BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 12 of 2013

BETWEEN:

AARON PARRIS CONSTRUCTION INC. First Appellant
TIMOTHY EDWARDS Second Appellant

AND

TRISTAN BROOMES Respondent

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2017: June 22
2018: October 9

Mr. Elliott D. Mottley QC, and Ms. Marilyn D. Moore for the Appellants.

Mr. Ivan A. Alert for the Respondent.

DECISION

BURGESS JA:

INTRODUCTION

[1] This is an appeal arising out of proceedings before **Richards J** in the High Court on that court's jurisdiction to hear the evidence of a witness after both the claimant and the defendants had closed their case, made written and oral submissions on the evidence adduced during the trial, and judgment had been reserved. However, the dispositive issue on appeal is **Richards J's** decision to recuse herself from the case on her own motion following exchanges between herself and Mr. Mottley QC, counsel for the appellant, on the court's jurisdiction to hear that evidence.

[2] Before us, the appellant seeks orders (i) that **Richards J's** decision to recuse herself was not legally justified and that that decision be "overturned"; and (ii) that she be ordered to render her judgment solely on the evidence that was before her during the trial. Because of our resolution of the first order sought, consideration of the merits of the second order sought is rendered otiose.

FACTUAL BACKGROUND

[3] On 8 December 2006, the respondent/claimant, Tristan Broomes, (Broomes) was run down by the first appellant/first defendant's Suzuki van, Registration Number S893, which was being driven by the second appellant/second defendant, Mr. Timothy Edwards. Broomes, who was then a school boy, was run down while he was walking across Mount Standfast Main Road, a north

south road in the Garden, St. James. S893 was overtaking a stationary minibus, Registration Number B135, when Broomes was run down.

[4] By writ of summons and statement of claim filed on 13 June 2008, Broomes brought an action claiming negligence and breach of statutory duty on the part of the appellants which they denied in their defence filed on 28 November 2008. In that defence, the appellants asserted that the accident was caused wholly by the negligence of Broomes or alternatively, that he contributed to the accident.

[5] The case was heard before **Richards J** on 19, 21, and 27 June 2012.

[6] On 27 June 2011, before the first date of hearing, the respondent had caused to be filed a witness summary for an intended witness, namely, the driver of B135. This witness was not found and was not called by the respondent up to the last day of the trial on 27 June 2012. On that date, both sides submitted closing arguments including written submissions.

[7] It is the events which transpired thereafter that provoked this appeal.

[8] Sometime in July 2012, **Richards J** contacted Mr. Alert, counsel for the respondent by telephone and informed him that she required the attendance of the driver of B135. **Richards J** indicated in that telephone conversation that she would likewise contact counsel for the appellants and apprise them of her requirement.

[9] The judge did contact counsel for the appellants by telephone and apprised him of her requirement. Counsel for the appellants did not raise any objection to the judge's requirement at that time.

[10] The efforts of the respondent, a bailiff on the respondent's behalf and the assistance of the police proved unsuccessful in locating the driver of B135. Eventually, however, a relative of the respondent serving in the Royal Barbados Police Force was able to find the driver of B135 and secure his attendance for the making of a witness statement. That statement was filed and served on counsel for the appellants in March 2013. It was learnt at this time that the correct name of the driver of B135 was Lennox Hewitt.

[11] Following the service of the witness statement, by letter dated 19 April 2013, counsel for the appellants wrote to counsel for the respondent as follows:

> "Further to your service of the witness statements of Lennox Hewitt. Kindly confirm you have arranged for this matter to be set down before Richards J."

[12] By letter dated 26 April 2013, counsel for the respondent acknowledged receipt and replied to the 19 April 2013 letter as follows:

> "Mr. Patterson Boyce Clerk to Madam Justice Richards indicated that he conferred with your office and that the date set was 8th July, 2013. Upon being so informed I had cause to adjust the date of 11th July, 2013 he had previously informed me of."

[13] On 8 July 2013, the date set for hearing and examination of the driver of B135, counsel for the appellants objected to the re-opening of the case and hearing of the witness. We consider it advantageous to recount verbatim at this point the exchange between counsel for the appellants and **Richards J** at that hearing.

> "THE COURT: Yes, Mr. Mottley.
>
> MR. MOTTLEY: One of the first things that I learnt as a young barrister in chambers was that as an advocate, you had a responsibility to your client and in performing that responsibility, counsel had to do so fairly and fearlessly and subject to, once you remained within the bounds of the tradition of the Bar. It was your duty to advocate and to represent your client's interest.
>
> Pursuant to that, My Lady, Counsel for the plaintiff has a duty to represent his client. Counsel for the defendant has a duty to represent his client.
>
> There is a role for the judge in civil cases and that role as I understand it, as a practitioner for all these 52 years, is to listen to the evidence put before the judge and to render a decision on that evidence, on the evidence that was called before the court whether it be by viva voce or whether it came from documentary evidence that was introduced put into evidence. And within that ambit, the judge must render a decision. It is not the function of the judge to go outside that ambit however desirous it may seem to be to the judge, for the judge has to remain within that narrow ambit, that is, evidence is led by the Plaintiff/Claimant as it is now called. There is cross-examination and then the Claimant's case is closed and equally the Defendant calls evidence and the Defendant's case is closed and submissions are made and it is at

that point that the judge has to make a decision.

It is no function of the judge first of all to ascertain the truth of anything, any accident. This is not an inquisition. There are those cases where as a Coroner's inquiry where that function is specifically given to the Coroner to ascertain how, why and in what circumstances a person came to meet his or her death. And in those circumstances, it is open to a judge -- it's open to a Coroner and sometimes it is a judge as you would see in certain retired judges or even judges in England, but it is at a Coroner that that function is performed. It certainly is not the role of a High Court judge to go beyond the ambit of the evidence led and seek to find out how an accident occurred.

My Lady, when you come to sum-up to a jury in criminal cases, the judge from time to time finds it necessary to tell the jury remind the jury: "Your function is to listen to the evidence and to render a verdict based on the evidence led" not on anything else outside that ambit and it is not the role of the Criminal Justice System, for instance, to find out the truth as to how a crime is committed. That is not the role of the Criminal Justice System. The role of the Criminal Justice System is to decide whether on the evidence led before it, whether a person is guilty. And equally, in civil cases, the function of the judge is to determine on the evidence led, not on any person going outside trying to ascertain who or what really happened and the dangers of that are so evident in this case.

My Lady, as far as I know, after this matter is completed, somehow or the other, and I am not willing to speculate, I heard what my learned friend said about the witness, how the witness came about and My Lady, it is an extremely dangerous thing for any judge after the case has been completed, and all the witnesses and if you look, if you just look, if you look at this affidavit which is attached, to which a statement from this witness is attached, it is the most despicable thing that could

ever happen.

THE COURT: Something has been filed in relation to –

MR. MOTTLEY: Yes, My Lady, it has been filed.

THE COURT: I have said I have not seen.

MR. MOTTLEY: I know your ladyship wouldn't see it because it is set for the 23rd. But my learned friend didn't tell you that it was set for the 23rd September but what I am saying, it shows how dangerous it is because the entire Case.

THE COURT: Just a minute. Proceed.

MR MOTTLEY: You have a witness now that they are now trying to call ex post facto, the whole case is finished. It was within their province if they wanted to, one, not to bring on the case without the witness, to ask for an adjournment. Secondly, if the witness couldn't be found at that stage, instead of closing their case, it was opened to them to say they want a further adjournment in order to seek to get this witness. But you cannot and it is most improper because the litigation must be brought to an end. We go through a whole case, we do a whole case and now to find that he is seeking to reopen a case and to … and what is so bad about it, I would use no other word, is that he is attempting to put a completely different case than that which has been pleaded and that which was put before the witnesses.

THE COURT: Pause a minute please counsel. When was the first time you became aware that this witness was going to be called?

MR. MOTTLEY: Friday.

THE COURT: That is not correct, Counsel.

MR. MOTTLEY: Sorry. That what, My Lady?

THE COURT: When is the first time you became aware that this witness

MR. MOTTLEY: My Lady, I don't want to say -- you want to say it, My Lady? You say it.

THE COURT: I am asking you counsel a question –

MR. MOTTLEY: Because from my memory, I believe Her Ladyship called me and said you discovered the witness, is that correct, My Lady.

THE COURT: No. I spoke to both of you on the 9th August 2012 and I spoke to both of you about my wish to reopen the case, to take evidence from Mr. Smith.

MR. MOTTLEY: Well that's the whole point, My Lady.

THE COURT: Because having gone through the evidence that I had I thought that he was an eye-witness to what happened and that he could be of assistance to the court.

MR. MOTTLEY: My Lady, with due respect, you see that is where

THE COURT: I spoke with both of you on the same day and neither of you gave me any objection or said no that is improper, nothing of that sort was ever said to me by either counsel. So I am the most surprised and shocked person this morning to be hearing that it is so improper because I take responsibility. It is not counsel, I take responsibility for wishing to have this witness to come because having read, I said here is an eye-witness who actually saw what happened, who may be independent of the parties who could assist the court, and I thought it would have been a travesty of justice to complete this case and write a decision without hearing from that witness if he was at all available.

MR. MOTTLEY: No, My Lady, with due respect to you, what is a travesty of justice is what is being attempted now is a travesty of justice.

THE COURT: By whom?

MR. MOTTLEY: My Lady, you have no authority at this stage.

THE COURT: So why didn't you tell me that on the 9th of August?

MR. MOTTLEY: Because I do not believe that a trial should be conducted on the telephone.

THE COURT: No, I accept that but you never gave me any indication that "No I would not be agreeing with that." You never. Quite the opposite.

MR. MOTTLEY: No, no, no, My Lady.

THE COURT: Because had you raised that objection at that stage, the proper thing to have done then would be to call both of you back into court to discuss it. There was no objection from either of you to my proposal to proceed in that manner.

MR. MOTTLEY: Let me tell you what he swear to in affidavit today because I told him one morning in front of Mr. Leslie Haynes, that if he coming with this he better find out what is the authority, this is what he swear to in an affidavit. He doesn't say --

THE COURT: I have not seen any affidavit so before we prejudice it any further, I do not know whether we should go there at this stage.

MR. MOTTLEY: My Lady, I am going to say what I said in the application.

THE COURT: Counsel, my position is that you are within your right to object to the proposal, but having spoken to you on the 9th August, that was never indicated to me, quite the opposite.

MR. MOTTLEY: My Lady, I didn't indicate to no opposite because I never agreed that after a case close that it should be reopened and I do not believe that I should carry on any conversation with the judge in the absence of Mr. Alert, saying what I think should happen. I have certain standards that I abide by, certain standards that I know.

THE COURT: And bearing those standards in mind then counsel. If having spoken to you on the 9th August, you figured that the judge was falling into fundamental error, then as you say, call the matter back and say, "Judge we will have to come back before you. I would say nothing further at this point but we would need to both appear before you if that is the course of conduct you are proposing, with respect".

MR. MOTTLEY: My Lady, this makes it even worse. I don't even remember the date but if Your Ladyship is saying that you made that call on the 9th August, and this is now almost a year later that we now get back before you?

My Lady, I started off by telling you that my duty is to my client and I will represent the interest of my client fairly. I do not believe

THE COURT: But I do not expect you to do otherwise,

MR. MOTTLEY: I don't expect you to do otherwise. I do not believe that I should engage in any conversation with a judge telling a judge on a telephone you right you wrong or anything like that. That is not my function and that is not how I see a role of the court. This is the first time after the 9th August that this

matter is coming back before you and it is my proper belief in this case, it is at this stage when we come back before you in open court. So the light comes through and shines on these procedures.

THE COURT: And with respect, Mr. Mottley, I don't disagree with you there either. All I am saying to you is if on the 9th August you were of the view that this court was falling into grave error. You also have a responsibility to the court and there was nothing stopping you saying, "ma'am I cannot discuss this now, I will not discuss this now, it is most improper, and if you are proposing a matter like that we need both to come back to you". There was nothing stopping you from saying that to me.

MR. MOTTLEY: No, no, no, My Lady, the proper thing to do is to come back before the court.

THE COURT: But there was nothing stopping you in so guiding the court. If you were of the view at that time that the court was falling into fundamental error. It can happen to a judge, it does happen to judges, so if I call you figuring well no, no this is not proper, this is not the way it is done. Say to me quite politely ma'am, "I cannot discuss this any further with you, the best way to proceed or the proper way to proceed is to call us back into court and deal with the matter. But nothing like that happened and quite the opposite. I put down the phone with the clear impression that you had no objection to me proceeding in that manner proposed.

MR. MOTTLEY: My Lady, how can you arrive at that? How can you arrive at that conclusion? I do not believe that I should be carrying on any conversation and telling you, you are right or wrong on a telephone in the absence of the other counsel? I do not believe that any correspondence I do not believe

communication in relation to a matter before a court should take place with a judge in the absence of the other counsel. That is not my belief and that's not the way I was brought up and that's not the way I see people practice law.

THE COURT: Fair enough. So if a judge calls you, you believe the judge is doing something that is improper, what do you say to the judge, "Ma'am I cannot continue this conversation?" But you didn't do any of those things. You didn't say to me "We need to come back before you; I should not discuss this with you. You gave me the clear impression—

MR. MOTTLEY: That's different, My Lady. I gave you a clear impression but I never said anything --

THE COURT: Clear impression and understanding.

MR. MOTTLEY: But I never told you that I was in agreement with what you were doing.

THE COURT: You did not tell me you were not. You said quite the opposite.

MR. MOTTLEY: No, My Lady.

THE COURT: What you said to the court was – because Mr. Mottley if at that stage it was clear obvious that no, Mr. Mottley is not going to proceed down that line, he does not think it is correct, there is no way that I would have pursued it. There is no way. Why if a counsel says to me and brings it to my attention that I have fallen into grave error, why would I persist?

MR. MOTTLEY: My Lady, the place for me to tell you that you falling into grave error, is here in the courts where it is on record. I am not telling you –

THE COURT: But you were quite free to tell me there and then.

MR. MOTTLEY: I am not having any private conversation with a judge telling a judge she is falling into error. That is not my role. But when you come before the court and the error is there, I am going to point it to you for the purposes of the record -- in support of record.

THE COURT: Mr. Mottley, just a minute. I believe that if you are of the view that I have committed so grave and egregious an error, that I need to recuse myself from it at this stage and the matter will have to be reheard by another judge.

MR. MOTTLEY: No, I am not saying that, My Lady. I know that is exactly what they would like because that is exactly -

THE COURT: At this point in time I am not about what anybody would like, about this point and time, I think I am about what is fair and what is just, and you have pointed out to me quite clearly that what I have done in speaking to you on the telephone, is quite unfair, quite improper, quite unjust. I would accept that and I will immediately recuse myself from this matter.

MR. MOTTLEY: No, you cannot -- My Lady, I am going to appeal against that order, because judges can't recuse themselves just like that. Because this is exactly what you are doing, My Lady –

THE COURT: If I have prejudiced the matter -- if I have done something that is unjudicial and seriously so –

MR. MOTTLEY: No, I have not said you have not done anything prejudicial, I never said that. What I said is that you

cannot recall a witness at this stage and what I am trying to say –

THE COURT: You said much more than that, counsel.

MR. MOTTLEY: My Lady, I said you have a duty.

THE COURT: Exactly. You have said that what I have done in calling you to indicate what I propose to do was improper and that I should not approach counsel in the absence of another in a matter that is before me. And that is prejudicial, that is severe prejudice to either party or to both.

MR. MOTTLEY: No, no, My Lady, because you have a case before you for almost a year, simple, straightforward running down action, nothing more than a magistrate's court case.

THE COURT: And I have committed a grave error, according to senior counsel, in the way that I have proceeded. And I believe that grave error that you would wish then to bring any decision that I write into serious question. So I do not believe I should proceed further. I think it is in the interest of both parties that this matter be heard again as soon as possible by another judge and I recuse myself. I am saying that for the last time.

MR. MOTTLEY: My Lady, this thing is now improper My Lady, because you are not being fair. This is exactly what they want. You heard a case and you have not given a decision. What you are doing now, My Lady, you are causing my client unnecessarily to have to go through and pay more money to do a case; a case that you have completed.

THE COURT: Mr. Mottley, a case that you said is a simple running down matter that could be heard by a magistrate. You yourself have just spoken to the simplicity of the matter.

So I do not see why it should take a court longer than a day or two to hear it over again and to have the—

MR. MOTTLEY: My Lady, that is not the point. It is unfair —

THE COURT: I accept the error of my ways.

MR. MOTTLEY: My Lady, it is unfair to a litigant for a judge just to recuse herself without any proper foundation. All I am saying to you is that you cannot call another witness and that you have the evidence before you and that the case ought to be given a decision on the evidence. Because you are saying -- you see how unfair this is, My Lady? You say that you found the witness and yet he swears an affidavit in which he says that the family found the witness. And he swore an affidavit which he puts before the court a completely different -- and that is what is unfair.

THE COURT: I did not find any witness. All there was an indication to me as to what the possible address was and that he was a former policeman. I did not find any witness.

MR. MOTTLEY: And that in itself is most improper, My Lady.

THE COURT: So if I conducted myself in this improper manner, it is in the interest of everybody that this matter be restarted.

Thank you.

Anything further from either of you today?

[Mr. MOTTLEY leaves the courtroom]

MR. ALERT: Ma'am, regrettably My Lady has taken that

> position. It is not in our interest that a 2008 case now has to be restarted. But if that is a decision of the court we have to live by. The other thing is -- ma'am, I'll leave it there. I wouldn't respond to anything that Mr. Mottley has accurately or inaccurately characterized that was said before the court. That's it.
>
> THE COURT: Thank you. The next matter please."

THE APPEAL

Leave to Appeal

[14] On 22 July 2013, the appellants filed a notice of application for leave to appeal "the oral decision" of **Richards J** made on 8 July 2013. After a hearing before this Court on 19 September 2013, the appellants were granted leave to appeal.

The Notice of Appeal

[15] On 23 September 2013, the appellants filed a notice of appeal against "the oral decision" of **Richards J** made on 8 July 2013. In particular, they appealed against the "orders" of **Richards J** that:

> "(A) The Court had jurisdiction to seek further evidence after both the Claimant and the Defendant had closed their case and submitted written and oral submissions on the evidence adduced during the trial and after judgment had been reserved;
>
> (B) The learned trial judge recusing herself after the trial of the matter had been concluded on June 27, 2012 with judgment reserved."

[16] Six grounds of appeal were notified in the notice of appeal as follows:

> "a. The Learned Trial Judge erred in fact and in law in finding that she had jurisdiction to seek further evidence after both the Claimant and the Defendant had closed their case and submitted written and oral submissions on the evidence adduced during the trial after judgment had been reserved;
>
> b. The Learned Trial Judge erred in fact and in law in making the decision to recuse herself on her own motion and when the parties or their counsel did not make any request that she should recuse herself;
>
> c. The Learned Trial Judge erred in fact and in law in taking the decision to recuse herself without affording either party's counsel an opportunity of addressing her on the issue of recusal at a stage when all the evidence had been given and submissions made since June 2012.
>
> d. The Learned Trial Judge erred in law in making a decision to recuse herself without any regard to the effect her conduct would have on the parties and the expense that her unjustified conduct would cause the parties.
>
> e. The Learned Trial Judge erred in fact and failed to appreciate that at this stage of the trial it was her duty to render her decision based on the evidence led before her and that she did not possess any inquisitorial functions to search for any witness.
>
> f. The Learned Trial Judge erred in law by finding that she had jurisdiction to reopen, on her own motion, a trial to call an additional witness."

COURT'S ANALYSIS AND CONCLUSIONS

The Issues in this Appeal

[17] Based on the pleadings and written and oral submissions before this Court, two major issues arise for our determination. The first coincides with grounds b, c and d in the appellant's notice of appeal which relate to **Richards J's** decision to recuse herself from the case at the hearing on 8 July 2013. For convenience, we refer to this as the recusal issue. The second coincides with grounds a, e and f in the notice of appeal. These grounds relate to **Richards J's** jurisdiction to seek further evidence after the claimant and defendant had closed their case. For convenience also, we refer to this as the further evidence issue.

[18] We now turn to exploring these issues.

The Recusal Issue

This Court's jurisdiction

[19] A preliminary point which arises in relation to **Richards J's** recusal decision is whether this Court has jurisdiction to hear an appeal against that decision. This question arises because **section 52** of the **Supreme Court of Judicature Act**, **Cap 117A** (**Cap 117A**) stipulates that the jurisdiction of this Court is "to hear and determine … appeals from any judgment or order of the High Court or a judge thereof". This section clearly contemplates that, for this Court to have jurisdiction to hear an appeal, the appeal must be against a judgment or order.

[20] Given the need for a "judgment" or an "order" to ground appellate jurisdiction, an appeal pursuant to **section 52** of **Cap 117A** against a decision of a judge to recuse himself/herself presents a particularly difficult problem. Conceptually, it is impossible to characterise such a decision as a "judgment" or "order" since a "judgment" or "order" must be directed by the court to relevant parties and not to the court itself or to the judge himself/herself. This analysis is supported by Sir Anthony Mason, former Chief Justice of Australia, who, writing extra-judicially in an article entitled "*Judicial Disqualification for Bias or Apprehended Bias and the Problem of Appellate Review*" (1998) *Constitutional Law and Policy Review 21* at *22*, expressed the view that a recusal "decision … does not constitute a curial order from which an appeal would lie to a supreme court in the hierarchy".

[21] Notwithstanding, Commonwealth case authority suggests that the difficulty presented by the requirement for a "judgment" or "order" may be satisfied in an appeal against a recusal decision where that recusal decision is raised as a ground in an appeal against the substantive judgment or order of that judge: see **R v Watson; ex parte Armstrong (1976) 136 CLR 248** at **266**, **Muir v CIR [2007] 3 NZLR 495 (NZCA) (Muir)**. Indeed, the **Caribbean Court of Justice** (**CCJ**) in **Walsh v Ward [2015] CCJ 14 (AJ)**, (**Walsh v Ward**) without mentioning or expressing an opinion on the recusal decision appellate

review problem, appears to have accepted the law adumbrated in the aforementioned Commonwealth cases.

[22] In the case before us, the appeal is against "the oral decision of the Honourable Madam Justice Richards, Judge of the High Court" that the "Court had jurisdiction to seek further evidence after both the Claimant and the Defendant had closed their case and submitted written and oral submissions on the evidence adduced during the trial after judgment had been reserved". **Richards J's** recusal decision is raised as a ground of appeal against the "oral decision" of **Richards J**. Based on the above authorities, it is our judgment that this Court has jurisdiction under **section 52** of **Cap 117A** to hear the appeal against **Richards J's** recusal decision.

[23] And so, we turn to the merits of the appeal against **Richards J's** recusal decision.

Applicable principles

[24] In approaching the substantive recusal issues in this case, it is our judgment that it is best to begin by underlining the fact that **Richards J** recused herself on her own motion; not, as is typically the case, on an application by one of the parties to the action before her. Given this fact, the question which naturally arises is: what is the applicable legal test in deciding whether **Richards J's** decision to recuse herself was legally justified.

[25] To begin with, recusal is inextricably bound up with the fundamental right to a fair hearing within a reasonable time by an independent and impartial court established by law as enshrined in **section 18 (8)** of our **Constitution**. Recusal is an important safeguard in ensuring that members of the public get this fair hearing which they are constitutionally guaranteed. In our view, this right inevitably implies an obligation on judges to hear and decide cases before them unless there is a compelling ground for disqualification. This obligation has been referred to as a "duty to sit" in the Australian High Court case of **Re JRL; exp CJL (1986) 161 CLR 342** at **352**, in the New Zealand Court of Appeal case of **Muir** at **para [35]** and in the New Zealand Supreme Court case of **Saxmere Company Limited and others v Wool Board Disestablishment Company Limited [2009**] **NZSC 72** at **paras [8]** and **[88]**.

[26] The duty of a High Court judge to sit in a civil case in Barbados appears to us to be mandated by **section 14** of **Cap 117A**. That section provides as follows:

> "Every proceeding in the High Court in a civil cause or matter, and all business arising out of those proceedings shall, so far as is practicable and convenient, and subject to this Act or any other Act, be heard and disposed of by a Judge sitting alone; and all proceedings in any action or matter subsequent to the trial or hearing, down to and including the final judgment or order, shall, so far as is practicable and convenient, be taken before the Judge before whom the trial or hearing took place."

This provision, in our view, obliges a High Court judge, as a general rule, to sit and decide any case allocated to him/her.

[27] Inextricably bound up with the duty to sit is the presumption of impartiality of judges which rests at the bedrock of the common law system of justice on which our system is based. This presumption is that, because of the professional background required for their appointment, as is the case in Barbados, pursuant to **section 7** of **Cap 117A**, judges are to be assumed to be persons of "conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances": per L'Heureux-Dubé and McLachlin JJ in **R v S (RD) [1997] 3 SCR 484** (**R v S (RD)**) at **[32]** or, as was said in the English House of Lords in the case of **Helow v Secretary of State for the Home Department and another [2008] 1 WLR 2416** at **[8]**: "The judge can be assumed, by virtue of the office for which she has been selected, to be intelligent and well able to form her own views."

[28] In the Supreme Court of Canada in **R v S (RD)** at **[32]**, L'Heureux-Dubé and McLachlin JJ noted that the presumption of impartiality "carries considerable weight". The measure of this weight is seen in the Privy Council decision in **Rees v Crane [1994] 2 AC 173** where, despite evidence of personal animosity of Bernard CJ of Trinidad and Tobago towards the suspended Justice Rees, the presumption of impartiality was not displaced against Bernard CJ, the

Privy Council stressing: "it is not lightly to be assumed that he would allow personal hostility to colour his decision to suspend the respondent."

[29] Against the foregoing backdrop, Mr. Mottley QC contended, and Mr. Alert agreed, that the well-settled test, finally established in England by Lord Hope of Craighead in the House of Lords in **Porter v Magill [2002] 2 AC 357** (**Porter v Magill**) at **494**, was the applicable test in determining whether **Richards J's** duty to sit and the presumption of her impartiality were displaced in favour of her recusal in this case. In **Porter v Magill**, Lord Hope propounded that test as follows:

> "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."

[30] In **Walsh v Ward**, the **Caribbean Court of Justice** appears to have accepted the **Porter v Magill** test as representing the law in Barbados. In this regard, Saunders J, expressly referring to **Porter v Magill**, said at **para [95]**:

> "In determining whether…a judge is disqualified from hearing a case, the reviewing court must place itself in the position of an objective and fair-minded lay observer fully informed of the facts. The pertinent question is whether such an observer would conclude that there was a real *possibility* of bias. What matters is not so much the reality of bias or prejudice on the part of the judge but its appearance." (Emphasis in original).

Importantly, Saunders J continued by observing that: "This test is aimed at preserving confidence in the administration of justice and not at censure of the judge".

[31] We pause here to recall that, in almost every case in which the **Porter v Magill** test has been applied, recusal arose on an application by one of the parties to the action and not upon the judge's own motion. This difference notwithstanding, we agree with counsel that the **Porter v Magill** test is equally applicable in a case such as the one before us where recusal is upon the judge's own motion. That is so because the **Porter v Magill** test is broad in its scope. That test raises a question of possibility of bias ("real and not remote") and not the probability of bias. Equally important, the test does not involve any attempt to predict or enquire into the actual thought processes of the judge. For these reasons, the test appears to us to be broad enough to embrace situations in which recusal is requested by a party to the litigation, as well as where the judge, as in this case, recuses herself *suo moto*.

[32] We therefore turn to applying the **Porter v Magill** test to the case before us.

Application of principles

[33] We begin by noting that, in applying the **Porter v Magill** test, the case law has made it plain that that test embraces two stages. Stage one involves an inquiry into all the context and circumstances which it is said might have

bearing on the suggestion that the judge might be biased. As was stated by the New Zealand Court of Appeal in **Muir**: "This factual inquiry should be rigorous, in the sense that complaints cannot lightly throw the 'bias ball in the air'." Stage two is ascertaining whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal might be biased. Here, the emphasis of the test is not the belief of the judge, but how would the reasonable observer view his/her conduct.

[34] In applying the **Porter v Magill** test, then, both the context and the particular circumstances said to give rise to a real possibility of bias must be ascertained as a first step. In this case, we consider it convenient to start with matters of context, and in particular, the legal structure and environment in which High Court judges and counsel are involved in litigation work.

[35] High Court judges in Barbados are almost always appointed from persons qualified to practise as attorneys-at-law and who have practised for a period of at least ten years. The full complement of High Court judges is eight, but the Chief Justice may also sit as a judge of the High Court.

[36] On taking up an appointment, a judge is required to take the constitutional oath to exercise his/her office of judge of the High Court "without fear or favour, affection or ill will". That oath embodies an overwhelming

responsibility of judicial integrity and its effulgence shines brightly as a guiding principle in every decision that a judge is called upon to make.

[37] The role and function of a High Court judge in a civil case is to hear the evidence put before the court, make rulings on all matters raised in the proceedings and to render a decision in disposal of the case based on the legal and factual merits as the judge sees them. The decision is to be made on the evidence called before the court whether that evidence be *vivo voce* or documentary. The evidence before the court is that led by the claimant, that emerging from the cross-examination of the claimant's evidence, that called by the defendant and that emerging from the cross-examination of the defendant's evidence.

[38] Attorneys-at-law in a civil case receive instructions to appear before the High Court to represent the parties, claimant and defendant. Thus, it is the duty of an attorney-at-law to represent the interests of the party from whom he/she has received instructions. It is accepted that in discharging his/her duty of representing his/her client in court, an attorney-at-law is entitled, and perhaps obligated, to do so fairly and fearlessly but must do so within the bounds of the traditions of the bar and the dignity of the court. This is the epitome of the adversarial system.

[39] The foregoing describes the factual context of our enquiry. We must therefore now turn to the factual circumstances which it is said might have bearing on the suggestion that **Richards J** might be biased. Generally speaking, the factual circumstances of this case may be found in the statement of case, the witness summaries and witness statements, the correspondence passing between counsel and the transcript of the proceedings of the hearing on 8 July 2013. In our view, however, the circumstances relevant to **Richards J's** recusal decision are mainly confined to the exchanges between **Richards J** and Mr. Mottley QC at the hearing on 8 July 2013.

[40] We have set out above the record of what transpired at the hearing on 8 July 2013. That record discloses vigorous exchanges between **Richards J** and Mr. Mottley QC on the court's jurisdiction to call a witness after counsel on both sides had closed their respective case and the judge reserved the matter for her decision. These exchanges were prompted by Mr. Mottley QC's objection to the driver of B135 being called as a witness at that stage of the proceedings on the basis that the judge would be legally wrong so to do. To that objection, **Richards J's** exchanges centred around her claim that she had discussed the call of the witness with Mr. Mottley QC in a telephone conversation and that he had not voiced any objection in that conversation.

[41] A central circumstance which might be said to have bearing on **Richards J's** decision to recuse herself is vividly captured in the following repartee between **Richards J** and Mr. Mottley QC:

> **Richards J**: "At this point in time I am not about what anybody would like, about this point and time, I think I am about what is fair and what is just, and you have pointed out to me quite clearly that what I have done in speaking to you on the telephone, is quite unfair, quite improper, quite unjust. I would accept that and I will immediately recuse myself from this matter."
>
> Mr. Mottley QC: "No, you cannot -- My Lady, I am going to appeal against that order, because judges can't recuse themselves just like that. Because this is exactly what you are doing, My Lady –"
>
> **Richards J**: "If I have prejudiced the matter-- if I have done something that is unjudicial and seriously so –"
>
> Mr. Mottley QC: "No, I have not said you have not done anything prejudicial, I never said that. What I said is that you cannot recall a witness at this stage and what I am trying to say"
>
> **Richards J**: "You said much more than that, counsel."
>
> Mr. Mottley QC: "My Lady, I said you have a duty."
>
> **Richards J**: "Exactly. You have said that what I have done in calling you to indicate what I propose to do was improper and that I should not approach counsel in the absence of another in a matter that is before me. And that is prejudicial, that is severe

> prejudice to either party or to both."
>
> Mr. Mottley QC: "No, no, My Lady, because you have a case before you for almost a year, simple, straightforward running down action, nothing more than a magistrate's court case."
>
> **Richards J**: "And I have committed a grave error, according to senior counsel, in the way that I have proceeded. And I believe that grave error that you would wish then to bring any decision that I write into serious question. So I do not believe I should proceed further. I think it is in the interest of both parties that this matter be heard again as soon as possible by another judge and I recuse myself. I am saying that for the last time."
>
> Mr. Mottley QC: "My Lady, this thing is now improper My Lady, because you are not being fair. This is exactly what they want. You heard a case and you have not given a decision. What you are doing now, My Lady, you are causing my client unnecessarily to have to go through and pay more money to do a case; a case that you have completed."

[42] Having due regard to the context and circumstances in which **Richards J** decided to recuse herself, the question to be answered now is whether the fair-minded and informed observer would conclude that there was a real possibility of bias. In our judgment, in approaching that question, there are three very important matters which the fair-minded and informed observer must be taken to understand in this case. The first is the independence and presumed impartiality of judges having taken the judicial oath. The second is the judge's duty to sit as explained above. The third is that our judicial system

functions to decide cases between litigants and that counsel are a critical element of that system. We address these matters in what follows.

[43] Prior to the **CCJ** decision in **Walsh v Ward**, we would have considered that the fair-minded and informed observer would not have concluded that there was a real possibility of bias on the part of **Richards J** in the context and circumstances of this case. We would have been of the view that the fair-minded and informed observer would have concluded that the robust exchanges between **Richards J** and Mr. Mottley QC at the hearing on 8 July 2013 were nothing more than was to be expected in a civil trial and was not enough to displace the presumption of **Richards J's** impartiality. We would have been of the further view that the fair-minded and informed observer would have concluded that the question at issue in these exchanges, namely, whether a witness could have been called at that stage of the proceedings, could have been resolved on an appeal if necessary. However, we feel ourselves jurisprudentially bound, in consonance with the **CCJ's** mission of crafting a Caribbean jurisprudence, to reconcile any such conclusions with **Walsh v Ward**.

[44] In **Walsh v Ward**, an attorney-at-law filed an application for an order that two justices of appeal recuse themselves from taking part in the disposal of the appeal in that case. The ground of the application was that the matters set

out in the application would cause a fair minded and informed observer having regard to those matters, to believe that there was a real possibility that the justices were biased.

[45] The matters set out in the application were that: (i) the justices had recently sought to engage legal counsel with a view to bringing legal proceedings against the attorney-at-law in a recently concluded appeal for defamation arising out of email correspondence sent by the attorney-at-law to various attorneys-at-law relating to the proceedings in the appeal; (ii) the open and manifest antagonism, "and on occasions rudeness", shown by the justices in hearing of the appeal; (iii) the refusal of the panel, and in particular the justices to allow the attorney-at-law the opportunity to reply on points of law raised by counsel on the other side; (iv) the failure of one of the justices who was then acting Chief Justice to reply to any of the letters written by the attorney-at-law which sought to invite the justices to recuse themselves from the hearing of that appeal; (v) the fact that it was only after the attorney-at-law brought a formal application in the appeal that a new panel of judges was appointed to hear the attorney-at-law's application; (vi) that the record would show that the panel in the appeal of which the justices were part manifested throughout the hearing behaviours that were not only prejudicial to the attorney-at-law, but can be objectively seen as being a predilection against the

attorney-at-law; (vii) the panel, without hearing the attorney-at-law, ruled that an application brought by the attorney-at-law for leave to appeal the decision in the appeal to the **CCJ** did not comply with the rules but did not give any reasons as to why; and (viii) that the panel did not reply to the attorney-at-law's letter requesting reasons for its decision on the application for leave to the **CCJ**.

[46] This Court dismissed the application as being entirely without merit. This Court held that it would be impossible for the fair-minded and informed observer to conclude, having regard to the facts, that there was a real possibility of bias on the part of the justices in that case. While acknowledging that the transcript revealed "vigorous exchanges between the Court and counsel", this Court held that those exchanges were nothing more than the fair-minded and informed observer would expect and that the matters alleged by the attorney-at-law went more towards an appeal against the decision of the Court than towards conduct that warranted recusal.

[47] In reaching its decision, this Court had firmly in mind the Privy Council decision in the Trinidad and Tobago case of **Rees v Crane** and that de la Bastide P in **AG v Joseph and Boyce [2006] CCJ 3 (AJ) (Joseph and Boyce)** declared such a decision to be binding on this Court "until and unless it is overruled" by the **CCJ**. A dispositive issue in **Rees v Crane** was whether

bias was established against the Chief Justice in his decision to suspend Justice Crane and to recommend to the relevant Commission to refer Justice Crane to a tribunal on the basis of personal animosity on the part of the Chief Justice which predisposed him against Justice Crane. The evidence was that there was an acrimonious relationship between the two men, that the Chief Justice showed from time to time between 1986 and 1990 hostility towards the respondent, that Justice Crane was not told by the Chief Justice of his decision to suspend him and to raise with the Commission the question of referring the matter to a tribunal and that Justice Crane, on his return from leave, "had much difficulty seeing the Chief Justice". In the face of this evidence, the Privy Council held that "… their Lordships are not satisfied that "a real danger" of bias has been established **(*R v Gough [1993] AC 646*)**."

[48] The **CCJ** overturned this Court's decision that recusal was not warranted but did not opine on **Rees v Crane**. Two passages from the judgment of the **CCJ** are central to an understanding of the *ratio decidendi* of that decision. The first is to be found at **para [91]** and reads in so far as is relevant as follows:

> "…the Court of Appeal decided that the matters adduced by Mr. Gale QC did not satisfy the substantive for recusal. The court premised its analysis and its decision on the presumption of impartiality of judges. According to the court, because of the professional background required for their appointment, judges are to be assumed to be persons of 'conscience and intellectual discipline, capable of judging a particular controversy fairly on

> the basis of its own circumstances'. This presumption, it was said, carried 'considerable weight' and it was not to be assumed that a judge would allow personal hostility to colour his decision. The court cited several cases including *R v S(RD) [1997] 3 SCR 484*; *Helow v Secretary of State for the Home Department [2008] 1 WLR 2416*; *Rees v Crane [1994] 2 AC 173*; and Section 7 of the Supreme Court of Judicature Act Cap 117A which outlines the requisite qualifications for appointment as a judge."

[49] The second is at **para [98]** where the **CCJ** stated as follows:

> "The Court of Appeal justified its decision against recusal by heavily stressing the presumption of impartiality of a judge. This presumption is not an impenetrable barrier to the making of a successful application that a judge should be disqualified on account of apparent bias. Like other presumptions, it is rebuttable. The professional status of a judge is only one factor that the informed lay-observer will consider. Here, there was cogent evidence that the judges concerned had recently demonstrated that they had carried with them, out of court, some animus against counsel and were moved to the point of contemplating legal redress against him. The prudent thing for them in the face of a complaint was to have refrained from trying any of Mr. Gale QC's cases until it could be said that a decent period had elapsed sufficient for one to believe that any ill-feeling had subsided. It is simply inconceivable that a lay-observer would not think there is a possibility of bias on the part of a judge who has recently engaged a lawyer to determine whether to institute legal proceedings for defamation against counsel appearing before the judge."

[50] In extracting the ratio of the **CCJ's** decision, it is important to note that the "cogent evidence" of animus that the justices had against counsel mentioned in the last cited passage was solely such "evidence" as was adduced by counsel before the **CCJ** and it does not appear that the justices were afforded

an opportunity to confront that "evidence". It follows therefore that the ratio of the **CCJ's** decision is that, as long as there is some evidence of animus, the presumption of impartiality may be treated as rebutted.

[51] It is plain from the foregoing that the weight given by the **CCJ** to the presumption of impartiality of judges was far less than that given by the Privy Council in **Rees v Crane**, and indeed, that given by courts in other Commonwealth jurisdictions. But, the **CCJ** did not consider the authority of **Rees v Crane** nor did the **CCJ** suggest anything that could be interpreted as explaining its decision in light of **Rees v Crane**.

[52] From the point of view of *stare decisis* as it applies to this Court, the absence of an explanation of **Rees v Crane** by the **CCJ** is significant, because, in **AG v Joseph and Boyce**, the **CCJ** declared the authority of Privy Council decisions in our courts after the establishment of the **CCJ** to be as follows:

> "The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written

> law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court. Accordingly we reject the submission of counsel for the appellants that such decisions were and are not binding in Barbados."

[53] The upshot of the foregoing is that, after **Walsh v Ward** and in light of **AG v Joseph and Boyce**, we are confronted by two different standards of determining whether a lay-observer would think there is a possibility of bias on the part of **Richards J** in this case, namely, the **Rees v Crane** standard and the **Walsh v Ward** standard. In our judgment, no matter which standard is applied, the conclusion that it was not open to **Richards J** to recuse herself on the basis of bias in the context and circumstances of this case is inescapable.

[54] Applying the first, the **Rees v Crane** standard, it is difficult to see how a fair-minded and informed lay-observer could think that **Richards J** does not possess a degree of impartiality that would render a possibility of bias unlikely. This is because the **Rees v Crane** standard renders the presumption of judicial impartiality almost impenetrable. We note here that *Professor Albert Fiadjoe* in his work *Commonwealth Caribbean Public Law 3rd ed Rutledge Cavendish (2010)* at *p 257* cites **Rees v Crane** as authority for the proposition that "a judicial officer is expected to possess a degree of rationality and to be largely immune to certain preconceptions". Put simply,

Rees v Crane establishes an extremely high bar to be scaled in rebutting the presumption of impartiality of judges.

[55] The second, the **Walsh v Ward** standard, yields a similar conclusion. This is because that standard requires that there be some evidence to rebut the presumption of **Richards J**'s impartiality and there was absolutely none in this case. Indeed, in the exchanges between **Richards J** and Mr. Mottley QC, on more than one occasion, while imploring **Richards J** not to recuse herself, Mr. Mottley QC assured that he was not questioning the impartiality of **Richards J** but was merely expressing disagreement with her view of the law in calling a witness at that stage of the case. Accordingly, it is our view that no fair-minded and informed lay-observer would think that in these circumstances a real possibility of bias was likely.

[56] We would add for completeness that, notwithstanding the foregoing, it may very well be that we should only have regard to the **Walsh v Ward** standard in this appeal. This is because, in the very recent **CCJ** decision in **Nervais v R [2018] CCJ 19 (AJ)**, Byron P stated as follows:

> "There are cases where the jurisprudence from the CCJ differs from and is inconsistent with decisions made by the Privy Council while it was the final appellate court for Barbados. In such cases, even in the absence of specific overruling of that decision of the Privy Council, it must be open to the courts in Barbados to apply the jurisprudence emanating from the CCJ."

As already intimated, choosing the **CCJ** over the Privy Council in this case would not lead to any conclusion other than that no fair-minded and informed lay-observer would think that in the circumstances of this case a real possibility of bias was likely and that it was not open to **Richards J** to recuse herself on the basis of bias.

[57] Our conclusion that **Richards J** was not bound to recuse herself in this case raises the very knotty question of whether this Court can order **Richards J** to resume sitting and to continue hearing the case. On this question, counsel for the appellants did not provide us with any authority one way or the other; counsel for the respondent, on the other hand, drew our attention to the Appellate Court of Connecticut decision of **Consiglio v Consiglio 48 Conn App (1998), 711 A. 2d 765** which seems to support the proposition that if a judge recuses himself from a case, no judicial authority can lawfully order him/her to hear the case; and our researches have not revealed any Commonwealth Caribbean, or other Commonwealth, authority indicating any answer one way or the other.

[58] And so, unaided by case authority or other legal authority, we must unravel the Gordian knot that is the question of whether this Court can order **Richards J** to resume sitting and to continue hearing the case. In this regard, it is our judgment that this Court cannot so order for two reasons.

[59] The first is that **section 14** of **Cap 117A** which governs the duty of a High Court judge to sit in a civil case does not appear to contemplate enforcement by any order of this Court**.** That section, which is recited at **para [25]** of this judgment, on its face appears to be addressed to the High Court judge himself/herself requiring him/her in every proceeding in a civil case to hear and dispose of all business arising in the case "so far as practicable and convenient". The section also requires that proceedings in any action or matter subsequent to the trial or hearing, down to and including the final judgment or order, be taken before the judge before whom the trial or hearing took place "so far as practicable and convenient". Significantly, the section does not establish any specific remedy for breach of its provision and more importantly does not envisage its enforcement by order of this Court.

[60] But, even if **section 14** contemplated enforcement of a judge's duty to sit by order of this Court, such order would still not be available in the specific instance of recusal by a judge *suo moto*. This is because the phrase "so far as practicable and convenient" in **section 14** is an unmistakeable statutory indication that the duty to sit is not absolute but is qualified by practicability and convenience. In our judgment, recusal from a case by a judge on his/her own motion is undoubtedly an event which would render it impracticable and inconvenient to insist on a judge's **section 14** duty to sit.

[61] The second reason is grounded in general principles governing judicial recusal. As regards this, it is undoubted that the question of a judge's recusal is in the reasonable discretion of that judge. The exercise of that discretion is an intrinsic part of his/her independence. This being so, it follows that as a general principle an order by an appellate court seeking to compel a judge to hear a matter after self-recusal is inconsistent with judicial independence.

[62] In light of the foregoing, our conclusion on the recusal issue is that the judge was not legally justified in recusing herself in the circumstances of this case. That notwithstanding, this Court has no power to enforce her **section 14** duty to sit.

[63] We now turn to the second issue raised in this appeal, namely, the further evidence issue.

The Further Evidence Issue

[64] As already noted, in their notice of appeal, the appellants claimed to "appeal against the oral decision" of **Richards J** that she had jurisdiction to seek further evidence after both the claimant and defendants had closed their case. Both the appellants and the respondent have presented before us oral as well as written submissions on this issue. This notwithstanding, we have searched the records assiduously and have not found any decision or order, oral or otherwise, of **Richards J** on her jurisdiction to seek further evidence in the

circumstances of the case before her. The transcript of the proceedings reveal exchanges between **Richards J** and Mr. Mottley QC which ended with **Richards J** notifying the parties that she was recusing herself from the case.

[65] It bears repeating that **Richards J** gave no decision, order or judgment on her jurisdiction to seek further evidence in the circumstances of the case before her. This being so, this ground of appeal is not properly raised before us and we have no jurisdiction under **section 52** of **Cap 117A** to pronounce on it.

DISPOSAL

[66] Given all of the foregoing, this Court orders as follows:

(i) That the judge's decision to recuse herself was not justified in law;

(ii) That, notwithstanding, the order sought by the appellants that the judge be ordered "to render her judgment based solely upon the evidence that was before her during the trial on 19 June 2012, 21 June 2012 and 27 June 2012" is denied;

(iii) That there be no order as to costs.

This Court further orders that the matter be set down for an expedited hearing before another judge of the High Court.

Postscript

[67] This Court wishes to place on record that, subsequent to the filing of the notice of appeal, **Richards J** provided written reasons for her recusal. This document does not form part of the record of appeal. Mr. Mottley QC objected strongly to this Court having regard to this document in this appeal. Out of the abundance of caution, this Court reiterates that that document was not considered by this Court in the determination of the appeal.

Justice of Appeal

Justice of Appeal **Justice of Appeal**