite the lack of any foundation in the documentary evidence for those allegations, and maintains the allegations, without apology, to the bitter end;

(c) Where the claimant actively seeks to court publicity for its serious allegations both before and during the trial in the international, national and local media;

(d) Where the claimant, by its conduct, turns a case into an unprecedented factual enquiry by the pursuit of an unjustified case;

(e) Where the claimant pursues a claim which is, to put it most charitably, thin and, in some respects, far-fetched;

(f) Where the claimant pursues a claim which is irreconcilable with the contemporaneous documents;

(g) Where a claimant commences and pursues large-scale and expensive litigation in circumstances calculated to exert commercial pressure on a defendant, and during the course of the trial of the action, the claimant resorts to advancing a constantly changing case in order to justify the allegations which it has made, only then to suffer a resounding defeat."

48. In ***Andrew Evans v R&V Allgemeine Verischerung AG***[11]**,** Her Honour Judge Catherine Howells, after examining the authorities (including *Three Rivers District Council v Bank of England),* said the following at paragraphs 9 and 10 in relation to the awarding of indemnity costs:

[11] ***[2022] EWHC 2688 (KB)***

9. "It is clear from my reading of the authorities that indemnity costs are not to be awarded simply because a party has lost or has pursued the case to trial which was, on the face of it, weak. It is wrong to consider this discretion with the benefit of hindsight, i.e. with knowledge of how a particular issue has ultimately resolved.

10. ***The approach I take in relation to this application and my wide discretion, is to consider, pursuant to this line of authorities, the conduct of the defendant during the proceedings both before litigation and after and before and during trial.*** *I then determine whether that conduct or other circumstances take this case outside the norm, i.e. something outside the ordinary and reasonable conduct of proceedings."* (Emphasis mine).

49. In ***Naim Lone v Michael Petrou***[12], Costs Judge Leonard awarded costs on an indemnity basis to the Defendant based on the conduct of the Claimant, and said at paragraphs 44 to 47:

> *"44. The Defendant has applied for the Claimant to pay the costs of the 5 September 2022 application on the indemnity basis. The test for awarding costs in the indemnity basis is whether the conduct of a party is such as to take the situation "out of the norm" in a way which justifies an order for*

[12] ***[2023] EWCH 729 (SCCO)***

indemnity costs (Excelsior Commercial and Industrial Holdings Ltd [2002] EWCA Civ 879).

45. It will be evident from the facts set out in my judgment of 22 December 2022 that the Claimant's conduct has taken this case are well out of the norm. By way of example, in that judgment I recorded his repeated attempts to dictate the court's listing process and his repeated refusal, over a period of years, to comply with CPR 39.8, both of which wasted a great deal of court time; his deliberate discourtesy to the court and to the Defendant's legal representatives; and his practice of making groundless allegations of dishonesty against those legal representatives.

46. Particularly pertinent for present purposes is the fact that the Claimant, having withdrawn his first two applications for me to recuse myself and accepted directions for the resolution of the costs issues arising from the abortive hearing of 1 August 2022, abruptly reversed his position to make yet another application for stay and recusal which I found to be totally without merit, engendering unnecessary delay, wasted court time and wasted costs.

47. For those reasons, I have no doubt that it is appropriate to award the costs of the 5 September 2022 application to the Defendant, to be assessed summarily on the indemnity basis. It does not follow that the Defendant receives all his claimed costs by default. Even on the indemnity basis, they must have been reasonably incurred and must be reasonable in amount. On

the indemnity basis there is however no consideration of proportionality (which, on the figures I am about to mention, would not in any case be an issue) and any doubt as to whether costs were reasonably incurred or reasonable amount must be resolved in favour of the receiving party."

50. Having carefully considered the authorities, I find that the conduct of the Plaintiff in pursuing the motion is unreasonable, takes this matter out of the ordinary and justifies an award of costs on an indemnity basis. In coming to this decision, I have considered the following factors:

i. The Plaintiff's motion is a thinly disguised attempt to relitigate issues which have already been considered and ruled on by this court, being whether I should recuse myself from the hearing of these matters on the grounds of apparent bias, the issue of my appointment as a judge of the Supreme Court of the Turks and Caicos Islands and the issue of me being assigned to preside over these matters.

ii. The motion contains no grounds for apparent bias but merely raises speculative questions. In short, the motion can be at best described as a fishing expedition rather than one making a specific allegation of apparent bias which one would expect in a motion of this nature.

iii. The Plaintiff's motion was filed three days before the day put aside for the hearing of these matters on 27th July 2023, notwithstanding the fact that the decision by this court to refuse the application to adjourn the matters sine die was given since 27th June 2023. The court considers this to have been a strategic attempt by the Plaintiff to have the hearing adjourned in order to further delay proceedings.

iv. The motion can be described as unjustified, having regard to my previous ruling on the issues raised.

v. Given its speculative nature, the motion is far-fetched.

vi. The motion has been aggressively pursued by the Plaintiff, resulting in a delay in the hearing of the matters.

vii. The motion contains irrelevant and scandalous matters, such as an attack on the competence and experience of this judge.

51. I therefore order that the Plaintiff is to pay the Defendants' costs on an indemnity basis to be taxed immediately in default of agreement.

Dated 28th September, 2023

The Honourable Justice Chris Selochan

Judge of the Supreme Court