

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**Case No. CLE/gen/00613/2005**

**B E T W E E N**

**A**

Plaintiff

**AND**

**B and Others**

Defendants

**CASE NO. CLE/gen/00734/2005**

**B E T W E E N**

**C and Others**

Plaintiffs

**AND**

**B and Others**

Defendants

**CASE NO. CLE/gen/00372/2006**

**B E T W E E N**

**B**

Plaintiff

**AND**

**D and Others**

Defendants

---

**APPEARANCES:**

**Mr. Nicholas Lavender, Q.C. with Mr. Wayne Munroe for D  
Mr. Alan Steinfeld, Q.C. with Mr. Michael Scott for A**

**Mr. Anthony deGarr Robinson, Q.C. with Mr. Randol Dorsett for B**

**Mr. Brian Moree for C and Others**

---

**DECISION ON RECUSAL APPLICATION**

**23 March 2009**

**ALLEN, S.J.:**

The application is that I recuse myself from hearing this matter on the ground of apparent bias.

2. In considering the application, the first thing I must do is to ascertain the circumstances, which have a bearing on the suggestion that I am biased.
3. In that regard, it is important to recount the background against which this application arose so that its context may be understood.
4. Senior Justice Lyons had carriage of this matter up to September 2008 when he recused himself on the basis that he did not have time to hear it and the parties were left to find another judge to take over the matter.
5. I was approached by the deputy registrar of this Court and asked if I would assume carriage of the matter as no other judge was able because either they did not have any available time to do so or for other reasons were not willing to do so.
6. I held an exploratory hearing at which the parties were all represented and told Counsel that I was in transition to another side of the Court and had already a lot on my plate with judgments to finish before taking up my assignment in the criminal division.
7. Counsel informed me of the tremendous volume of material involved in the matter and suggested that another attempt be made to find a judge who had the time to give to this matter.
8. I instructed the clerk of the list to make those enquiries and after making such inquiries she reported in writing that she could find no other judge who

could hear the matter. Counsel were informed and it was agreed that I would assume carriage of the matter and give it such time as I was able to.

9. In January 2009, after hearing all Counsel and after reviewing the Court's file, including the May 2006 Judgment of Justice Lyons (as he then was) and the Accounting and Engagement Orders, and aware of the delay already occasioned, I directed that I would first hold a hearing to determine whether the Accountant's report, commissioned by the Accounting Order, should be approved since the parties did not agree the report.

10. I also directed that the second limb of the trial would be concerned with determining what the balancing payment should be, which is the substantive issue between the parties.

11. I further directed, inter alia, that the accountant should complete his report by 16 February 2009 and submit it to the Court on or before the close of business on 23 February 2009 as the time set for the enquiry and reporting to the Court had long expired and the accountant had only produced interim reports.

12. The trial of the issue, whether I should approve the accountant's report, began on 16 March 2009 with the cross examination by Counsel for A of the accountant, Daniel Ferguson, who was appointed by Justice Lyons on 22 October 2007. His mandate based on the finding of Mr. Justice Lyons that A and D operated a business pursuant to a partnership of honour between 1992 and 31 March 2000 and agreed to distribute the profits 50/50, was to enquire and report on:

- “(1) the amount of the 1992/2000 Profits;**
- (2) the net amount received by A or paid for his benefit or at his direction or request, whether directly or indirectly, in respect of his share in the 1992/2000 Profits, net of: (a) any sums paid (or assets transferred) on account or otherwise by A and/or by his**

**nominees or at his direction to, or for the benefit, or at the direction or request, of, D in respect of the 1992/2000 Profits;**  
**(b) such or other sums (if any) paid by A as the Accountant considers ought properly to be taken into account;**  
**(3) in the light of the foregoing, and in the light of any related matters (including, without limitation, claims by A or D for interest and/or other compensation for the use of moneys) which either A or D contends (and the Accountant considers) to be relevant, what sum (“the Balancing Payment”) would require to be paid by A to D or by D to A, to ensure that A or D (as the case may be) has received (whether directly or indirectly, and whether personally or by payment to his nominees) the amount of his entitlement under the terms of the partnership of honour.”**

13. In addition, he was directed by the judge during the proceedings on 11 October 2007, that the enquiry and determination of the balancing payment was **‘by nature a forensic accounting and you should put together the best team you can. They have kept records, it is a reconciliation of their records we need.’**

14. It was therefore appreciated by all, that the task would require a team which could detect the relevant documents and reconstruct the partnership’s accounts to determine the balancing payment. (See transcript of 11 October 2007 page16, lines 16-24).

15. On the first day of the hearing before me, the accountant was asked and denied that he had a social relationship with Senior Justice Lyons.

16. On the second day of cross examination, he was asked whether a relative of his had any relationship with Senior Justice Lyons to which he responded that he didn’t get into his sister’s business but he knew she and the judge were

friends. He also admitted that she was a part of the team employed by him to do the work.

17. It was only then that I made the connection between the accountant and information, which was in the public domain for sometime that the judge had more than a friendship with a woman, who up to that point I did not know was the accountant's sister.

18. In an attempt to ensure transparency in my conduct as a judicial officer and as the judge who was to determine whether the accountant's report should be approved, I informed Counsel that I was aware of this information. Counsel informed me that they were also aware of the information and had brought up the issue between them before the appointment of the accountant but did not raise it with the judge. The matter was left there at that time.

19. Counsel for D asserted at the hearing of the application for recusal, that because A did not object to the appointment of Mr. Daniel Ferguson, he waived his right to object now.

20. Counsel for A maintained he did not raise it because Mr. Justice Lyons had literally forced the appointment on them, threatening to walk out of Court if they did not agree the appointment.

21. The transcript of 11 October 2007 is replete with references to the judge threatening to leave the case if the appointment was not agreed and at one point got up to leave when Counsel begged him to have a seat. The judge was asked by one Counsel if it was an ultimatum to which he responded '**you bet it is**'. (See pages 9 and 10 of the transcript of 11 October 2007).

22. During the further cross examination of the accountant before me, the accountant told the Court he obtained his qualifications as a Certified Public

Accountant in 1985. He admitted that his forensic accounting experience was limited to two forensic accounting exercises in the whole of his career. He said he read up on the subject after his appointment to understand his engagement and made enquiries of Deloitte and Touche and Price Waterhouse to assist him with the preparation of the necessary program and the choice of his team. He also said he had consultations with the former accountant Ellison and his partner in London.

23. The accountant admitted during the cross examination that the last auditing experience he had was before he became qualified as an accountant. He agreed he had never certified an account.

24. He further admitted on cross examination that at the time of his second interim report in which he recommended the November 2001 route which was the same route he recommended in his final report, the only skilled members of his team were himself and a part-time accountant. He explained that his thinking was that it represented the only agreement of A and D in relation to profits and distributions.

25. The accountant admitted he had only gathered the documents and put them into piles and did not examine them to see what was missing for his second interim report and that his only attempt to identify them was in the final report. He also admitted that he did not identify which of the missing documents was relevant to the calculation of the balancing payment. He also agreed he had made no effort to compel the production of any missing relevant documents by reference to the Court. He said he did not need to determine what was there and what was missing.

26. The cross examination of the accountant further revealed that he was appointed at a rate of 500 pounds sterling per hour at an exchange rate of about something over \$2 to the pound which when converted was about \$1000 per

hour. He said he worked an average of 50 hours a week which amounted to \$50,000 a week or about \$2.5 million per year for the work.

27. On the morning of the fourth day of the trial, Counsel asked to meet in Chambers and raised with me what they apprehended was a breach of the Confidentiality Order.

28. At the end of that discussion, I told them that it was my preliminary view on the cross examination of the accountant and his admissions thus far, that it appeared that the report was not sufficiently thorough and complete to provide much assistance to the Court.

29. I also expressed what I told them was a preliminary view that having regard to the matter I had raised with them earlier, I had serious concerns about the appointment of the accountant and as a consequence, the integrity of the report.

30. I also said that as a result, even if I were minded to approve the report, I did not know what weight I could reasonably attach to it. I further asked them whether given these circumstances and in the interest of saving time and expense, Counsel were minded to make any concessions in relation to the report.

31. I said further that if there were no concessions, I was minded to dispense with hearing the evidence of the parties and their experts on the issue of the approval of the report as I had previously directed, and seek to complete just the cross examination of the accountant by the parties and then determine whether to approve the report.

32. Mr. Lavender asserts that I also said I was conflicted by the information known to me. I have no firm recollection of this, but if I did express what I felt in

those terms, it was said in the context of what I had said before about my concern and the disquiet I felt about the appointment. I did not intend to, nor do I think I conveyed, that I had some conflict of interest or felt I could not impartially determine this matter.

33. My recollection of what happened next is at odds with three of the Counsel in this matter while one of the other two Counsel (the other not being present when this was raised on the second day of the recusal application) agreed with my recollection. Instead of holding my ground as to my recollection of events I conceded since three of them held that view that their recollection must be right.

34. However after searching the recesses of my mind and aided by the memory of my clerks, both of whom were present throughout and further aided by Mr. Lavender's heading of his own submissions, namely: "**D'S SUBMISSIONS IN SUPPORT OF HIS INVITATION TO MRS. JUSTICE ALLEN TO RECUSE HERSELF**", I now realize that my recollection was indeed correct.

35. I maintain that after the above discussion in Chambers, Counsel asked for time to consult their clients and I gave them thirty minutes to do so. I sent my clerk to see whether Counsel was ready for me to ascend the bench downstairs in the court room and I was subsequently informed by my clerk that Counsel wished to see me in Chambers again because they wished to raise another matter with me.

36. When Counsel returned, Mr. Lavender informed me that he was instructed to make an application that I recuse myself and I replied "**so be it**" and instructed Counsel to return to Court to begin the hearing of the application.

37. Mr. Lavender however contends, supported by Mr. Robinson and Mr. Dorsett that I invited the parties to make an application that I should recuse myself and it was then that he asked for time to consult his client and after doing

so, returned and informed me of the decision. He further submits that by my invitation I admitted my inability to impartially determine this matter.

38. If indeed I had invited Counsel to do that, it follows, as night follows day, that I would not have called on Mr. Lavender to make his application but would have invited the other Counsel to express their views and would have determined the application immediately.

39. The very fact that I embarked on the hearing of the application and continued to do so for a day and a half of a rather contentious hearing further supports my recollection, for if what Counsel contends was the case, I would not have any reason to consume one full day in hearing his application.

40. I do not accept the accuracy of Mr. Lavender's notes of what transpired in Chambers.

41. Both Mr. Lavender and Mr. Robinson relied on my "reaction" during the hearing of the application to say that that was further reason to recuse myself as it showed a lack of judicial objectivity. I do not intend, nor do I think it necessary, to specifically answer each response I made during his submissions. Suffice it to say I thoroughly and sometimes repetitively quizzed Mr. Robinson on the circumstances he alleged showed bias towards the accountant or any of the parties in this matter.

42. At no time did I display such irritation, or said anything, which could reasonably be considered grounds for concluding that I lacked objectivity.

43. Mr. Robinson laid over the case of **Howell and others v Lees-Millais and others [2007] EWCA Civ 720**, an English Court of Appeal decision which he admitted was extreme. I am therefore surprised he would even suggest that **Howell** was instructive given the facts of this case.

44. Just one passage from the judgment of Sir Igor Judge (P) at paragraph 40 illustrates how far removed the facts of that case are from the facts in this case:

**“There is no disguising the regrettable features of this case. The application to Peter Smith J to recuse himself was entirely justified and, notwithstanding the inevitable delicacy of the position in which he found himself, leading counsel responsibly handled the case throughout in accordance with his professional obligations both to his client and to the court. The exchange of still very recent e mails demonstrates that the judge was extremely displeased that the negotiations about his possible future with the firm of solicitors Addleshaw Goddard had broken down. His irritation is obvious. It did not arise from previous professional encounters with the solicitors or their conduct of earlier or indeed the current litigation when different considerations would apply. It arose exclusively and directly from the judge’s personal affairs and his private but recently unsuccessful dealings with Addleshaw`Goddard....”**

45. **Howell** (above) is of no assistance either on its facts or in setting out any general principles of law relative to apparent bias that may have any application to the present case.

46. Mr. Lavender, in support of his submissions that the views I expressed in Chambers went beyond an initial or preliminary view of my thinking and that I expressed firm views which favored the case of A, cited a number of cases including **Locabail (UK) Ltd. v Bayfield Properties et al** [2000] 1AER 65, a decision of the English Court of Appeal, **Delta Properties Ltd. v Minister of Housing and National Insurance**, a decision of this Court and **Magill v Porter Magill v Weeks** [2001]UKHL 67, a House of Lords decision, to ground his application.

47. It is now well established that the test as settled by the House of Lords in **Rv Gough`[1993] 2 All ER 724** and followed in **Locabail** (above) has now

shifted slightly to the test as laid down in **Porter v Magill** (above) supporting the approach of Lord Phillips MR in **Re Medicaments and Related Class of Goods (No2)** [2001] 1WLR 700 and as recently summarized in **AWG v Morrison** [2006] EWCA Civ6: “that having ascertained all of the circumstances bearing on the suggestion that the judge is biased, the court must itself decide whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal was biased.”

48. I also followed those cases in **Regina v Keith Jones** 72 WIR 72 where I applied the test in **Porter v Magill** when determining the suggestion that I, as a judge of the Supreme Court, was not independent and impartial having regard to remarks made by the Attorney General on the performance of judges and the failure by the executive to appoint a commission to review judicial salaries and pensions required by the Judges Remuneration and Pensions Act.

49. In **Lawal v Northern Spirit** [2004] 1 All ER 187 Lord Steyn explained the shift: “... the small but important shift approved in **Porter** has as its core the need for public confidence which must be inspired by the courts in a democratic society...public perception of the possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in **Johnson v Johnson** [2000] 201 CLR 488, 509 para 53 by Kirby J when he stated that a ‘reasonable member of the public is neither complacent nor unduly suspicious’.”

50. Mr. Steinfeld in opposing the application submitted that it could not possibly be said that a fair-minded informed observer could come to the opinion that a fair trial of the matter could not be had in the circumstances.

51. He referred me to the case of **Steadman –Byrne v Amjad** [ 2007] EWCA Civ 625 which I cite generously in this decision in that it very poignantly illustrates how unsustainable the application in this case is.

52. In **Steadman-Byrne** (above), a judge, made the following comments after the claimant's case: “

**(1) Having heard the claimants give evidence, he believed them.**

**(2) He had considered the manner in which they gave their evidence and in particular the quickness with which they responded to questions.**

**(3) He had warned each one of them of the consequences of his deciding that they were pursuing a fraudulent claim and has seen their reply. He did not consider the men to be dishonest.**

**(4) He accepted that he had not yet heard the defendant give evidence, but in view of his decision that the claimants were honest he could not see how the defendant could win.**

**(5) He wanted to give both counsel an indication of his thoughts.**

**(6) It was ‘flavour of the month’ for insurers to prosecute claimants with ‘Asian sounding names’/**

**(7) He would, if necessary, say something about that in his judgment...**

**(8) Insurance companies are trying to send out a message about fraudulent claims to the Asian community, if there was such a thing.**

**(9) There were some discrepancies in the evidence given by the claimants but not such as to make him think that this was a fraudulent claim.**

**(10) He noted that the defendant worked for the police.**

**(11) Someone with a police background ‘always thinks that they are right’ [or ‘never thinks that they are wrong’] ‘and find it difficult to accept that they might be mistaken’.**

(12) **The defendant may or may not be mistaken, but he believes that he saw two people in the car and may have concluded that the claimants are ‘at it’.**

(13) **He would continue to hear the case, but the defendants’ counsel may wish to take instructions over the lunch break.”**

53. Lord Justice Sedley, in considering whether the above comments of the judge showed bias said at paragraph 10 of his judgment: **“The test of ostensible bias is not contentious. ... Bias in the present context must mean the premature formation of a concluded view adverse to one party. We put it in this way because it is well recognized not only that a judge may and commonly will begin forming views about the evidence as it goes along, but that he or she may legitimately give assistance to the parties by telling them what is presently in the judge’s mind. This may properly include ... letting the parties know before reaching the defence case that the judge did not think much of the claimant’s evidence”.**

54. At paragraph 14 the learned justice endorsed the view expressed in paragraph 22 of the judgment in **Project v Hutt** (2006) UKEAT S/0065/05/RN that: **“There are, of course, occasions when a judge or tribunal can quite properly explore difficulties that have become apparent from the evidence in a case, prior to the point at which all evidence has been led and submissions made, whether with a view to encouraging parties to consider settlement or narrowing the issues between them, or otherwise. There must, though, be few occasions when that can properly be done at a point prior to the leading of any evidence in the case since, at that stage, there is by definition, no evidence before the court or tribunal on which it can comment. Moreover, if minded to make such a comment, it is plain that the risk of giving an impression of prejudgment will arise if it is not made clear to the parties that any views expressed are but provisional, that the tribunal’s mind is not yet made up and that it remains open to persuasion.”**

55. Lord Justice Sedley went on to comment that if the judge's remarks had ended at (9) (above), he would have done no more than tell the defendant's counsel that he had not in the judge's eyes succeeded in discrediting the claimants' evidence leaving open the impression which the defendant would now make. But the judge went on to close this door, having already told counsel that he did not see how the defendant could win, by expressing the view that his insistence that there were only two people in the car was, in paraphrase, rigid thinking typical of members of the police service.

56. Mr. Moree also opposed this application. He described it as unfair and unsustainable and asserted that there was no demonstration of partiality. He saw the judge's action as an attempt to move the proceedings along so as to decide the substantive issue i.e. the balancing payment. He concurred with all of the submissions of Mr. Steinfeld

57. The Accounting Order provides for the approval of the accountant's report and the certification of the balancing payment with adjustments if any. The final report, as did the second interim report, recommends as a first option, setting the balancing payment based on post November 2001 receipts by A on the basis that the **'settlement reached by A and D in November 2001 represents the best available record of the profits and distributions up to that date.'**

58. The accountant then verified a sum representing net receipts to A after November 2001 and an additional sum he said he could not verify. The report adds: **"In my view Option One is the best route to completion of the account in the circumstances. As such I recommend it. The recommended figure is only an estimate of the Balancing Payment. The missing documents and missing explanations mean that it is not possible to accurately measure the Balancing Payment."**

59. If at the end of the day the accountant's report is approved, the court must still determine whether there should be any adjustments to that payment up or down before it certifies it, as the recommendation is said to be an estimate and not accurate. The Court will have to hold a hearing to determine what adjustments if any should be made as there is not likely to be agreement on that.

60. The parties will then have the opportunity to put their case before the payment is certified, including giving their evidence and calling any expert witnesses.

61. If the report is not approved, the issue of what the balancing payment should be, will likewise have to be determined at a trial in which the parties will participate and will be able to call any expert evidence they deem fit.

62. It is as clear as day to me that the decision as to whether or not to approve the report, does not and cannot, determine the substantive issue between the parties, namely what is the balancing payment.

63. Further, the Accounting Order under which the appointment was made recites that the accountant was appointed in accordance with Order 40 and/or the inherent jurisdiction of the court. Order 40 rule 2(3) provides that where any part of the report of the expert is not accepted by all the parties, the report shall be treated as information provided to the court and be given such weight as the court thinks fit.

64. There seems therefore to be a conflict between Order 40 and the provisions of the Accounting Order requiring approval by the Court and there may well be a question as to whether the approval of the Court was at all necessary in the events which have happened.

65. The other circumstance bearing on this matter, which is of less importance, was the fact that this case was filed since 2005/2006, and has already been in the system longer than it ought to have, due mainly to the resignation of the first accountant appointed by the court and more recently to the sudden recusal of the judge who had carriage of the matter.

66. It is precisely because of all of these circumstances that I tried to focus and help the parties in telling them what my preliminary perceptions were after 2 days of cross-examination of the accountant, with a view to encouraging them to perhaps settle at least this issue so as not to waste too much more time on a matter which could not resolve the substantive issue between the parties in any event.

67. No doubt there may be a concern whether the non approval of the accountant's report would adversely affect his remuneration. That is a matter for hearing and the court will have to determine it based on such things as the work done and the verification of the costs and expenses associated therewith etc. But that is a matter which will have to be determined whether or not the report is approved as the accountant was appointed by the court in accordance with the terms of the Accounting Order and Order 40 and his remuneration will be determined in accordance therewith.

68. In expressing my preliminary views to Counsel, I was careful not to and did not make any comments whatsoever on what the balancing payment should be and how it should be arrived at or any other question in issue.

69. My views on an aspect of the case which is not determinative, were nevertheless balanced and fair and in accordance with the practice approved by Lord Justice Sedley in **Steadman –Byrne v Amjad** [ 2007] EWCA Civ 625 (above). I was only seeking to move the matter along.

70. Of course if on any question in issue between the parties, I had expressed views in an extreme and unbalanced way as to raise any doubt about my ability to determine the matter in a fair and impartial way, then I would, without question, recuse myself.

71. Indeed, in **Locabail (UK) Limited v Bayfield Properties Ltd [2000] 1 A.E.R. 65** the House of Lords, Lord Bingham said at paragraph 25:

**“....a real danger of bias might well be thought to arise if... on any question at issue in the proceedings before him, the Judge had expressed views, particularly in the course of the hearing, in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind...or if, for any other reason, there were real ground for doubting the ability of the judge to ignore extraneous considerations, prejudices, and predilections, and bring an objective judgment to bear on the issues before him. The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection.”** But that was not the case here.

72. With respect to Counsel’s submission that there was real ground for doubting my ability to ignore what they say is an extraneous matter namely the information about the widely circulated report of a more than friendly relationship between the judge who appointed the accountant and his sister, that objection is unsustainable. The issue of the relationship of the accountant’s sister and the judge who appointed him is not an extraneous matter, in as much as it was first raised by the parties themselves before the appointment of the accountant and communication to that effect is included in the bundles before this Court.

73. Indeed, the accountant was cross-examined on that issue on the first and second days with no objection taken as to the relevance of that line of

questioning. In my view, that is therefore not a ground for any doubt of my ability to fairly hear and determine the question in issue between the parties.

74. As I have said above, the approval of the report is not the question in issue in these proceedings and I could well have, after hearing argument on the matter, determine to apply the provision of Order 40 rule 2(3) and use the report as information only.

75. Having ascertained all of the circumstances which have a bearing on the suggestion that I am biased and having asked myself whether a fair minded observer informed of all of these circumstances would conclude that there was a real possibility that I was biased, the resounding reply is no. I have absolutely no doubt that I can objectively decide the issues before me.

76. In the premises, I refuse the application for recusal and reserve the issue of costs for further argument.

77. I must say as an aside that I was troubled by Mr. Lavender's response to my assertion that the cases he cited were not applicable on the facts and did not assist, namely: "**I will search until I find one that fits.**" I trust that was a momentary lapse and not an indication that he was prepared to neglect his professional obligations to the court.

**DATED this 23<sup>rd</sup> day of March 2009.**

**Anita Allen,  
SENIOR JUSTICE**

**COMMONWEALTH OF THE BAHAMAS**

**IN THE SUPREME COURT**

**Common Law and Equity Division**

**Case No. CLE/gen/00613/2005**

**B E T W E E N**

**A**

Plaintiff

**AND**

**B and Others**

Defendants

**CASE NO. CLE/gen/00734/2005**

**B E T W E E N**

**C and Others**

Plaintiffs

**AND**

**B and Others**

Defendants

**CASE NO. CLE/gen/00372/2006**

**B E T W E E N**

**B**

Plaintiff

**AND**

**D and Others**

Defendants

---

**APPEARANCES:**

**Mr. Nicholas Lavender, Q.C. with Mr. Wayne Munroe for D  
Mr. Alan Steinfeld, Q.C. with Mr. Michael Scott for A**

**Mr. Anthony deGarr Robinson, Q.C. with Mr. Randol Dorsett for B**

**Mrs. Diane Stewart holding for Mr. Brian Moree for C and Others**

---

**DECISION ON COSTS**

**24 March 2009**

**ALLEN, S.J.:**

Counsel for A asks for the costs of the recusal application to be borne by D. His argument is that D's application was resoundingly refused and that he should bear A's costs of defending an application which lasted for a day and a half.

2. In support of A's application, Counsel referred me to Order 62 of the English Supreme Court Rules (Order 59 of our Rules). Rule 3 (2) provides that no party to any proceedings shall be entitled to recover any of the costs of those proceedings except under an order of the Court. Paragraph (3) further provides that if the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.

3. On D's behalf, Mr. Lavender asks me to make no order as to costs in as much as these were unusual circumstances in which the application for recusal arose. He submitted that the application was as a result of what was said in Chambers by me and further that D was invited to make the application.

4. I cannot think of any application for recusal on the ground of apparent bias which does not involve allegations that the Judge did or said something which would raise a real possibility of bias in the mind of a fair minded informed observer. This application is no different.

5. Mr. Lavender has not therefore convinced me that there are any circumstances in this case, which would justify me depriving the successful party of his costs. I will therefore follow the rule that costs follow the event and grant the costs of the application to A to be borne by D. The costs are to be taxed if not agreed certified fit for two Counsel. It is accepted that the hearing of the application lasted two and a half days.

6. Counsel for C also asked that D bear her clients' costs of the proceedings. In my directions of 19 January 2009, I gave a costs warning to C and B. In as much as there may be questions arising as to the appropriateness of their participation in these proceedings and whether they ought to be awarded any costs, I reserve the decision on Counsel's application for C's costs to a date to be fixed.

7. In relation to B's costs, on the application of his Counsel, I reserve B's right to apply for costs of this application to a date to be fixed.

**DATED this 24<sup>th</sup> day of March, 2009.**

**Anita Allen,  
SENIOR JUSTICE**