In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 94

BETWEEN: **(1) JAYMO DURHAM**

(2) KEIVA DURHAM **PLAINTIFFS**

AND

THE ATTORNEY GENERAL **DEFENDANT**

JUDGMENT AND ORDER

Application for an Order setting aside the decision of an Acting Justice on the basis of an appearance of bias; alleged abuse of process; section 15 Bermuda Constitution Order 1968.

Date of hearing: **9 and 10 June 2025**

Date of Judgment: **23 June 2025**

Appearances: Mr Jaymo Durham in person

Mrs Keiva Durham in person

Brian Moodie of the Attorney General's Chambers for the Attorney General

JUDGMENT AND ORDER of Martin, J

Introduction

1. This is the Court's Judgment in respect of an application made by the Plaintiffs by way of Originating Summons to set aside a decision dated 7 March 2024 made by Mr. Mark Pettingill sitting as an Assistant Justice on the grounds of apparent bias. That decision refused an application that had been made by the Plaintiffs for a permanent stay of criminal proceedings pending against them in **Criminal Jurisdiction 2022 No 8 Rex v Jaymo Durham and Keiva Durham** (the "stay application') on the ground that the decision to prosecute them taken by the Director of Public Prosecutions ("the DPP") was tainted by the appearance of bias. The Plaintiffs say that the learned Assistant Justice's decision should be set aside, and the stay application should be remitted for rehearing by another judge who is independent.

2. No allegation of actual bias has been made against the learned Assistant Justice, but it is said that a fair-minded independent observer (whose 'characteristics' will be discussed later on in this judgment) would consider that there was a real possibility that the learned Assistant Justice was unable to bring an independent mind to the question that he was asked to decide.

3. It should also be noted that at the outset of the hearing the Durhams also requested this Court to consider recusing itself, but after some initial discussion, no application was in fact made. The suggestion was that because this Court has sat on a disciplinary tribunal involving similar charges against another barrister that this meant that this Court is somehow conflicted. That submission was not understood. For the avoidance of any doubt, the Court is and was satisfied that there is and was no basis on which the Court should recuse itself from hearing this matter.

4. The facts on which the present proceedings are based are undisputed and so there was no cross examination of witnesses, and the Court has not been asked to resolve any factual matters. The decision turns on an analysis of the legal principles and their application to those undisputed facts.

Summary and Disposition

5. For the reasons given in Judgment, the Court has concluded that the application made by these proceedings to set aside the decision of Assistant Justice Pettingill dated 7 March 2024 refusing the stay application is not an abuse of the process of the court.

6. In summary, this is because the Durhams had no right to seek leave to against the refusal of the stay under the Court of Appeal Act 1964 and will not be able to exercise a right of appeal until the conclusion of the criminal proceedings (in the event that they are convicted). In those circumstances, there was no readily available remedy in respect of the complaint of appearance of bias, and accordingly the Durhams were

entitled to seek relief under section 15 of the Bermuda Constitution Order in these proceedings.

7. For the reasons also set out in detail in the Judgment, the Court has set aside the decision of the learned Assistant Justice on the grounds that (i) his membership of the Bar Council gave rise to an automatic requirement to recuse himself from hearing the stay application in circumstances where the Bar Council's complaint to the Professional Conduct Committee ("the PCC") against the Durhams was still outstanding and (ii) the Bar Council's complaint to the PCC formed the basis of the criminal proceedings against the Durhams, which were the proceedings which the Durhams sought to stay.

8. In the alternative, the Court also finds that in the circumstances summarised in paragraph 8, a fair-minded and informed observer would conclude that there was a real possibility that the learned Assistant Justice did not bring an independent mind to the question he was called upon to consider, and his decision is to be set aside on the ground of an apparent bias.

9. The Court emphasises that the Durhams did not allege, and this Court does not find, that there was any actual bias on the part of the learned Assistant Justice. This case is about the appearance of bias only.

10. The Court therefore orders that the decision of the learned Assistant Justice dated 7 March 2024 be set aside and the Durhams' stay application be remitted for re-hearing by another judge on an expedited basis.

Background facts

11. The Plaintiffs (to whom I shall refer as "Mr. and Mrs. Durham" or "the Durhams") are lawyers who own and manage their own law firm in Bermuda. The law firm is called Amicus Law Chambers Limited ("Amicus"). As members of the Bermuda Bar Association, the Durhams' professional activities are regulated by the Bermuda Bar Council ("the Bar Council") under the Bermuda Bar Act 1974 and related legislation. Amicus is a registered professional services company, and it is also regulated by the Bar Council under the same legislation.

12. In September 2017 the Bar Council received complaints from several clients or former clients of Amicus about the way in which their financial affairs had been managed by the Durhams. The Bar Council considered these complaints and was satisfied that if the underlying facts of the allegations were proved, they would amount to breaches of the Bermuda Barristers' Code of Professional Conduct 1981 ("the Bar Code"). At a meeting in early October 2017 the Bar Council resolved to take immediate steps to appoint an inspector to review Amicus' accounts, and by a letter of 6 October the Bar Council referred the matter to the PCC to open an

investigation. The letter was copied to the Commissioner of Police. It appears that the PCC decided not to take any further action pending the investigations that were initiated by the Bermuda Police Service ("the Police"), following receipt of the Bar Council's complaint to the PCC.

13. Following an investigation by the Police, various charges were brought against the Durhams for theft of credit balances of certain clients of Amicus. These charges were laid in 2022. Before they were required to enter a plea in the criminal proceedings, the Durhams complained that the DPP's decision to profer an indictment against them had been tainted by apparent bias in breach of section 71 (6) of Schedule 2 to the Bermuda Constitution Order 1968 ("the Constitution"). The Durhams applied to the court for an order that those proceedings should be stayed.

14. In support of the stay application the Durhams alleged that the DPP was a member of the Bar Council when the complaint of unprofessional conduct was made against them to the Bar Council. This (they said) gave rise to a conflict of interest and an appearance of bias on the part of the DPP, because she was a member of the Bar Council at the time the complaint was received, and the Bar Council referred the complaint to the PCC and the Police. They alleged that Bar Council was in effect the complainant in the Police investigation and as a member of the Bar Council, the DPP was therefore conflicted in authorising the indictment to be laid against them. The Durhams alleged that in so acting, the DPP was in breach of her obligation to be independent and impartial in the performance of her duty. The Durhams alleged that this gave rise to an appearance of bias, and applied in the Criminal Proceedings (No 8 of 2022) for an Order that the criminal proceedings against them should be stayed permanently.

15. In answer to the Durhams' application for a stay, the DPP swore an affidavit explaining that she had not participated in the Bar Council's decision to refer the matter to the PCC and that she had no specific knowledge of the nature of the complaints made against the Durhams. The accuracy of the DPP's statements was challenged by the Durhams in argument. However, there was no oral evidence or cross-examination of the witnesses at the hearing of the stay application.

The decision of 7 March 2024 refusing the stay application

16. The learned Assistant Justice heard the stay application at the end of February 2024 and by a Ruling dated 7 March 2024 he refused to grant it. Some of the details of the Ruling are relevant to the present application, but in referring to these matters it must remain clearly understood that this Court is not considering the merits of that decision. This Court is not sitting as an appeal Court or deciding whether the Assistant Justice's decision was correct or not. The Court will only refer to the aspects of the Ruling which are relevant to the issue that this Court has to determine, namely apparent bias.

17. The learned Assistant Justice explained his reasons for refusing the stay application, saying that the Bar Council was not in the position of 'quasi-complainants'. He said[1]:

> *" A complainant is often the victim of a crime but in any event, what actually happened in this instance quite clearly on the facts, is that one the Bermuda Bar Council became aware of the nature of the alleged complaint to them they quite rightly "flagged" the matter and referred it to the Bermuda Police Service directly as opposed to even placing it before the Bar Professional Conduct Committee as a matter for their consideration."*

18. He dismissed the idea that the Police or the DPP were assisting the Bermuda Bar Council in pursuing the complaint so that the Bar Council would not have to prove the charges at a disciplinary hearing, and described that as being

> "*...a view that was without logic or evidential foundation and would be an entirely unreasonable view for the well-informed observer to make.*[2]*"*

19. He went on to say[3]:

> *"... even if the evidence were to show that the DPP participated in any decision to refer the matter to the police at such time when she was the Vice President of the Bermuda Bar Council (and not the DPP) would in my judgment give any valid support to the argument of 'apparent' bias."*

20. He added[4]:

> *"The fact is that the DPP in her affidavit indicates that she was not party to the decision to refer the matter to the police and had no particular prior knowledge to what the allegation was. Whilst the Court accepts this position unequivocally, I do not have to make a finding with regard to the credibility or accuracy of her evidence given the fact that it would not have impacted upon the Court's finding were it to be that she had some knowledge or even participation in the decision of the Bermuda Bar Council to refer the matter to the police. In my judgment in the circumstances it would not even been required for her to sensibly recuse herself from part of that decision making process by the Bermuda Bar Council."*
>
> and
>
> *"The fact that the DPP was on the Bar Council when a complaint was brought before them is neither here nor there. There has been no manipulation, unfairness, bias or anything else nefarious or conduct that would bring disrepute on the justice system.*

[1] Paragraph 6 of the Ruling.
[2] Paragraphs 7 and 8 of the Ruling.
[3] Paragraph 14 of the Ruling.
[4] Paragraph 15 of the Ruling.

The foregoing are the key considerations for determining whether a criminal matter should be stayed because of the conduct of the police or the prosecutor"[5]

Right to a fair hearing under the Constitution

21. The Durhams say that their right to a fair trial under section 6 (1) of the Constitution has been infringed by the appearance of bias on the part of the learned Assistant Justice. They say that their right to apply for a stay of the criminal proceedings goes to the root of the fairness of the whole criminal trial process.

The grounds relied upon in respect of the appearance of bias

22. The Durhams say that the fact that the learned Assistant Justice was a member of the Bar Council at the time the application for a stay was made gives rise to an appearance of bias. In this respect the learned Assistant Justice was in fact sitting as a judge in his own cause: namely that the complainant to the Police was the Bar Council, and the judge was a member of the Bar Council.

23. The Durhams also complained that the fact that the learned Assistant Justice did not disclose his position on Bar Council, and when it was raised by them, he did not address the issue or explain why he felt able to sit as a judge on the hearing of the application.

24. They also said that the credibility of the DPP was in issue on the stay application and that the learned Assistant Justice was required to make a finding in relation to what the DPP's role on Bar Council was when it considered the complaint against the Durhams. They pointed to the Judicial Code of Conduct which cautions judges from sitting in cases where they have to determine the credibility of a former client's testimony. They said that this consideration was engaged because the learned Assistant Justice had acted on behalf of the DPP in a prior case[6] in which he defended her credibility.

25. Finally, they suggested that the terms in which the learned Assistant Justice expressed himself also suggest that the reasonable fair-minded observer would think that there was a real possibility that the learned Assistant Justice was not able to bring an independent mind to the decision he was called upon to make.

26. As already stated, the Court is not called upon in these proceedings to determine whether the decision of the learned Assistant Justice was correct as a matter of law. The sole question is whether a fair minded and informed observer would consider that there was a real possibility that the learned Assistant Justice was did not bring an independent mind to the issue he had to decide because of (i) his own membership of the Bar Council at the time hear the application and (ii) his professional connection to

[5] Paragraph 17 of the Ruling.
[6] **DPP v Clarke** [2019] CA (Bda) 8 Civ 21

the DPP in prior proceedings which had involved (inter alia) defending the integrity of the DPP.

Jurisdiction

27. Mr. Moodie took a preliminary objection to the Court's jurisdiction to entertain the application to set aside or quash the decision of the learned Assistant Justice on the ground that the proviso to section 15 (2) of the Constitution states that an application for relief under that section cannot be made when the applicant has (or has had) adequate means of redress which is available under any other law. Mr. Moodie submitted that the Durhams' right of appeal at the end of the criminal trial provides that adequate means of redress, therefore he cannot apply for relief before this Court in civil proceedings. He said that these proceedings are an abuse of the process of the court.

28. Section 15 of the Constitution provides (so far as it is relevant to this point):

> *"(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*
>
> *(2) The Supreme Court shall have original jurisdiction*
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> *(a) to hear and determine any application made by any person in pursuance of subsection (1); and*
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> *(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,*
>
> *and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:*
>
> *Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.*
>
> *(3) If in any proceedings in any court established for Bermuda other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the foregoing provisions of this Chapter, the court in which the question has arisen shall refer the question to the Supreme Court unless, in its opinion, the raising of the question is merely frivolous or vexatious.*

29. On the question of abuse of process, the Durhams submitted that no right of appeal is available to them in respect of an interlocutory application in the criminal jurisdiction of the Supreme Court because the right of appeal under the Court of Appeal Act 1964 is limited to persons who have been convicted of an offence after a trial.

30. Section 17 (1) of the Court of Appeal Act 1964 provides:

> *"A person convicted on indictment .....may appeal to the Court of Appeal."*

31. Alternatively, the Durhams submitted that a right of appeal after the trial has been conducted is not readily available because in order to exercise that right they have to undergo a trial. They said that it would be oppressive to force them to undergo a trial when the whole point of the stay application was to prevent that from happening, and if they were right on the application for the stay, then they would have been put through the whole ordeal unnecessarily.

32. The Durhams relied upon several authorities to support their submissions. It is not necessary to summarise all of them, but the essential principles are set out below.

33. In **Hinds v Attorney General & Ors**[7] the Privy Council stated that:

> *"It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal."*

34. In **Sam Maharaj v Prime Minister (Trinidad & Tobago)**[8]

> *"While therefore **Rees v Crane** and **Durity v Attorney General** should not be interpreted as laying down an inflexible rule that every instance of a failure to observe the rules of natural justice will give rise to a constitutional claim, in general, where a prompt and effective legal remedy cannot be or is not provided, such a claim will arise."*

35. In **Derreck Daniel v Attorney General**[9] the High Court of St Lucia held

> *"Therefore, the claimant not having been indicted or convicted of any criminal offence under the DPMA in the proceedings giving rise to the forfeiture orders is not an appellant for the purposes of section 33 of the Supreme Court Act. Therefore, the claimant cannot obtain redress by way of appeal against the forfeiture orders."*
>
> and
>
> *"In the light of the foregoing discussion, the court is compelled to find that the claimant has no alternative remedy and is entitled to seek redress under the Constitution."*

[7] [2002] 1 AC 854 at paragraph 24 per Lord Bingham.
[8] [2016] UKPC 37 at paragraph 40 per Lord Kerr.
[9] Case No SLUHCV2023/0115 at paragraph 20 and 25 per Innocent J.

36. In the present context, the Durhams have not entered a plea and the trial of the indictment has not been scheduled. The criminal trial has not begun.

37. The Crown's submission was that in respect of proceedings in the Court's criminal jurisdiction a defendant is simply not entitled to appeal an interlocutory order. He submitted that the defendant must undergo a trial and be convicted and then take a constitutional point on appeal, and if successful, undergo a re-trial. The right of appeal is available at the end of the trial and adequate to give redress. He submitted that justice is administered according to law, and that is the law; accordingly, he submitted that the present application is an abuse of the court's process because of the proviso in section 15 (2) of the Constitution quoted above.

The Court's analysis of the abuse of process point

38. The Court starts from the position that section 15 (1) states that the right to seek relief is *"without prejudice to any other action with respect to the same matter which is lawfully available".* This seems to the Court to mean that even though there may be other action that can be taken, the right to seek relief under section 15 (1) is not affected by the mere existence a right to take that action. This must include the exercise of a right of appeal. It is difficult to ascribe any other meaning to the words *"without prejudice to any other action with respect to the same matter which is lawfully available".*

39. The proviso relied upon by the Crown arises under section 15 (2). This subsection gives the Supreme Court jurisdiction to hear and determine an application under subsection (1) or (3) and the power to *"make such orders, issue such writs and give such directions as it may consider appropriate to secure the enforcement of"* the constitutional right that has been infringed.

40. It seems to the Court that the proviso applies to the exercise of the powers "*under this subsection*", but it does not impinge on the right to apply for redress conferred by subsection (1). The proviso under (2) becomes relevant after the court has determined that there has been an infringement of a constitutional right; it requires the court not to exercise its powers (i.e. to make such orders, issue such writs and give such directions as it may consider appropriate etc) if other adequate means of redress **are** or **have been** available (emphasis added).

41. If that analysis is correct, then no objection can properly be taken to the present application made by the Durhams, notwithstanding the existence of a potential right of appeal **in the future** *if* they are convicted (emphasis added).

42. If the Court is held to be wrong on that interpretation, in the alternative, the Court concludes that the exercise of a right of appeal after the trial is not a means of redress which is "readily" available in respect of the interlocutory ruling, applying the *dictum*

in **Hinds** referred to above. The redress is only available in the future, after the criminal trial has resulted in a conviction. Thus, the proviso does not prevent the Court giving 'redress'[10] in these proceedings.

43. Furthermore, it seems to the Court that the question of whether an application for constitutional relief under section 15 amounts to an abuse of process will depend on the facts of the individual case. The Court must assess the particular circumstances of the case and decide if the application is made for an improper or impermissible purpose, or there is some other reason why the application undermines or frustrates the administration of justice.

44. The Court fully agrees with the Crown that it would be an abuse of process for a defendant to raise a constitutional objection to the fairness of the trial once it has started, for obvious practical reasons. The Court cannot be required to stop the criminal trial in order for constitutional objections to be taken as they arise during the course of the proceedings: the only course is for the defendant to take those points by way of appeal.

45. However, in this case the criminal trial has not started. The stay application was properly made, albeit unsuccessfully. The fairness of the hearing of the stay application goes to the heart of the criminal proceeding itself. In the absence of a right of appeal (or the right to seek leave to appeal) against a refusal of the stay, it seems to the Court that it is not an abuse of the process for a defendant to seek relief against an alleged denial of his or her constitutional right to a fair hearing under section 15 in separate proceedings (i.e. like these proceedings).

46. It would also be undesirable for a complaint about the fairness of the hearing of the stay application to be postponed until an appeal (if the Durhams are convicted). This is because if an appeal were successful, there may be a retrial, if that remains possible. This would result in an enormous loss of time and resources, not to mention the wasted effort and energies of the witnesses, the jury, the court staff, the DPP's staff and the inevitable strain and financial burden on the defendants. The court must be alert to prevent a situation where there is a possibility of this occurring, unless it cannot be avoided.

47. The appearance of bias complaint is a short point, and it ought in my view to be determined now. It would be unjust to the Durhams to require them to undergo a trial before being able to raise the point. This would be contrary to the interests of the efficient administration of criminal justice for the reasons explained above.

[10] Redress can mean compensation or other remedy, but the words of the subsection say the court's powers are to make orders, issue writs, and give appropriate directions. The scope of these powers will be considered at a later stage of these proceedings.

48. Therefore, the Court holds that the present proceedings are not an abuse of process.

The appearance of bias

49. It is a trite but vital principle of justice that in order to command the respect and confidence of the public, justice must not only be done, it must be seen to be done. This goes to the heart of the right to a fair trial. One of the most basic (and ancient) rules of fairness is that no one may be a judge in his (or her) own cause. This can involve actual bias, or a deemed bias, for example where the judge has a financial interest in the outcome of the proceedings[11]. But an appearance of bias can also arise where the judge is so closely associated with a particular cause that a reasonable and fair-minded observer would think that there is a real possibility that the judge will not come to the case with an open and impartial mind[12].

50. In this case it is not alleged that the learned Assistant Justice was guilty of actual bias. It is solely a case of an appearance of bias on the grounds described above.

51. The law on how to approach the allegation of an appearance of bias is well settled[13]:

> *"The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."*

The fair-minded and informed observer

52. This character is an imaginary composite of characteristics whom the courts have conjured to represent the interests of justice, watching the conduct of proceedings as a disinterested bystander. This person is fair, well informed as to the context of the legal proceedings and the legal traditions of the legal process, not overly suspicious, nor unduly sensitive[14].

53. For the purposes of the application of the legal test in legal proceedings, the judge must assume the role of this imaginary character and walk in the shoes of the fair-minded and informed observer. Fortunately, the judge has a body of previous case law to serve as a guide.

54. The primary issues that the Durhams have raised are that the learned Assistant Justice (i) was himself a member of the Bar Council at the time the stay application came before him in February and March 2024 and (ii) had acted on behalf of the DPP in previous proceedings in which he had defended her integrity.

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[11] **Dimes v Proprietors of Grand Junction Canal** (1852) 3 HL Cas 759
[12] **R v Bow Street Stipendiary Magistrate *ex parte* Pinochet Ugarte** (No 2) [2000] 1 AC 119 per Lord Hutton.
[13] **Porter v Magill** [2001] UKHL 67 at paragraph 103 per Lord Hope.
[14] **Helow v SOS Home Dept and Another** [2008] UKHL 62 paragraph 2 per Lord Hope.

55. It is a basic principle of natural justice that no one can be a judge in his or her own cause. If the judge has an interest in the outcome of the proceedings, then the judge cannot hear the case, whether the judge's interest is a (sufficiently) direct financial interest or a personal interest in a cause of which the judge is a supporter or promoter. It will often be a matter of degree and sometimes the line may be hard to draw.

56. The Durhams say that the Bar Council is in reality the party who referred the matter to the Police and is therefore motivated to see the prosecution and conviction of the Durhams. As a member of the Bar Council at the time the stay application was made, they say the learned Assistant Justice was to be associated with the Bar Council's action in referring the complaint that a reasonable and fair-minded observer would think there was a real possibility that the learned judge could not bring an open mind to deciding the question.

57. The Durhams relied upon extensive written submissions and numerous cases in their presentation to the Court. It is not necessary to set all of these out in detail, but the Court will refer to a few extracts which illustrate the main principles they relied upon.

58. The Durhams relied upon re **P (A Barrister)**[15] in which it was held that the essence of common interest is an interest in the outcome o the proceedings. It was said that as a member of the Bar Council, the learned Assistant Justice had a common interest in achieving an outcome that was in alignment with the charges referred to the PCC and which were the basis of the criminal prosecution.

59. The Durhams also relied upon **R (*ex p* Darsho Kaur) v Institute of Legal Executives Appeal Tribunal**[16] the vice president of Ilex was disqualified by her inevitable interest in Ilex's policy of disciplinary regulation, and that such a consideration would extend to all members of the council, which was said to relate as an exact parallel to the present case.

60. They also relied on **Hall v Bermuda Bar Association**[17] in which a member of the Bar Council's membership of the Disciplinary Committee of the Bar Council was sufficient to vitiate the proceedings, even though that member did not take part in the Bar Councils' decision. That case was an example of the principle that an accuser (or his agents) may not be a judge.

61. In this case, the Durhams say that the learned Assistant Justice's membership of the Bar Council associated him with the Bar Council's complaint against the Durhams, which formed the basis of the criminal proceedings, and so the accuser (by one of its members) was also sitting as the judge.

[15] [2005] WLR 3019
[16] [2011] EWCA Civ 1168 at paragraph 24.
[17] [1983] BLR 1

62. The Durhams also pointed to the fact that the learned Assistant Justice did not himself disclose that he was a member of the Bar Council and failed to address the position in his ruling, even though the Durhams had raised it as an objection at the outset of the proceedings. The Durhams drew attention to the language in which the learned Assistant Justice roundly dismissed their objections about the DPP's appearance of conflict of interest out of hand. They said that this should give the Court pause in assessing the conduct of the judge.

63. As to the second ground, the Durhams submitted that the learned Assistant Justice should not have placed himself in a position in which he was called upon to assess the credibility of the DPP, who was a former client whose integrity he had defended in earlier court proceedings. They pointed to the Guidelines for Judicial Conduct which caution against judges sitting in case where former clients are involved.[18]

64. Mr. Moodie said that the Bar Council has no interest in the prosecution of the Durhams: he submitted that it is equally interested in maintaining the integrity of the profession and has an equally keen interest in the acquittal of members of the profession who are prosecuted. He submitted that the Bar Council simply passed on a complaint from former clients of Amicus to the Police, and that it is really those clients who are the complainants, not the Bar Council.

65. As to the personal and professional association with the DPP, Mr Moodie relied upon **Locobail (UK) Ltd v Bayfield Properties Ltd**[19] in which the English Court of Appeal held that a recusal application could not be based solely on the judge's previous receipt of instructions to act for a client, or for an advocate who is engaged in a case before him, nor by reason of membership of the same law society.

66. Moreover, Mr Moodie submitted that the court had to be astute not to give way to meritless applications for recusal, especially in a small jurisdiction[20], and there was no evidence of any personal or pecuniary interest in the proceedings or the outcome. Therefore, it was submitted that there was no basis upon which a fair minded and informed observer would conclude that there was any real possibility that the learned Assistant Justice could not bring an independent and impartial mind to the stay application.

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[18] Paragraph 78 (ii) of the Guidelines for Judicial Conduct: "*It is a good rule of thumb for a judge to consider disqualification in cases where a witness of disputed fact is someone known to the judge and about whom he or she has formed a view in the past. Former clients may well be people about whom the judge has formed a view in the past.*"

[19] [2000] QB 451

[20] **Ewart Brown v DPP & Ors** [2021] SC (Bda) 74 Civ (10 September 2021)

The Court's assessment

Automatic disqualification

67. In **R v Bow Street Magistrate *ex parte* Pinochet Ugarte No 2 ("Pinochet")** the House of Lords proposed a four-step enquiry when an issue of bias is raised[21]. (i) The court must ascertain whether the judge is a party or is so substantially a constituent of a party to be presumed to partake of its purpose as a participant in the proceedings; (ii) if the judge is not a party or a 'constituent' of the party, then the court must ascertain whether the judge has a common interest with that party that the party will have a certain outcome; (iii) the interest referred to in (ii) need not be a financial interest, but includes an interest in securing a particular outcome; (iv) in these situations, there will be an automatic disqualification, and no enquiry need be made as to the judge's actual or suspected bias. This gives rise to an automatic disqualification.

68. Applying this approach to the present facts, the learned Assistant Justice was not a member of the Bar Council when the complaint was made to the Bar Council and when that complaint was referred to the Police in 2017. Therefore, he cannot be associated with the decision to refer the complaint to the Police, and there is no evidence that he has had any involvement with that complaint in his capacity as a member of the Bar Council. Nor is he a member of the PCC, which is the sub-committee which has responsibility for professional disciplinary complaints. There is no evidence that the learned Assistant Justice had any pecuniary or other personal interest in the outcome of the proceedings.

69. However, the question remains whether the fact that the learned Assistance Justice was a member of the Bar Council at the time he heard the stay application means that he was a "*substantial constituent*" of the Bar Council that he is "*presumed to partake of its purpose*" in the Bar Council's referral of the complaint to the PCC and the Police.

70. In considering this factual situation, the Court derives assistance from the facts of a case referred to in **Pinochet** as explaining the practical application of the principle. In **R v Fraser**[22] a magistrate was a member of the council of a religious organisation which opposed the grant of liquor licences. He was present at a meeting at which it was resolved by the council to instruct a solicitor to oppose the grant or renewal of some particular liquor licences when they were put before the panel of magistrates. When the case came on, the magistrate sat on the panel of magistrates and took part in the decision. The decision was set aside.

[21] Cited above and explained in **Re P (a Barrister)** [2005] WLR 3019 at paragraph 84 per Colman J.
[22] (1893) 9 TLR 613.

71. On the facts of the present case, although the learned Assistant Justice was not present at the meeting when the Bar Council referred the complaint to the PCC and the Police, he was a member of the Bar Council at the time he heard the stay application.

72. It is understood that the Bar Council's complaint to the PCC has not progressed further on account of the Police investigation, but it was then (and is still) pending. It seems to the Court that this means that, at the time he heard the stay application, the learned Assistant Justice was to be associated with the Bar Council's interest in the complaint against the Durhams which it had referred to the Police. The Bar Council's complaint to the PCC is the fundamental basis of the criminal prosecution. The Bar Council's 'interest' in the criminal proceedings is therefore, in the Court's view, a ground for automatic disqualification of the learned Assistant Justice.

Appearance of bias

73. Alternatively, if the Court were to be held to be wrong on this, applying the test in **Porter v Magill**, the Court would also hold there was an appearance of bias in the learned Assistant Justice hearing the stay application.

74. It seems to the Court that a fair-minded and informed observer would consider that the learned Assistant Justice's position as a member of the Bar Council was to be associated with the Bar Council's interest in (i) the Bar Council's own complaint to the PCC which was still pending, and (ii) because that complaint was the basis of the charges laid by the Police that gave rise to the criminal case that was before him. In my view a fair minded and informed observer would conclude that there was a real possibility that the learned Assistant Justice did not bring an independent mind to the question he was asked to decide.

75. It was said that the fair-minded observer is well-informed, and that in this situation, the informed observer would know from the legal tradition and culture of the Bermuda legal system that experienced lawyers are able to exclude irrelevant matters from their consideration of cases that come before them.

76. However, in relation to this submission, there are a number of features to which the Court draws attention. The fact that the learned Assistant Justice went on to say that he had reviewed the charges and that they were "*pellucid*" would in my view be likely to suggest to the fair-minded and informed observer that the judge had formed a view as to the merits of the ultimate charges, and that this would give rise to the real possibility that he did not bring an open mind to the merits of the stay application. The learned judge had no reason to consider the details of the charges in order to consider the merits of the stay application, which was based solely and simply on the DPP's alleged conflict (i.e. because she had been a member of Bar Council at the time the original complaints from former clients of the Durhams had been received by the Bar Council in 2017).

77. The learned Assistant Justice's comments about the correctness of the Bar Council's action only add to the impression in the eye of the fair-minded and informed observer that the learned Assistant Justice had formed a view as to the merits of the application for a stay.

78. The Court does not consider this assessment as being 'unduly suspicious' or 'overly sensitive', when it is recalled that the learned Assistant Justice also said that he did not think that it would have mattered *even if* the evidence had shown that the DPP had in fact taken part in the decision to refer the complaint to the Police.

79. The Court is mindful that it should not give way to tenuous or frivolous assertions of bias or the appearance of bias, particularly in a small jurisdiction where such claims may more easily be made based on personal acquaintance or professional connection[23]. However, the interests of justice require that the trial of serious charges against persons accused of dishonesty are not tainted by unfairness or the appearance that the judge was not acting impartially in refusing the stay.

80. In my view, there is a sufficient basis to hold (i) that the learned Assistant Justice's position as a member of Bar Council at the time of the stay application gave rise to a ground for automatic disqualification or alternatively (ii) that for the reasons explained in the preceding paragraphs, the fair-minded and informed observer would conclude that there was a real possibility that the learned Assistant Justice did not bring an independent mind to the stay application.

81. In those circumstances, the Court concludes that the decision of the learned Assistant Justice should be set aside and the stay application should be remitted for a re-hearing to another judge, and the Court so directs. The Court also directs that the re-hearing shall be listed on an expedited basis.

Guidelines for Judicial Conduct

82. Having found that there are grounds to set aside the learned Assistant Justice's decision, it is not strictly necessary to consider the argument that he should have recused himself under the Guidelines for Judicial Conduct. Nonetheless, the Court should address the point briefly.

83. Reliance was placed on the Guidelines for Judicial Conduct which recommend that a judge should consider recusal when he or she is required to assess the credibility of someone that is known to them, and about whom they have formed a view, including former clients. Because Mr. Pettingill had represented the DPP in proceedings some years ago, the Durhams said that this fact attracted the application of the Guidelines, and the learned Assistant Justice should have recused himself.

[23] See **Ewart Brown v DPP and Ors** (supra) at paragraphs 91-2 per Subair Williams J.

84. However, contrary to the argument advanced by the Durhams, the credibility of the DPP was not in issue before the learned Assistant Justice. The DPP had sworn an affidavit explaining her lack of involvement in the handling of the original complaint as a member of Bar Council. The Durhams said that they doubted that evidence in argument, but the Durhams put in no affidavit evidence to challenge the DPP's explanation, and there was no cross examination of the DPP on her affidavit. The learned Assistant Justice was entitled (and bound) to accept the unchallenged evidence of the DPP as to her lack of involvement.

85. Accordingly, the submission on this aspect of the Durhams's objections to the learned Assistant Justice's approach to the stay application is rejected.

86. The Court will hear the parties on (i) costs and (ii) the prayer for damages.

Dated this 23rd June 2025

THE HON. MR. ANDREW MARTIN

PUISNE JUDGE