Neutral Citation Number: [2025] CA Bda 23 Civ (15 August 2025)

Civil Appeal Nos. 3 and 3A of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MR. JUSTICE MUSSENDEN
CASE NUMBER 2019: No. 379 and 2018: No. 315

Sessions House
Hamilton, Bermuda HM 12

Before:

SIR CHRISTOPHER CLARKE, PRESIDENT
SIR ANTHONY SMELLIE, JA
SHADE SUBAIR WILLIAMS, JA (Acting)

DENISE PRISCILLA TREW

Applicant

- v -

(1) MOLLY WHITE
(2) STEPHEN WHITE

Respondents

-and-

DENISE PRISCILLA TREW

Applicant

- v -

HSBC BANK BERMUDA LIMITED

Respondent

Appearances: Mr Michael Scott, Browne Scott, for the Applicant
Mr Kim White, Cox Hallett Wilkinson Limited, for the Respondents (Molly White and Stephen White)
Mr Dantae Williams, Marshall Diel & Myers Limited, for the Respondent (HSBC Bank Bermuda Limited)

Date of Ruling: 15 August 2025

RULING

Renewed Application for Leave to Appeal against Judge's refusal of recusal application

SIR CHRISTOPHER CLARKE P

1. These are the reasons for our decision to dismiss the renewed application by Mrs. Trew ("the applicant") to the Full Court for leave to appeal the decision of Mussenden, J ("the Judge"), as he then was, of 24 December 2021, by which he declined to recuse himself from hearing these two matters ("the HSBC matter" and "the White matter"). Leave to appeal was refused by Bell, JA, sitting as a single judge of the Court, for the reasons given by him on 25 February 2022. At the end of the hearing on 5 June 2024, we dismissed this application for leave and ordered the applicant to pay the Respondents their costs of the application. Other applications for leave to appeal against the Judge's decisions in the HSBC and White matters, are the subject of other decisions to be handed down at the same time as this decision.

2. The basis of the application for recusal was that there was a real possibility of unconscious bias by the Judge[1], not towards Mrs Trew, but towards her counsel, Mr Michael Scott.

3. The matters essentially relied on were as follows:

   (i) From 2013 onwards, there was a body known as the Joint Investigation and Prosecution Team ("JIPT"), set up for the purpose of investigations into public corruption.

   (ii) The members of the JIPT are said to have included lawyers from the Bermuda Department of Public Prosecutions (in whose premises it was located), the Deputy Governor of Bermuda, the Commissioner of Police for Bermuda and the United Kingdom Overseas Territories Law

[1] In her affidavit of 15 September 2021 Mrs Trew said "*I discount emphatically any lack of integrity on the part of the learned judge".*

Enforcement Officer.

(iii) The Judge was the Director of Public Prosecutions for Bermuda ("DPP") from 2016 until 2019.

(iv) The applicant asserts that the alleged involvement of the DPP on the JIPT was a breach of section 71A of the Bermuda Constitution which provides that the DPP shall not be subject to the direction or control of any other person or authority.

(v) During his tenure as DPP the Judge launched an investigation into the applicant's attorney, Mr. Michael Scott, in relation to corruption and related crimes while Mr. Scott held the public offices of Member of Parliament and Attorney General for Bermuda (amongst others).

4. In relation to (v) above by a letter dated 31 January 2018, sent to Mr Scott by the Judge in his capacity then as DPP, the Judge referred to the fact that:

> "*in the course of a number of investigations by the Bermuda Police Service (BPS) into allegations of corruption and/or fraudulent conduct involving a number of persons, including some public officials over the last decade, there were some lines of inquiry in relation to you when you were a Minister and prior to your holding ministerial positions*".

The letter went on to say that Mr Scott had been asked to make himself available for formal interviews with the Bermuda Police Service in October 2015; that the BPS and the Department had conducted a thorough review of materials including witness statements, documents and other exhibits, and now informed Mr Scott that as a result "*of determining that no criminality or charges of corruption or like offences against you arise out of our review*" no further action was to be taken against him and the investigation against him was closed.

5. Bell JA asked Mr Scott some questions in relation to the 31 January 2018 letter, as he recorded in [8] of his ruling:

> "*For my part, I asked Mr Scott how that January 2018 letter could have been said to reflect badly on him, such that the judge could never thereafter hear a case in which he was counsel. His response was that the outcome of the investigation was not the substratum of the appeal, and he continued to make complaint of the makeup of the JIPT. I referred him to what the judge had said at the end of paragraph 38 of his ruling, where he disclosed that during his tenure as DPP, he was not a member of an oversight group comprising the named officials (or any other officials) called JIPT (or called anything else). Finally, the judge recorded that he had made his decision in respect of Mr Scott as an independent DPP, and not as part of any other body."*

6. The test as to whether there is an appearance of bias that the judge concerned should recuse himself has been established, and confirmed, in a plethora of cases. The question is whether a fair-minded and informed observer would conclude that there was a real possibility that the judge was biased.

7. This test has been established for decades in England: see ***Locabail* UK *Ltd v Bayfield Properties Ltd*** [2000] QB 451(CA); and ***Porter v McGill*** [2002] 2 AC 357. It has been followed consistently in Bermuda: see ***Athene Holding v Siddiqui et al*** [2019] Bda LR 21; ***R v Brown*** [2021] SC (Bda) 75 Civ; ***JS v AS*** [2021] SC Bda 40 Div; ***VSE v TRT*** [2023[CA (Bda) 9 Civ; and in the Privy Council: see ***Grant* v *The Teacher's Appeal Tribunal & Anor (Jamaica)*** [2006] UKPC 59. The characteristics of the fair-minded and informed observer were classically set out by Lord Hope of Craighead in ***Helow v Secretary of State for the Home Department & Anr*** [2008] UKHL 62. Two of those characteristics were that:

> "*She is not unduly sensitive or suspicious…Her approach must not be confused with that of the person who has brought the complaint*".

8. It does not seem to me that the fair-minded observer, possessed of all the relevant facts, would think that there was a real possibility of bias if the Judge were to have decided the cases involving Mr Scott as counsel. He had no engagement with, or personal knowledge of, the facts of the two cases themselves; or any links (otherwise than as the judge) to the parties thereto or their witnesses. Neither he nor any of his family have any personal interest in the outcome. Even if he had been a member of the JIPT, which he was not (see [38] of his Ruling), that would not mean that he was somehow subject to its direction or control. There was no evidence that his decision in relation to Mr Scott was anything other than (as he said it was) a decision made as an independent DPP and not as part of any other body: [38]. Nor can I regard his decision that no charges against Mr Scott arose out of the review as being something that would cause the reasonable, informed and fair-minded observer to think that he might be unconsciously biased against Mr Scott, let alone Mrs Trew.

9. Mr Scott knew of the investigation and its outcome and the Judge's involvement by January 2018. No application was made for recusal on that ground until late 2021. Meanwhile there had been several hearings and rulings in the cases. The failure to make any application until very late in the day underscores the conclusion that this allegation of apparent bias is misplaced.

10. Before us, but not before Bell JA[2], it was contended that there was a further reason why the Judge should recuse himself. That was that the Judge was a former member and,

[2] The fact of Lt Col White's position appears for the first time in Mr Scott's affidavit of 30 December 2021 - para [32] in which he confirmed that neither he nor the appellant took objection to the appearance of Lt Col White at the time "*even though his cameo appearance was a matter that was seen by me as irregular* ..". The

latterly, second in command of the Bermuda Regiment (now the Royal Bermuda Regiment). Lt. Col. William White, the son of Mrs. Molly White, was the Regiment's former Commanding Officer. He retired in 2009. The Judge had retired from the Regiment in 2002. Lt. Col White apparently appeared in court in the proceedings before the Judge, at an online hearing on 17 October 2021.

11. This ground seems to me to have no greater merit than its predecessor. The fact that a Plaintiff's son was, nearly 20 years ago, the Regiment's Commanding Officer (and remained so for another 7 years after the Judge retired from the Regiment) would not cause the fair minded observer to think that there was a real possibility of bias in a case involving his mother, especially in the absence of any evidence of contact between the two in the intervening years or any particular liaison at any stage. It was not surprising to us to learn that this suggestion of apparent bias only surfaced at a very late stage.

12. Further the question of recusal was a matter to be determined by the Judge in his discretion. It does not seem to me that he was in any way in error in acting as he did.

13. In those circumstances it was not necessary for us to deal with the point that the application for recusal was out of time or as to whether we should entertain the application none the less.

Extension of time

14. At the hearing on 5 June 2024, we also indicated that we would extend the time for filing the notices applying for leave to appeal in the two cases mentioned above and with which we are concerned for reasons which we would give later.

15. The position in relation to those two cases is somewhat complicated and we have not found it entirely easy to work out exactly what occurred because of the fact that we were not provided with any agreed bundle of prime documents in chronological order and received documents from the parties in a somewhat haphazard manner and, in some cases, at the last moment.

The White matter

16. The first of the two actions– Molly and Stephen White v Denise Priscill Trew ("**the White matter**") – concerned an application for a stay of an order for possession of a property in Warwick ("**the Property**"). The Defendant ("Mrs Trew") became the owner of the Property in 2004 after the death of her husband, Robert Trew, on 20 January 1999. By a mortgage dated 14 December 2004 the Property was conveyed to Molly and Stephen White ("the Whites") as security for a loan of $ 450,000. On 25

argument that it was another ground for apparent bias appears in the appellant's skeleton argument of 3 June 2024.

October 2018 the Supreme Court made a possession order against Mrs Trew in respect of the Property and an order for the payment of principal, interest and legal fees. A Bailiff entered the Property and effected possession on 9 April 2019. Mrs Trew moved out of the Property but, at any rate in 2019, goods belonging to the Defendant remained at the Property.

17. Mrs Trew made an application for a stay of the further execution of the possession order (effectively the removal of her possessions, repairs and the sale of the Property) pending the determination of an action begun by her, by a writ issued on 18 September 2019 against a trustee of the estate of her deceased husband and HSBC Bank Bermuda Ltd in respect of a property in St George's – the second action, to which I refer below ("**the HSBC matter**").

18. In the White matter Mrs Trew made several claims and sought a stay on the footing that once the HSBC matter was concluded she could extinguish her indebtedness to the Whites. Mussenden J refused Mrs Trew's application (which included an application to re-enter the Property).

The HSBC matter.

19. The second action – Trew v HSBC Bank Bermuda Ltd and Dennis Dwyer (as executor of the Estate of Robert Allen Trew ("**the HSBC matter**") – was an application by the Bank to strike out Mrs Trew's claim against it. The facts behind that case were as follows. On 12 January 1996 Mrs Trew's husband borrowed $ 325,000 from the Bank. The loan was secured by a Promissory Note and an equitable mortgage over the property known as 6 York Street. By his Will executed on 23 June 1998 Mr Trew appointed three persons, included Mr Dwyer, as executors of his estate and directed that the York Street Property should pass to Mrs Trew as a life tenant, and, upon her demise her interest was to be passed to several of his children.

20. Soon after Mr Trew died the loan fell into arrears. On 20 April 2016 the Bank filed an Originating Summons to enforce the equitable mortgage, The Summons was served on Mrs Trew and Mr Dwyer. On 7 December 2017 the Court ordered that the equitable mortgage be foreclosed and that the Bank was entitled to enforce it by sale. On 17 January 2018 the Court granted a writ of possession which was executed by the Provost Marshall on 15 May 2018. The property was sold by the Bank on 7 November 2018.

21. In her Statement of Claim Mrs Trew claimed, inter alia, that the Bank had acted in bad faith in selling the Property at an alleged undervalue and that that had caused her loss for which she claimed damages. The Bank applied to strike the action out and the Judge acceded to that application. He did so on the grounds that (a) the Bank owed no duty of care to Mrs Trew but only to the mortgagor; (b) the Bank owed no duty to account to Mrs Trew; (c) the Bank owed Mrs Trew no duty of good faith, fairness or reasonableness; (d) the Bank complied with its duty (not owed to Mrs Trew) to obtain

the best price. (e) the Bank owed no duty or obligation to Mrs Trew under section 36C of the Conveyancing Act 1983 and, in any event, there was insufficient evidence as to the requisite intention i.e. to sell the property at an undervalue.

22. The judgment in the White matter was delivered on **23 July 2021**; and the judgment in the HSBC natter was delivered on **28 July 2021**. On **23 August 2021** Mrs Trew filed a Notice of Motion (headed "In The Court of Appeal") for a Supreme Court single judge to grant **leave to appeal** in relation to both matters. On the footing that these were interlocutory rulings an application for leave to appeal was required to be filed with the Registrar of the Supreme Court within 14 days of the decision of the Supreme Court: Order 2/3 (1) (a) and Order 2/36. The Notices of Motion were thus, by my calculation, 17 days out of time in the White matter and 12 days out of time in the HSBC matter.

23. On or about **19 October** 2021 Mrs. Trew swore an affidavit in support of an application to the Supreme Court in both the White and the HSBC matters for enlargement of time in which to file a motion for leave to appeal. It is not clear whether any such application was made, although Mr Scott assured us that there was a summons. The affidavit was only filed on 11 January 2022. On **15 January 2022** an application was made to the Court of Appeal in both matters to extend the time for filing the respective motions for leave to appeal. The Bank relies on the fact that these dates are a considerable time after the time by which an application for leave to appeal should have been made.

24. On **24 December 2021** the Judge gave judgment in respect of the applications that had been made by Mrs Trew in both the White and the HSBC matters that he should recuse himself. He also dealt with a request by Mr Scott on behalf of Ms Trew that he should, as a single Judge of the Court of Appeal, grant leave for an enlargement of time for filing Notices of Motion for leave to appeal including in the White and HSBC matters**.** The Judge dismissed the applications for recusal. He held that he had power pursuant to Order 2 rule 4 (2) of the Rules to consider an application for an enlargement of time within which to file a Notice of Motion for Leave to Appeal. But he made no decision on whether or not there should be an extension of time. No such application had in fact been filed: it was only filed on **15 January 2022**.

25. The effect of the above would appear to be that no judge has actually addressed the question of whether an extension of time to apply for leave should be granted although the Judge determined that he had power to grant an extension. On the basis that the relevant rulings were interlocutory, an application for leave would fall to be made in the first instance to the Supreme Court, and if refused, to the Court of Appeal: Order 2/3 (1) (a) and Order 2/36.

26. We decided in June that we should ourselves determine whether Mrs Trew should have an extension of time for filing her applications for leave to appeal. We regarded ourselves as entitled so to do pursuant to the power in Order 1.5 whereby the Court of Appeal "*may enlarge the time provided by these Rules for the doing of anything to*

which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interest of justice".

27. We decided to extend time for filing the applications for leave to appeal to 23 August 2021. We did so because the delay in filing was very modest, the prejudice attributable to the delay minimal, and, according to the evidence in Mrs Trew's affidavit of 19 October 2021 ,Mr Scott made a mistake as to whether the time limit was 14 days or six weeks and failed , because of work pressure, to do what he usually did , namely to ask the Registrar whether the appeal was interlocutory. In an affidavit of Mr Scott of 30 December 2021 it appeared that the work of Mr Scott in preparing the two notices of motion was substantial and that he had had inadequate time available to do so, particularly given other professional commitments.

28. It did not seem to us right that in those circumstances Mrs Trew should be precluded from seeking leave to appeal on the grounds of delay. Because the decision was made to address the extension of time first, leaving the question of leave to be addressed later if time was extended, we were not in a position fully to address the viability of the putative appeals in any detail; but we declined to refuse an extension of time on the basis that a subsequent consideration of whether leave should be granted might result in the refusal thereof.

29. Accordingly, as indicated at [1] and [14] above, we shall address the question of leave to appeal in those cases, the rulings in which will be handed down at the same time as this one.

SMELLIE JA

30. I agree.

SHADE SUBAIR WILLIAMS JA (Acting)

31. I, also, agree.