BARBADOS

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

CLAIM NO. 106/2018

IN THE MATTER of the Legal Profession Act Cap 370 of the Laws of Barbados and the Disciplinary Proceedings Rules set out in the Fifth Schedule of the said enactment

IN THE MATTER of the Administrative Justice Act Chapter 109B of the Laws of Barbados AND IN THE MATTER of the Supreme Court (Civil Procedure) Rules 2008 Part 56 AND IN THE MATTER of an Application by Patterson K.H. Cheltenham, Q.C. for Judicial Review

BETWEEN:

PATTERSON K. H. CHELTENHAM **APPLICANT**

AND

THE DISCIPLINARY COMMITTEE **DEFENDANT**

Before: ***The Honourable Mr. Justice William J. Chandler, High Court Judge***

2021: February 9th

Appearances:

Mr. Leslie Haynes QC, Ms. Richel Bowen with him for the Applicant.

Mr. Alair Shepherd QC, Mr. Philip Mc Watt and Ms. Rita Evans with him for the Defendant.

Mr. Steve Straughn, the Interested Party, in person.

Decision

CHANDLER J.

Judicial Review- Application for judge to recuse himself - Judge having made a decision in a previous matter - allegation of apparent bias - applicable principles relative to recusal.

The Application

[1] The application before me is for me to recuse myself from further hearing of the principal application and is made by Mr. Steve Straughn, an Attorney-at-Law engaged in private practice in this Island, and who is an interested party to the principal proceedings.

The parties

[2] The Applicant Mr. Patterson Cheltenham Q.C. (hereinafter called the Applicant) is an Attorney-at-Law registered on the Roll of Attorneys-at Law

and engages in the practice of law in Barbados pursuant to the **Legal Profession Act Cap 370A (Cap 370A)**. The Respondent is a committee or body established by **section 18** of **Cap 370** and is tasked with the duty of upholding the standards of the Legal Profession in Barbados. The Interested Party is an Attorney-at-Law engaged in private practice in this Island and upon whom this Court ordered service of the filed documents in these proceedings.

The Principal Application

[3] This matter arises out of an application made by Mr. Cheltenham QC for an injunction restraining the respondent from continuing an application made before it by the Interested Party alleging a breach of the respondent's ethical duties toward him under **Cap 370A** in a matter intituled **S/C suit No. 1186 of 2013 Steve Straughn v Jennifer Edwards, Gail Atkins and the Attorney General (Straughn v Edwards et al.)** in which Mr. Cheltenham QC represented the first defendant. The Claimant in those proceedings is the Interested Party to these proceedings. The factual matrix is as follows:

1. By letter dated 5 July, 2013 from the Deputy Solicitor General of Barbados, Ms. Donna Brathwaithe Q.C, the Applicant was asked to represent the defendants in **Straughn v Edwards et al** in which the Interested Party (as Claimant therein) had filed an action for defamation against the Defendants. The defendants are all employees in the Office of

the Solicitor General which falls under the Responsibility of the Attorney General of Barbados.

2. The Applicant, acting on instructions, filed a defence to the claim on 15 April, 2014 and on 25 March, 2014 he was served with a Notice of application which sought a court order that the Applicant be disqualified from acting on behalf of the defendants in the proceedings. The basis for this Application was that the Applicant on a previous occasion, was retained by the National Union of Public Workers to represent the Claimant in a matter, which the Claimant alleged, was closely related to the matter before the High Court. Moreover, it was alleged that, during consultation with the Applicant, the Claimant provided the Applicant with evidence on which he intended to rely in his claim before the High Court. The Interested Party alleged that the Applicant was in breach of **Articles 24, 26, 29, 67** and **71** of the **Legal Profession Code of Ethics 1988**.
3. The Interested Party alleged that Mr. Cheltenham QC had been retained as his counsel and ought not to have represented the first defendant in those proceedings.
4. Of significance is the fact that I presided over **Straughn v Edwards et al**. and ruled that Mr. Cheltenham QC was not precluded from representing the first defendant in those proceedings.
5. A court hearing relating to the issue whether the Applicant should be disqualified from acting for the defendants was heard by me and on 3 December, 2015 I held, in a written decision, that the Applicant was not disqualified from acting on the behalf of the defendants. The relevant extracts are reproduced for ease of reference as follows:

> "[36] *In the circumstances and having regard to my findings above, I hold that Articles 29 and 67 of the Code are irrelevant to this matter. I hold further that Mr. Cheltenham Q.C. is not in breach of Article 26 of the Code since he was not retained by the Claimant to file the instant matter. He was not the Claimant's Attorney-at-Law at the date of filing the instant matter and was therefore not retained and under no duty to disclose to the Claimant all the circumstances of his relations to the parties and his interests in or connection with the controversy (if any) which might influence the Claimant in his selection of an attorney-at-law.*
>
> *[37] And it is further ordered that Mr. Cheltenham Q.C. should not be disqualified from acting on behalf of the Defendants in S.C Claim 1186/2013*."

[4] The Interested Party filed a complaint with the respondent on 23 January 2014 alleging a breach of ethical duty towards him on the part of the Applicant and filed an affidavit in support thereof. The Respondent Disciplinary Committee, by way of affidavit sworn by its Chairman, Ms. Rita Evans and filed 21 February, 2018 deposed that the Applicant had a case to answer. This affidavit articulates the complaint of the Interested Party and the various meetings that were held by the respondent.

The Issue

[5] The sole issue to be decided is whether I should recuse myself from continuing to adjudicate over the principal proceedings on the basis of apparent judicial bias alleged by the Interested Party.

The Submissions of the Interested Party

[6] Mr. Steve Straughn appeared in person and prefaced his submissions with the following definition of judicial bias from *West's Encyclopedia of American Law, 2nd edition 2008*:

> *"The predisposition of a judge, arbitrator, prospective juror, or anyone making a judicial decision, against or in favour of one of the parties or a class of persons. This can be shown by remarks, decisions contrary to fact, reason or law, or other unfair conduct."*

Mr. Staughn submits that, "an application for recusal of a judge is a mechanism available through the Courts to ensure that not only is justice done in the Court, but also that justice is clearly seen and perceived to be done in the Court by the officers of the Court as well as the ordinary bystander and layman who is for the most part ignorant of the law, and procedures of the Courts." He relies on **Porter v Magill [2002] 2 AC 357 (Porter v Magill)** as authority for the proposition that, *"a judge must recuse himself or herself if a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that a judge was biased."* He also

cited **R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256**, which espoused the maxim that not only that justice be done, but also that justice must be seen to be done.

Counsel also relied upon **Bjerkham v Timothy Walsh, Stephen Ward and Nature's Produce Inc. [2015] CCJ 14 (AJ) (Bjerkham v Walsh et al)**.

The Applicant's Submissions

[7] The Applicant submits that, without more, the hearing of the Interested Party's complaint by **Chandler J** does not give rise to apparent bias. He further submits that the Interested Party has not produced or referred to any facts which would give rise to apparent bias. The bases relied upon by the Interested Party are not capable of supporting a claim that there is a real possibility that the judge would unfairly favour the Applicant or show disfavour to the complainant.

[8] The Applicant argues that there is no evidence to raise apparent bias; there is no personal friendship between the Judge and the Applicant, nor is there animosity between the Judge and the Interested Party. The Applicant also submits that the Judge has never, during the High Court proceedings or in these proceedings before him, expressed views in such extreme and unbalanced terms as to throw doubt on his ability to try the current case with an objective judicial mind.

[9] It is further submitted that an application for recusal cannot be based on the fact that the Judge made a decision in an action which involved the Interested Party and the Applicant in this action. Judicial impartiality is not affected by the fact that the Judge found for one party in the case and not the other. The Applicant contends that the Interested Party's application for recusal is at best fanciful and unsubstantiated, relying upon **Gladys Gafoor v The Integrity Commission No. 2012-00873,** where **Kokaram JA** stated that improper, spurious and baseless requests for recusal, will do nothing to inspire confidence in the administration of justice.

The Disciplinary Committee's Submissions

[10] Ms. Rita Evans in her affidavit on behalf of the Disciplinary Committee deposed that the judgment of **Chandler J** is not binding on the Disciplinary Committee in the discharge of its statutory duties. The Disciplinary Committee further asserted that the only entity capable of adjudicating on issues of misconduct within the legal profession and under the **Cap 370A** is the Court of Appeal, after it has received a report from the Disciplinary Committee in accordance with **Section 21** of **Cap 370A**.

The Applicable Legal Principles

[11] A balanced discussion on recusal and bias must be prefaced with the relevant constitutional provisions which give judges their power, authority and

independence. The **Constitution of Barbados (the Constitution**) has insulated judges from societal pressure by granting them the security of tenure and autonomy to carry out their functions. **Section 84** of the **Constitution** gives judges security of tenure and provides that the removal of a judge from office should only be done by a special procedure and therefore not by an unsanctioned method. In ***Valente v R [1985] 2 SCR 673 at 674***, it was said that, "***Judicial independence involves both individual and institutional relationships: the individual independence of a judge as reflected in such matters as security of tenure and the institutional independence of the court as reflected in its institutional or administrative relationships to the executive and legislative branches of government***." **(emphasis added)**

[12] The oath taken by judges is critical to their functions as it places in context the responsibility which attends their office as judicial officers. In essence it states that the particular judge will do right to all manner of people after the laws and usages of Barbados without fear or favour, affection or ill will. This oath is the basis for which a presumption of impartiality may be made.

[13] Having set the context in which the issue is to be analysed, we now consider the test for apparent bias as articulated by the House of Lords in **Porter v Magill,** namely that, "*a judge must recuse himself or herself if a fair-minded and informed observer, having considered the facts, would conclude that there*

was a real possibility that a judge was biased." This statement is not without qualification and in **Panday v Virgil TT 2007 CA 13**, **Archie JA** noted that the test is one of possibility (capable of existing; real and not remote) and not probability (more likely than not).

[14] The words "fair-minded" and "informed" summarise the characteristics that are to be imputed to the hypothetical observer. The fair-minded observer is neither complacent nor unduly sensitive or suspicious when he examines the facts. **Archie JA** added that there is a presumption that judicial officers and other holders of high public office will be faithful to their oath to discharge their duties with impartiality and in accordance with the constitution. The burden of rebutting that presumption of bias lies with the person alleging it. Mere suspicion of bias is not enough. A real possibility must be demonstrated on the available evidence.

[15] One of the central planks of the Interested Party's submissions is that any adjudication by this court in **SC No. 106 of 2018-Patterson Cheltenham v The Disciplinary Committee**, "unavoidably raises the spectre of apparent judicial bias in the case". This is because this court adjudicated in favour of Mr. Cheltenham QC in the application brought by the complainant for the disqualification of the said Mr. Cheltenham Q.C. in **Straughn v Edwards et al**.

Discussion and analysis

[16] We now proceed to examine the applicable case law in this area. In **R v Ruel Gordon** (**1969) 14 WIR 21** the appellant was summoned to appear at a Resident Magistrate's Court to answer two charges. The Resident Magistrate proceeded to hear one of the charges and found the appellant guilty thereon. He then proceeded to hear the other charge on which he also found the appellant guilty. On appeal against the conviction on the second charge, it was contended that the resident magistrate had acted contrary to the principles of natural justice as the circumstances indicated a real likelihood that he would have had a bias. It was held that "**the resident magistrate, who was a trained lawyer, must be taken to have disabused his mind of any knowledge he may have gained from the previous trial, and must be taken to have applied himself to the issues presented to him in the case of the second information. Accordingly, there was no real likelihood of bias on the part of the resident magistrate**. (**emphasis added**)"

[17] In **Re J.R.L Ex parte C.J.L [1986] CLR 348,352, Mason J** opined that:

> "**It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party. There may be many situations in which previous decisions of a judicial officer on issues of fact and law may generate an expectation that he is likely to decide issues in a particular case adversely to one of the parties. But this does not mean either that he will approach the issues in that case otherwise than with an impartial and unprejudiced**

> **mind in the sense in which that expression is used in the authorities or that his previous decisions provide an acceptable basis for inferring that there is a reasonable apprehension that he will approach the issues in this way. In cases of this kind, disqualification is only made out by showing that there is a reasonable apprehension of bias by reason of prejudgment and this must be "firmly established". Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour." (emphasis added)**

[18] In **R v Australian Stevedoring Industry Board Ex parte Melbourne Stevedoring Co Pty [1953] HCA 22** the High Court of Australia, **Dixon CJ, Williams, Webb and Fullagar JJ**, opined as follows:

> "But when bias of this kind is in question, as distinguished from a bias through interest, before it amounts to a disqualification it is necessary that there should be strong grounds for supposing that the judicial or quasi-judicial officer has so acted that he cannot be expected fairly to discharge his duties. Bias must be "real". The officer must so have conducted himself that a high probability arises of a bias inconsistent with the fair performance of his duties, with the result that a substantial distrust of the result must exist in the minds of reasonable persons. It has been said that "preconceived opinions - though it is unfortunate that a judge should have any - do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded".

[19] Having established the context in which the legal principles relative to recusal or disqualification on the grounds of apparent bias have been applied, I now proceed to examine the submissions which have been set out earlier in this decision. Mr. Straughn submitted that if this Court agrees with the Applicant's

contention that his (Mr. Straughn's) application for the Applicant's disqualification from acting on behalf of the Defendants in **Straughn v Edwards et al** and his complaint before the Disciplinary Committee are essentially the same matter, the Court's adjudication in the instant matter would constitute a rehearing of his application for Mr. Cheltenham's disqualification from acting on behalf of the Defendants in **Straughn v Edwards et al** before the same judge.

[20] This submission is predicated upon a finding by this Court that the issues in **Straughn v Edwards et al** are the same as those in the instant case. It conflates the fear that the Court might rule against the Interested Party based on its previous decision with apparent bias. This matter differs from the previous matter in which I adjudicated and the issues are not the same. The instant matter relates to the impact of that finding on the proceedings before the Respondent.

[21] With respect to the submission that the instant case constitutes a re-hearing of the previous matter**,** there can be no re-hearing of the application for disqualification of Mr. Cheltenham QC from acting in **Straughn v Edwards et al** or the simple reason that that matter is Res Judicata. Any re-hearing would have to be by way of appeal.

Conclusion

[22] For the reasons aforementioned, I am of the opinion that there is no substance in the submission which is accordingly dismissed.

[23] It was Mr. Straughn's further submission that since the basis of the Applicant's application for judicial review constitutes a collateral attack on the judgment it is inappropriate for this Court to adjudicate in the instant matter.

Discussion and Analysis

[24] I must preface the discussion by stating that this matter was assigned to me because no other judge could hear it. The reason being that I was the only judge who had not then been the subject of legal proceedings brought by Mr. Straughn.

[25] Mr. Straughn quite rightly noted in his submissions that this Court had enquired of counsel present on 30 January 2018 whether they had any concerns about his presiding in the matter and that all counsel indicated that they had no such concerns. It is also clear that Mr. Straughn was not present then. His presence was facilitated by my Order of 30 January 2018 that certified copies of the filed documents together with the Order be served on him.

[26] Notwithstanding that the certified copies were served on the Interested Party to date he has made no application to be joined in the proceedings. I referred earlier to the fact that other counsel in the matter did not object to this Court

hearing the matter. What is the significance of this in light of the fact that the parties to the matter have no objection to the Court adjudicating on the matter?

[27] The significance of this is that the objection to this Court hearing the matter is by a person who is not a party to the proceedings. This notwithstanding, I considered it in the interest of justice to hear his concerns.

[28] Mr. Straughn's final submission is that, in light of the fact that this Court ruled in favour of Mr. Cheltenham QC in the matter which he brought for disqualification of Mr. Cheltenham QC in **Straughn v Edwards et al,** the spectre of apparent judicial bias is raised.

Discussion and Analysis

[29] This submission conflates the fear that the Court might rule against the Interested Party based on its previous decision with apparent bias. I restate my view that this matter differs from the previous matter in which I adjudicated and I reiterate that the issues are not the same. In my previous discussion on apparent bias, I outlined the matters which must be established with respect to apparent bias and ruled that these had not been established. For those same reasons I find this submission not proved.

[30] It remains only for me to observe that the facts of this case differ materially from those of **Bjerkham v Walsh et al** on which the Interested Party relied. This matter concerned an application by Attorney-at-Law, Mr. Barry Gale Q.C,

counsel for Timothy Walsh, to have two members of the panel of the Court of Appeal recuse themselves from hearing an Application. This Application was triggered by proceedings arising from **Roseal Services Ltd. v Michael Challis Civil Appeal No. 2 of 2009** in which there were "extremely sharp exchanges" between the judges of the Court of Appeal and Mr. Barry Gale Q.C. Mr. Gale QC characterized these exchanges as being demonstrative of "open and manifest hostility and antagonism (and on occasion rudeness) on the part of the two justices". Mr. Gale QC also complained about the way the Panel in the case reached its final decision. He sent an e-mail to the members of the Legal Profession in which he stated, *"For those interested in how justice is currently administered in our Courts, the attached should make for interesting reading!! Read the transcripts first and judge for yourself!!"*

[31] The Panel's attempts to meet with Mr. Gale QC regarding the e-mail proved futile. The two members of the Panel also contemplated legal redress against Mr. Gale QC to protect their interests. Mr. Gale QC subsequently learned that the members of the said Panel were scheduled to sit in a matter intituled **Bjerkham v Timothy Walsh, Stephen Ward and Nature's Produce Inc.** in which he was scheduled to appear as counsel. Concerned that there may be judicial bias against him, he made an application for the Panel to recuse itself from hearing the matter.

[32] The Court rejected the application on the basis that in accordance with the professional background required for their appointment, judges are presumed to be persons of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. This presumption, the members of the panel opined, carried considerable weight and it was not to be assumed that a judge would allow personal hostility to colour his decision.

[33] On appeal to **the Caribbean Court of Justice** that Court held, on the peculiar facts of that case, that:

> "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."

The present matter differs materially from **Bjerkham v Walsh et al**. No similar allegations have been alleged here against the Court. I therefore consider that **Bjerkham v Walsh et al** is inapplicable to the matter before me.

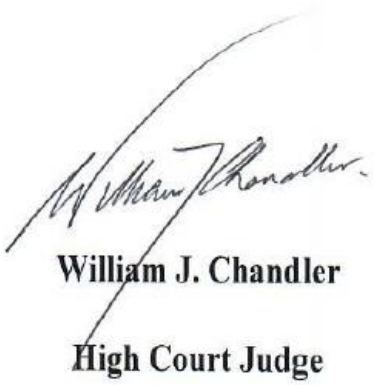
Conclusion

[34] One common thread which runs through the authorities is that bare allegations of bias will not suffice to justify recusal. The burden lies on the complainant to show that the judge has adopted a posture which would cause the fair minded and informed observer, having considered the facts, to conclude that there was a real possibility that the judge was biased. The standard of proof is on a balance of probabilities. In the instant case, no evidence was placed before this court to satisfy this test for apparent bias.

Disposal

[35] In the circumstances, I am of the opinion and find that the Interested Party has not made out a case for recusal, it is accordingly ordered as follows:

1. The application for recusal is dismissed, and
2. The decision on costs is reserved.



William J. Chandler

High Court Judge