

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV No. 0997 of 2008

BETWEEN

TRISTAN BROOMES

CLAIMANT

AND

AARON PARRIS CONSTRUCTION INC.

FIRST DEFENDANT

TIMOTHY EDWARDS

SECOND DEFENDANT

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2012: June 19, 21 and 27

2013: July 08

2016: June

Mr. Ivan A. Alert, Attorney-at-Law for the Claimant.

Mr. Elliott D. Mottley Q.C. and Ms. Marilyn Y. Moore, Attorneys-at-Law of E.D. Mottley & Co. for the Defendants.

REASONS FOR RECUSAL

Introduction

[1] On 08 July 2013, this matter was continued after a hiatus of approximately

one year. After hearing the submissions of counsel for the Defendants, I determined that, in the interest of justice, I should immediately recuse myself from any further involvement in the proceedings. The reasons for my recusal are tendered pursuant to an appeal filed by the Defendants on 13 September 2013.

Background

- [2] A brief history of the proceedings would be appropriate. This case involves a claim for personal injuries arising out of a motor vehicle accident that occurred in December 2006. The trial took place on 19 and 21 June 2012. Three witnesses gave evidence for the Claimant, and four witnesses offered evidence on behalf of the Defendants. Oral submissions were heard on 27 June 2012, and an order made for written submissions to be received by the Court on or before 27 July 2012.
- [3] At the beginning of the August 2012 court recess, I perused the evidence with a view to initiating the drafting of the decision. There was evidence from an eyewitness that was challenged by counsel for the Defendant. The evidence also indicated the existence of another eyewitness who had a better view of the accident. This other eyewitness was the driver of the minibus B135. Minibus B135 was mentioned by the Claimant and his eyewitness.

B135 was also central to the evidence of the witnesses for the Defence. The police investigator informed the Court that he had made several attempts to interview the bus driver, but he was unsuccessful. Counsel for the Claimant was also unable to locate this witness.

[4] I considered that this absent witness was critical to the case. I further considered the possibility of reopening the case, so that the evidence of the missing witness could be received by the Court. With this in mind I contacted Mr. Mottley Q.C. and Mr. Alert by telephone on 09 August 2012. This was approximately two weeks after the case was closed, pending delivery of the judgment.

[5] I spoke first with Mr. Mottley Q.C. I indicated my wish to reopen the case to take evidence from the driver of B135. I told Mr. Mottley Q.C. that, in all fairness, the Defence would be permitted to recall its witnesses if necessary. Mr. Mottley Q.C. informed me that he had no difficulty with my proposal. However, his challenge was that he would be out of the island for various periods in the future. I also told Mr. Mottley Q.C. that after I spoke with him I would be calling counsel for the Claimant, Mr. Alert. Mr. Mottley Q.C. registered no verbal objection to my proposal to reopen the case.

[6] After speaking with Mr. Mottley Q.C., I contacted Mr. Alert on the same day. Mr. Alert had no objection to my proposal, but expressed the concern

that he was previously unable to locate the witness. Despite this concern, Mr. Alert undertook to make another attempt to find the witness.

- [7] I expressed the view to both counsel that in a small island like Barbados, the driver of a minibus, on a particular route, should be found unless he was deceased or had left the island. It subsequently came to my attention that the driver of B135 was a former policeman. This information was passed on to Mr. Alert, and may explain why a member of the Claimant's family, who is also a police officer, was able to find the witness.

The Events of 08 July 2013

- [8] I heard nothing further about this matter until it appeared on my list for 08 July 2013. It was then that I became aware of Mr. Alert's application for the Court to take the evidence of Lennox Hewitt. When the matter was called, Mr. Alert requested the Court Marshal to call for Lennox Hewitt. Given the possibility that evidence might be taken by the Court, counsel for the parties were requested to pause to allow the FTR to be turned on to record the proceedings.
- [9] When the matter resumed, Mr. Mottley Q.C. proceeded as per the transcript of proceedings. The Court understood Mr. Mottley Q.C. to have made statements that:
- (1) disavowed any agreement with the Court to permit the reopening of

the case to hear the evidence of the driver of B135;

- (2) accused counsel for the Claimant of swearing to untruths in an affidavit that the Court had not yet seen;
- (3) accused the Court of procedural impropriety by speaking to counsel for the parties separately about a matter before the Court; and
- (4) accused the Court of improper conduct by finding a witness in the matter.

Interpretation of Statements

[10] With respect to my conversation with Mr. Mottley Q.C. on 09 August 2013, what is evident is that Mr. Mottley Q.C. questioned the truthfulness of the Court's account of the conversation. I say that he agreed to reopen the case. Mr. Mottley Q.C. says that he never agreed to do such. I considered that it was untenable for me to continue to preside over this case, when my veracity and professional reputation were called into question by Mr. Mottley Q.C.

[11] Mr. Mottley Q.C. went further, and accused the Court of procedural impropriety by engaging counsel for the parties in separate conversations about a matter before the Court. He washed his hands clean of any responsibility to guide the Court if, as he maintained, the Court's telephone conversation with him was unethical and misguided. I have never denied that I spoke to counsel for the parties separately.

[12] As Mr. Mottley Q.C. made these separate conversations with counsel on an issue, *ex post facto*, this was a further ground for the Court's self imposed recusal. The forcefulness of Mr. Mottley's indictment of the Court conveyed to the Court that these individual conversations with counsel for the parties could cause substantial injustice to either party, and to the Defendants in particular.

[13] In **Norbrook Laboratories Ltd v. Tank** [2006] 2 Lloyd's Rep 485, Colman J. opined that:

“132. The making of direct unilateral telephone contact by the arbitrator with the parties is generally to be deprecated for it inevitably gives rise to the risk that evidence or submissions will be put before the arbitrator in circumstances where no record is kept of what has been said and without the opposing party's awareness and therefore of an opportunity of challenging it”.

The Court accepts this guidance, and observes that there is the further risk of inaccurate or incomplete recall on the part of any party to the telephone conversations.

[14] I categorically deny that I found the witness Lennox Hewitt. And I have never contacted or spoken to Mr. Hewitt. But Mr. Mottley Q.C.'s statements, in this regard, suggest interference by me in the process; and a breach of the ethical and professional standards of the Bench.

[15] There was no attempt on my part to stop senior counsel from making his objections to Mr. Alert's application. However, his objections were not couched in the language of excess of jurisdiction. Rather, Mr. Mottley Q.C. engaged in a diatribe that focussed on his perception of the Court's misconduct, and the serious irregularities occasioned by that misconduct. Any submissions about jurisdiction, passage of time, or unwarranted additional costs, were overshadowed by direct attacks on the professional reputation of the Court. The statements made went beyond a robust representation of the interests of Mr. Mottley's clients.

[16] In these circumstances, I believed that recusal was the only choice before the Court, given the accusations of grave and questionable conduct on the part of the Court. The decision to recuse was taken in the interests of justice. I considered Mr. Mottley's allegations to be a direct attack on the integrity of the Court, that warranted my immediate recusal.

Directive From the Chief Justice

[17] By memorandum dated 08 July 2013, I informed the Honourable Chief Justice about my decision to recuse as follows:

“CV0997/2008: The trial was completed and the judgment reserved on 27 July 2012. After going through the evidence and the written submissions, I formed the opinion that in the interests of justice an independent eye witness

should be called to give additional evidence. To this end I spoke to both counsel, Mr. E. Mottley Q.C. and Mr. Alert, indicating my wish to reopen the case. I spoke to each counsel by telephone and separately. Neither counsel objected to the proposal. The matter was set down for today, and Mr. Mottley indicated that the Court had committed a grave judicial error by speaking to either counsel in the absence of the other. I indicated that in my view such an error would be [prejudicial] to the parties, and that in those circumstances the matter should be reheard by another judge. Please refer to the FTR recording for Court No.6”.

[18] The Chief Justice responded by a memorandum dated 15 July 2013. He indicated as follows:

“...your recusal is denied for the following reasons:

- (i) The trial has already been completed.
- (ii) Judgement has been reserved since July 2012.
- (iii) It would be injudicious for the trial to be re-heard by another Judge at this late stage in the process.

My directive to you, therefore, is that you proceed with the judgment, and, in the event that any of the parties is aggrieved by the decision of the Court, the option to appeal may be exercised. At that point, the issue of your *ex parte* communication with the attorneys, individually, will be brought up for appellate review”.

[19] Prior to the directive of the Chief Justice, I had on 10 July 2013 amended and approved a draft order submitted by Mr. Alert. In addition, the events

were overtaken by Mr. Mottley's appeal. And I do not see how I could continue to be seized of this matter, given my understanding of Mr. Mottley's submissions.

Delay in Submission of Reasons

- [20] I received notice of this appeal by letter dated 23 September 2013 from the Deputy Registrar. By letter of 02 October 2013, I informed the Deputy Registrar that I had no Notes of Proceedings, but that the proceedings were captured by the FTR in Court No.6. I also requested a copy of the transcript so that I could properly prepare my reasons for the decision to recuse.
- [21] The CAT office maintained for some time that a recording of the proceedings could not be found. I continued to insist that a recording did exist. It was not until 02 September 2014 that a transcript was made available to me. I immediately perused it against the FTR recording, and noticed errors in the document. These errors were drawn to the attention of the Deputy Registrar by letter dated 03 September 2014. An amended transcript was requested as a matter of urgency.
- [22] The Deputy Registrar (Ag.) reminded me that the Court of Appeal Registry continued to await my reasons. This was by letter of 30 October 2015. She was informed immediately that the amended transcript was never received. I am informed that the Deputy Registrar (Ag.) communicated this to the CAT

Office. However, no one in the CAT office could be identified as the individual who prepared the original transcript.

[23] Alternative arrangements were made for the production of the transcript in 2015. My reasons were forwarded after the transcript was finalized. I hereby tender an apology for any contribution I may have made to the delay in this matter.

Sonia L. Richards
Judge of the High Court

**Postscript: Recusal considered by Court of Appeal in Civ. Ap. No.12
of 2013 Aaron Parris Const. et al v. Tristan Broomes (09
Oct. 2018)**