BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

Civil Division

Civil Suits Nos. 411 and 412 of 2013

Between:

LEROY PARRIS

Claimant

AND

BARBADOS ADVOCATE PUBLISHERS (2000) INC.

First Defendant

GEORGE GRIFFITH (T/A BARBADOS LABOUR PARTY)

Second Defendant

NATION PUBLISHING CO. LTD

Third Defendant

Before:

The Hon. Madam Justice Elneth O. Kentish, Judge of the High Court

Appearances:

Mr. Vernon O. Smith, Q.C. of Smith & Smith in association with Mr. Hal Mc. L. Gollop, Q.C. and Mr. Steve A. H. Gollop for the Claimant

No appearance on behalf of the First Defendant

Mr. Elliot D. Mottley, Q.C. in association with Ms. Lani Daisley of Elliot D. Mottley & Co. and Mr. Ralph Thorne, Q.C. for the Second Defendant

Mrs. Sherica Mohammed-Cumberbatch of Carrington & Sealy for the Third Defendant

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2013: July 1

2013: July 23

DECISION

[1] Before me is a formal application made orally by learned counsel for the Claimant, Mr. Vernon Smith, Q.C. requesting that I recuse myself from the hearing of two separate actions both in defamation and both filed on behalf of his client, Leroy Parris, against firstly the Nation Publishing Co. Ltd and George Griffith (trading as the Barbados Labour Party) in Suit No. 411 of 2013 and secondly against the Barbados Advocate Publishers (2000) Inc. and George Griffith (trading as the Barbados Labour Party) in Suit No. 412 of 2013.

[2] The sole fact adduced by Mr. Smith in support of his application for my recusal is that he acts for a client who has, according to him, sued me in my personal capacity in Suit No. 1505 of 2010, an earlier but still pending action. No other fact or circumstance is adduced to demonstrate the appearance of bias on my part.

Background

[3] On October 22, 2004 Wilma Marjorie Newsom-Stroud instituted an action in High Court Suit No. 1621 of 2004 against the estate of her deceased brother represented therein by Collis Morris, the qualified executor of the said estate.

[4] The matter was entitled *Wilma Marjorie Newsom-Stroud v. Collis Morris (Qualified Executor of the Estate of Sylvester Greenidge, Deceased)* and in that action the Claimant initially sought an order that the sum of $1,501,146.83 be paid by the estate to her, as well as an order that the property situate at 122B Durants, Fairways, Christ Church be conveyed to her and any title deeds and documents relating to the said property in the possession and custody of the Executor also be delivered up to her. She subsequently amended the action to claim an additional BDS $1.4 million as half share in a business that she allegedly carried on in partnership with her deceased brother.

[5] The matter was heard before me on the 16th, 18th and 23rd of January, 2007, the 21st and 27th of September, 2007 and then finally on March 15, 2010. The Claimant was represented at all times by Mr. Vernon Smith, Q.C. who appeared with Ms. Lisa Greaves.

[6] On November 15, 2010 (ten days after the filing of Suit No. 1505 of 2010 hereinafter described) I delivered my decision in which I gave judgment in favour of the Claimant against the Defendant as follows:

"1.The defendant shall pay to the plaintiff the sum of BDS $1,338,147.55 made up as follows:

(i) the sum of $120, 428.48 being the net proceeds of sale of lot 37 Fairholme Gardens;

(ii) the sum of $215,430.62 being the net proceeds of sale of Lot 51 Newton Terrace, Christ Church;

(iii) the sum of $487,328.75 being the net proceeds of sale of Lot 35 Plover Court (Inch Marlow) Christ Church;

(iv) $84,000.00 being rent received from Questor Management Group Inc. in respect of Lot 122B Durants, Christ Church;

(v) The sum of $430,959.60 being rent received in respect of Lot 122B Durants, Christ Church for the period 1st January 1997 to 30 June 2002.

2. It is hereby declared that the late Sylvester Greenidge, deceased, held Lot 122B Durants, Christ Church in trust for N-Stroud. And it is ordered that the defendant, the qualified executor of the estate of Sylvester Greenidge, deceased convey to N-Stroud the property situate at Lot 122B Durants, Christ Church and deliver up to the plaintiff all the documents and title deeds to the said property which were in the possession or custody of the late Sylvester Greenidge, deceased.

3. The defendant shall further pay to the plaintiff, interest on the sums set out in para. 1 hereof at the rate of 6% per annum from the date of this order until payment.

4. The monies paid into court by the defendant in this action together with the interest accrued thereon shall be paid out by the Registrar to the plaintiff on account of the judgment debt herein.

5. The defendant shall pay to the plaintiff the costs of the action certified fit for two counsel to be agreed or taxed."

[7] On November 5, 2010, Wilma Marjorie Newsom-Stroud, acting by her attorney-at-law, Vernon Smith, Q.C. of Smith and Smith commenced an action by Fixed Date Claim Form entitled Claim No. 1505 of 2010, Wilma Marjorie Newsom-Stroud (Claimant) v. the Attorney-General of Barbados (First Defendant), Madam Justice Elneth Kentish (Second Defendant) and Collis Morris, Qualified Executor of the estate of Sylvester Greenidge (Third Defendant). The claim was supported by an affidavit of the Claimant filed contemporaneously with the Fixed Date Claim Form.

[8] In that Fixed Date Claim Form, the Claimant sought the following declarations and/or orders:

"1. A Declaration that at all times in the High Court action No. 1621 of 2004 intituled Wilma Marjorie Newsom-Stroud v. Collis Morris (the qualified executor of the estate of Sylvester Greenidge, deceased) instituted by the claimant for the determination of the existence or extent of her civil rights and claims against the defendants in the said action the claimant is entitled to be given a fair hearing which includes a determination of the same within a reasonable time pursuant to the provisions of section 18(8) of the Constitution of Barbados.

2. A Further Declaration that the failure of the First and Second Defendants to provide to the Claimant a fair hearing within a reasonable time pursuant to the provisions of Section 18(8) of the Constitution of Barbados for the determination of the existence or extent of her civil rights claims as against the Defendants in the said action is in breach of the claimant's constitutional rights to fair hearing within a reasonable time as enshrined in section 11 and protected by section 18 of the Constitution of Barbados.

3. A Further Declaration that the failure of the First and Second Defendants to provide to the Claimant a fair hearing within a reasonable time pursuant to the provision[s] of Section 18(8) of the Constitution of Barbados is a breach of the Claimant's constitutional right in that it deprives the Claimant of an interest in or right over the property as estimated [sic] by Section 11 and protected by Section 12 of the Constitution of Barbados.

4. An order of mandamus to compel the Second Defendant to adjudicate and determine the said action without further delay.

5. An order that the First and Second Defendants compensate the Claimant for the loss and damage she has suffered by reason of the delay in the adjudication of her rights and claims in the said action.

6. Pursuant to the order sought in the preceding paragraph 5 above an enquiry into damages and consequential loss suffered by the Claimant as [a] result of the said delay and payment of the damages so found due on such enquiry.

7. Interest on damages pursuant to Section 35 of the Supreme Court of Judicature Act Cap 117 A of the Laws of Barbados.

8. All such orders, writs and directions as may be necessary or appropriate to secure redress for the Claimant in respect of the contravention of her human and fundamental rights guaranteed by Section 18 of the Constitution of Barbados.

9. Costs."

[9] It is of some importance that in the particulars set out in the Fixed Date Claim Form, the Plaintiff states, *inter alia*, that:

"(i) The circumstances in which it is alleged that the liability of the Crown has arisen [are] set forth in the Affidavit filed herewith in support of the Fixed Date Claim Form.

(ii) The government department in respect of which the liability of the Crown arises is the Supreme Court of Barbados.

(iii) The Officer involved in the liability of the Crown is the Second Defendant.

(iv) That the First Defendant is sued as representing the Crown in its right of the Government of Barbados pursuant to the provisions of the Crown Proceedings Act Cap197 of the Laws of Barbados."

[10] These particulars show quite clearly that the capacity in which I am being sued in Suit No. 1505 of 2010 is as an officer of the Crown and not in my personal capacity as Mr. Smith has contended.

[11] *The Present Actions:* On March 13, 2013 Leroy Parris, the former Executive Chairman of the now liquidated insurance company, Clico Holdings (Barbados) Limited and the Claimant in this matter, filed two actions in defamation.

[12] The First Defendant is the printer and publisher of the Barbados Advocate, a daily national newspaper circulated in Barbados and was named as a Defendant in the first action only.

[13] The second action was brought against the Second Defendant which is the Nation Publishing Co. Ltd. and the publisher and printer of the Daily Nation and the Sunday Sun newspaper.

[14] The Third Defendant, George Griffith (trading, it is said, as the Barbados Labour Party) is the General Secretary of the Barbados Labour Party, one of two primary national political parties on the Island, and was sued in both actions.

[15] Both actions arise out of the publication of certain political advertisements by the First and Second Defendant during the last electoral campaign in Barbados earlier this year. Each advertisement was sponsored and paid for by the Barbados Labour Party and not only contained a photograph of the Claimant but used words, which the Claimant has alleged were calculated to and did disparage him in his business and professional capacity. The Claimant has also contended that by the publication of these matters, his credit and reputation has been seriously damaged and he has suffered distress and embarrassment. He therefore claims damages, injunctions and costs against each Defendant.

[16] It is clear from the nature of these actions and the parties involved that they are not connected in any way with Suit No. 1505 of 2010.

Law

[17] There is no dispute as to the legal principles that govern whether a judge should recuse herself from hearing a matter on the ground of an allegation of apparent bias. Counsel for the Claimant referred the Court to the legal principles set out in ***R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 2) [2000] 1 AC 119, Meerabeux v Attorney-General of Belize [2005] 2 AC 513*** and ***R v Gough [1993] AC 646*** and the article by the Honourable Mr. Justice David Hayton of the Caribbean Court of Justice on judicial recusal entitled "Recusing yourself from hearing a case".

[18] However, little assistance on the application of the law to the particular facts of this case was given to the Court by counsel for the Claimant on whom rests the onus to displace the judicial presumption of impartiality and establish apparent bias.

[19] The law clothes judges, who are selected for the office on the basis of their intellect and integrity, with a presumption of impartiality which can only be displaced with cogent evidence:

> *"…The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 361 in Commentaries on the Laws of England III . . . '[t]he law will not suppose possibility of bias in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea'. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: R. v. Smith & Whiteway Fisheries Ltd. (1994), 133 N.S.R. (2d) 50 (C.A). at pp. 60-61."*: ***R v S (RD) [1997] 3 SCR 484 at para. 32 per L'Heureux-Dubé and Mcachlin JJ***.

[20] The impartiality which judicial officers are assumed to possess was described by Lord Clyde in ***Roylance v. the General Medical Council [2001] 1 AC 311*** as being:

> *"… a state of mind which is free from any influences extraneous to the merits of the particular case; which is capable of dispassionate inquiry and an objective judgment; and which is not turned aside by any motivation to favour one side against the other."*

[21] Impartiality does not mean that judges do not come to the bench without opinions or views, but that they remain, despite these views and opinions, capable of and willing to entertain and even act upon different points of view with an

open mind: ***R v S (RD) [1997] 3 SCR 484 at para. 119, per Cory J***.

[22] Bias may be contrasted with impartiality and has been described, at least on the part of a judicial officer, as "*the premature foundation of a concluded view adverse to one party*": ***Steadman-Byrne v Amjad [2000] EWCA Civ 625 at para. 10, per Sedley LJ***. It may take a number of forms and exist for a variety of reasons, but in each instance it prevents the judge from undertaking an objective determination of the issues which need to be resolved: ***Re Medicaments and Related Classes of Goods [2001] 2 AC 513 at para. 37 per Lord Philips***.

[23] Where an allegation of apparent bias has been made, it is well established that in order to determine whether the judge should recuse herself from the matter because of such an allegation, the question that must be asked is that set out by Lord Hope in ***Porter v. Magill [2002] 2 AC 357 at 494***:

> *"The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility [as opposed to a 'real danger'] that the tribunal was biased."*

[24] This test requires the Court to undertake a process that may be divided into two stages. The Court is required to firstly ascertain with some degree of precision all the facts and circumstances which have a bearing on the allegation of bias and secondly to consider whether these facts and circumstances would lead a fair-minded and reasonable observer to conclude that the tribunal was or is likely to be biased: ***Flaherty v National Greyhound Racing Club [2005] EWCA Civ 1117, The Times, 5 October 2005 para. 27, per Scott Baker LJ.***

[25] The test for determining apparent bias is clearly objective, intended to ensure the integrity of the judicial system and public confidence in the administration of justice. The opinion of a judicial officer as to whether she is capable of adjudicating the claim with an open mind free of prejudices and irrelevant considerations is therefore of no importance; it is the perspective of the fair-minded and informed observer that counts.

[26] And who is the fair-minded and informed observer on whom rests the responsibility of determining an allegation of apparent bias? The fair-minded and informed observer, like the reasonable man used in the tort of negligence, is a judicial construct or figure of legal fiction, employed, as Alleyne J. pointed out, "*to represent the standard to be applied*": ***Fiton Technologies Corp. v the Attorney-General (unreported) High Court of Barbados, Civil Suit No. 844 of 2008, Decision dated June 17, 2003***.

[27] The fair-minded and informed observer has been the subject of extensive judicial consideration and a number of judicial pronouncements have been made of the characteristics that are to be attributed to her, including the following:

1. The observer is not to be mistaken with the complainant and "*any assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively*": ***Helow v Secretary of State for the Home Department [2008] 1 WLR 2416 at para. 2, per Lord Hope***.

2. He/she is "*gender-neutral*": ***Helow (ibid) at para. 1 per Lord Hope***.

3. The observer is not an "insider" or member of the judiciary: ***Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781, para 39 per Lady Hale.*** He is also not a member of the legal profession: ***Saxmere Company Limited et al v Wool Board Disestablishment Company Limited [2010] 1 NZLR 35 at para 5, per Blanchard J cited in Fiton Technologies (supra) at para. 109***.

4. Instead, the observer is a layman who belongs to the community from which the case originates and who "*will possess an awareness of local issues gained from the experience of having lived in that society*": ***Panday v Virgil (Senior Superintendant of Police) (unreported) Court of Appeal of Trinidad and Tobago, Mag. App. No 75 of 2006, Decision dated April 4, 2007 para. 5, per Archie JA***.

5. The observer is informed. This means that he does not come to the matter "*as a stranger or complete outsider*" but is taken to have "*a reasonable working grasp of how things are done*": ***Prince Jefri Bolkiah v State of Brunei Darussalam [2008] 2 LRC 196 at para. 16, per Lord Bingham***.

6. The observer will not only possess reasonable working knowledge but "*will take the trouble to inform herself on all matters that are relevant*" and "*put whatever she has seen or read in its overall social, political or geographical context*": ***Helow (supra) at para. 3, per Lord Hope***.

7. The observer is fair-minded and expected to adopt a balanced approach. She will be "*neither complacent nor unduly sensitive or suspicious*" : ***Johnson v Johnson (2000) 201 CLR 488 at para. 53***. Lord Hope described her as "*the sort of person who always reserves judgment on every point until she has fully seen and understood both sides of the argument*": ***Helow (supra) at para. 2, per Lord Hope at para 2.***

8. The observer must also be taken to be aware of the "*legal traditions and culture of this jurisdiction*" (***Taylor v Lawrence [2003] QB 528, 548 at para. 61 per Lord Woolf CJ***) although he may not be "*wholly uncritical*" of it (per Lord Bingham in ***Lawal v Northern Spirit Ltd [2008] UKHL 35 at para. 22***).

9. In particular, he is taken to know that judges are trained to have an open mind: ***El-Farargy v El-Farargy [2007] EWCA Civ 1149 at para. 26, per Ward LJ.*** He must also not only be aware of "the *traditions of judicial integrity and of the judicial oath*" but must "*give it great weight*": ***Robertson v HM Advocate 2007 SLT 1153 at para. 63, per Lord Justice-Clerk (Gill)***.

[28] In ***Locabail (UK) Ltd. v Bayfield Properties Ltd [2000] QB 451***, Lord Bingham of the English Court of Appeal, in conducting a comprehensive review of the law relating to bias, stated at para. 25 that:

"Everything will depend on the facts, which may include the nature of the case 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…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 Vacauta v Kelley (1989) 167 CLR 568); or if, for any reason, there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on issues before him."

[29] In ***Locabail (ibid) at para. 21***, the court cited with approval the following observations of the Constitutional Court of South Africa in ***President of the Republic of South Africa & Others v South African Rugby Football Union & Others 1999 (7) BCLR (CC) 725 at 753***:

"The reasonableness of the apprehension [for which one must read in our jurisprudence "the real risk"] must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or pre-dispositions. … At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial …"

[30] I now turn to the facts and circumstances in this case that may have a bearing on the allegation of bias that has been made. These facts are not limited to those which are mentioned by Counsel for the Claimant but extend to any relevant fact that is capable of being known by the public: ***Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781 at para. [17], per Lord Hope***.

[31] As Mr. Smith grounds his application solely on the existence of Suit No. 1505 of 2010, the facts that a fair minded and informed observer would have to consider in the instant case are as follows:

1. In Claim No. 1505 of 2010, the judge is not being sued in her personal capacity but with respect to the conduct of her professional responsibilities.

2. The Claimant in Claim No. 1505 of 2010 is not named as a party in either Claim No. 411 of 2013 or Claim No. 412 of 2013.

3. The Defendant in Claim No 1505 of 2010 and the Defendants in Claim Nos. 411 and 412 of 2013 are in no manner related to each other.

4. None of the parties in Claim No. 411 of 2013 and Claim No. 412 of 2013 appeared as parties or were otherwise involved in Claim No. 1505 of 2013.

5. Moreover, there is no similarity in the nature of the actions or in the evidence that has been or might be adduced in these actions.

6. The sole connection between Claim No. 1505 of 2010 and Claim Nos. 411 and 412 of 2013 is that Mr. Smith, Q.C. appears as leading counsel with Mr. Hal Gollop, Q.C., on behalf of the Claimants in each of the actions.

[32] Having set out the material facts above, I must now consider whether the fair-minded and informed observer, having full knowledge of those facts would conclude that there was a real possibility that I, as the decision-maker, would be biased against the Claimant.

[33] In considering whether the observer would arrive at such a conclusion, I have had regard to the Jamaican case of ***Berry v DPP (1996) 50 WIR 385***, which was cited by Justice Hayton in his article on recusal (***supra at para. 17***).

[34] In ***Berry*** the Appellant had appealed his conviction for murder and his appeal had failed before the Jamaican Court of Appeal but succeeded before the Privy Council which had directed the matter be remitted to the Jamaican Court of Appeal in order for it to consider whether the conviction should be quashed and a verdict of acquittal entered or a new trial ordered. Two judges appearing on the panel hearing the case after it had been remitted to them had also sat on the panel of the Court of Appeal that had dismissed the original appeal. The Appellant therefore argued in a constitutional motion subsequently brought that this meant that his right to a fair hearing before an independent and impartial tribunal had been denied. His motion was, however, dismissed.

[35] In dismissing his constitutional action, the Privy Council held at pp. 384-5 that there was no real danger of bias:

> *"Their lordships were grateful to [Counsel for the Appellant] for his helpful and lucid submission; but they nevertheless concluded that there was no substance in his argument. The test to be applied is whether there was, in the circumstances, a real danger of bias: see R v Gough [1993] AC 646. Their lordships have no doubt that the courts below were right to conclude that there was no such danger. The fact that two members of the court were previously party to a judgment in which strong views were expressed as to the guilt of the appellant in the light of the evidence then before them does not suggest that there was any danger of bias on their part when they came to perform the balancing operation involved in deciding whether or not to order a new trial."*

[36] This case makes it clear that the ground on which Counsel for the Claimant has based his application for my recusal in this matter is baseless and cannot succeed. The sole fact upon which Counsel for the Claimant relies is the fact that he legally represented a claimant in an action in which I was sued in my professional capacity and also appears as counsel for the Claimant in the actions currently before me.

[37] A fair-minded and informed observer, aware of the judicial oath, the presumption of impartiality and the way the judicial system operates, would to my mind conclude that such a ground is frivolous and without any merit. The observer would be conscious of the fact that judges are trained to adjudicate objectively and dispassionately upon issues arising in matters before them solely on the evidence adduced without fear and favour and in accordance with the law, regardless of the parties or counsel that appear in those matters. The fact that Counsel appears for the Claimant in both Claim No. 1505 of 2010 and the defamation actions currently before me certainly would not, to my mind, lead such an observer to harbour a reasonable suspicion of bias on my part. Without more, it is also far from sufficient to displace the presumption of impartiality.

[38] While a party has a right to request the recusal of a judge, such right being a necessary corollary to his constitutional right to a fair trial according to the law, a litigant does not have the right to have a matter heard before a specific judge of his choosing who he believes is more likely to decide the case in his favour. Accordingly, it "*would be as wrong [for me] to yield to [such] a tenuous and frivolous objection as [it] would [be] to ignore an objection of substance*": ***Locabail (UK) Ltd. v. Bayfield Properties Ltd. (supra) at para. 21, per Lord Bingham***.

[39] Mr. Smith seems to have formed the view, which he has indeed expressed, that whenever a matter comes before me in which he is retained as counsel, it is incumbent upon me, without more, to recuse myself. That view is not reflected in the law. If acted upon, it would place an intolerable burden on other judges and a further strain on the operation of the judicial system.

Disposal

[40] Accordingly, I find that there is no substance in the allegation of apparent bias laid against me by Counsel for the Claimant and the application for my recusal from these matters is therefore without any merit whatsoever.

[41] The application is hereby dismissed.

Elneth O. Kentish

Judge of the High Court