IN THE COURT OF APPEAL OF BELIZE, AD 2011

CIVIL APPEAL NO 29 OF 2008

BETWEEN

RBTT TRUST LIMITED

Appellant

AND

CEDRIC FLOWERS

Respondent

—

BEFORE:

The Hon Mr Justice Alleyne	**-**	**Justice of Appeal**
The Hon Mr Justice Mendes	**-**	**Justice of Appeal**
The Hon Mr Justice Carey	**-**	**Justice of Appeal**

Dr Elson Kaseke and Mr Phillip Zuniga SC for the appellant.
Mr Eamon H Courtenay SC for the respondent.

22, 23 June 2011 and 23 March 2012.

—

MENDES JA

The application

[1] Before us is an application by the respondent to re-hear this appeal which was determined on 30 October 2009 by a panel comprising Justices of Appeal Sosa (as he then was), Carey and Morrison. Necessarily, the respondent also seeks an order setting aside the court's judgment. Such a course is warranted,

the respondent contends, because of apparent bias arising from Morrison JA's past association with companies which are part of a group of companies to which the appellant belongs, and from the fact that Morrison JA's wife is a partner in a firm of lawyers which continues to provide legal services to those companies. The respondent claims to have discovered the facts which found his complaint only after judgment was delivered and perfected.

The procedural history

[2] In its judgment delivered on 30 October 2009, this Court allowed the appellant's appeal against the judgment of Awich J. given on 10 October 2008 and substituted an order that there be judgment for the respondent in the sum of US$32,500.00. Awich J. had ordered the appellant to pay the respondent the sum of US$787,981.48. The unanimous judgment of the Court was delivered by Morrison JA. The dispute between the parties was over the amount to which the respondent was entitled for work done as receiver of International Telecommunications Limited (Intelco), a position to which he was appointed by the appellant. The Court had reserved the question of costs on the appeal and in that regard invited written submissions from the parties. The Court delivered its judgment on costs on 19 March 2010. Its order dismissing the appeal was perfected on 31 March 2010.

[3] In the meantime, by notice dated 18 November 2009, the respondent applied for leave to appeal to the Privy Council. Given the amount involved in the appeal, the respondent was entitled as of right to be granted such leave pursuant to section 3(a) of the Privy Council Appeals Act. The Court granted conditional leave to appeal on 9 March 2010 and this order was perfected on 25 March 2010. Final leave to appeal was granted on 11 June 2010 pursuant to an application made on 7 June 2010.

[4] On 5 April 2010, the respondent carried out a search on the internet and discovered, inter alia, that Morrison JA was listed in the 2005 Annual Report of

RBTT Financial Holdings Limited as a director of RBTT Bank Jamaica Limited (hereafter "RBTT Jamaica"). As a result of this discovery, the respondent's attorney at law wrote to the appellant by letters dated 21 April 2010 and 31 May 2010 seeking disclosure of Morrison JA's connection with the appellant. By letter dated 2 June 2010, the appellant disclosed details establishing links between Morrison JA, his former firm Dunn Cox and RBTT Jamaica and RBTT Securities Jamaica Limited (hereafter "RBTT Securities").

[5] With this information in hand, the respondent caused his notice of motion to set aside the court's judgment to be filed on 29 June 2010. The motion was first listed for hearing on 20 October 2010. On 8 October 2010, the respondent deposed that he had been advised that the likely costs he would have to incur in prosecuting his appeal to the Privy Council was in excess of BZ$200,000.00. Since he was unable to afford such costs, he instructed his counsel not to pursue to appeal. It is not clear if or when a notice was filed discontinuing the appeal. On 12 October 2010, the respondent deposed further that at the time he had deposed his affidavit on 8 October 2010 neither he nor his counsel was aware of the decision of this Court in ***Belize Electricity Limited v Public Utilities Commission*** (Civil Appeal No. 8 of 2009) which was delivered on 8 October 2010. The relevance of this observance was never really explained.

[6] On 18 October 2010, the appellant filed a notice of preliminary objection claiming that the Court had no jurisdiction to entertain the respondent's application. I will deal with the appellant's preliminary objection straightaway.

The preliminary objection

[7] Dr Kaseke, who appeared for the appellant, argued that upon perfection on 31 March 2010 of the order allowing the appeal, this court became *functus officio*. He relied on the judgment of Carey JA in the ***Belize Electricity*** case, with which Sosa JA (as he then was) was in agreement. That case also involved

an application to re-hear an appeal on the ground of apparent bias on the part of a member of the panel. After accepting the court's implicit jurisdiction to re-open an appeal in order to "do what is necessary to correct wrong decisions and ensure public confidence in the administration of justice," Carey JA went on to state (at para 29, p. 18) that:

> An important point to note is that ***this restricted power to re-open an appeal, is exercisable only before the order of the court is drawn up or perfected***. Lord Woolf CJ had no doubt that this was the legal position when in the case just cited, he stated in categorical terms (para. 9)
>
> > "Once the judgment is perfected, however, the Court that has delivered judgment, be it a court of first instance or the Court of Appeal, would not entertain an application to re-open the judgment in order to consider the effect of the fresh evidence. This is not because of any express statutory prohibition. In considering the extent of their jurisdiction the courts have ruled that a perfected judgment exhausts their jurisdiction because this accords with the fundamental principle that the outcome of litigation should be final."
>
> This principle was articulated as long ago as 1887 in **Flower v Lloyd 6 Ch. D. 297** in which Jessell MR stated that if the Court of Appeal "had once determined an appeal, it has no further jurisdiction." On this firm foundation, I would rest the jurisdiction of the court to re-open an appeal on which it has pronounced ***provided the application is made before and not after the order is perfected***. (Emphasis added)

Since the application to re-hear the appeal in this case was only made after the order of the court was perfected, Dr. Kaseke continued, the court had no jurisdiction to entertain it. He reminded us that the Court of Appeal of Belize is bound by its own decisions in civil matters and that accordingly to the extent that the passage quoted from the judgment of Carey JA represented the *ratio decidendi* of the case we were bound to dismiss the respondent's application without more.

[8] Dr Kaseke acknowledged that the quoted passage was at variance with the decision of the English Court of Appeal in ***Taylor v Lawrence*** [2003] QB 528 which was referred to by Carey JA without any apparent dissent. In ***Taylor v Lawrence***, the English Court of Appeal decided that it did have the jurisdiction to re-hear an appeal even after its order had been perfected, provided that it was clearly established that a substantial injustice had probably occurred and that there was no alternative remedy. Nevertheless, Dr. Kaseke maintained that this court had decided to the contrary in the ***Belize Electricity*** case and we were bound to follow it.

[9] In his judgment, which I have had the pleasure of reading in draft, Carey JA advises that in the ***Belize Electricity*** case the court was in no way intending to depart from ***Taylor v Lawrence*****,** but I am compelled to accept that the passage quoted above could be interpreted as amounting to a determination that the Court of Appeal has no jurisdiction to reopen an appeal on an application made after the order of the court has been perfected. Be that as it may, the issue in that case was not whether the court could entertain an application to re-hear an appeal in those circumstances. In fact, the application in that case had been made before the order was perfected, but only came up for hearing afterwards. As Dr. Kaseke pointed out in his written submissions, there was ample authority for the proposition that the court has the power to re-consider its decision as long as its order has not yet been perfected. – see, for example, ***Re Harrison's Share under a settlement, Harrison v Harrison*** [1955] 1 All ER 185, at 188 b-c. Since the application in the ***Belize Electricity*** case was made before the order was perfected, there could not have been any objection to the exercise of the court's jurisdiction if the application had been heard and determined before such perfection. The issue in that case was whether the application could nevertheless be entertained after the order was perfected, where the application to re-hear had been made before. The court was unanimous in finding that it did have the jurisdiction to do so. The question

whether the court could entertain an application filed after perfection of the order was not before the court and to the extent that the passage quoted from Carey JA's judgment could be interpreted as determining that the court lacked jurisdiction in those circumstances, it was clearly *obiter* and not binding on us.

[10] In anticipation no doubt that this panel might consider that the ***Belize Electricity*** case did not bind us to decide that we lacked jurisdiction to hear the respondent's application, Dr. Kaseke urged us not to follow ***Taylor v Lawrence*** but to uphold an absolute rule that the court becomes *functus officio* after the perfection of its order, except where the application to set aside had been made before then. In his written submissions, which, to be fair, were not pursued with much vigour orally, Dr. Kaseke contended that such an absolute rule was rational and in the interests of justice since public confidence in the judicial system would be undermined if a party could be permitted to re-open an appeal at any time after the court's decision had been made final. The public's interest in the finality of litigation demanded, he submitted, that a well-defined cut-off point be established after which no further applications would be entertained. That cut-off point was the perfection of the order which provided a certain and easily determined "bright line date". Without such a clearly defined cut-off date, further litigation would be encouraged on the very question as to when the court's order had become final. An analysis of the *ratio* of ***Taylor v Lawrence*** is accordingly required.

Taylor v Lawrence

[11] In that case, the Court of Appeal delivered judgment on 25 January 2001. More than ten months later, the defendants applied for permission to reopen the appeal on the ground that the judge had obtained a financial benefit from the claimants' solicitors during the trial and had failed to disclose it. The Court of Appeal assembled a panel of five judges, including the Chief Justice, Lord Woolf, and the Master off the Rolls, Lord Phillips. The unanimous judgment of the court

was delivered by Lord Woolf. Foremost in the court's mind was the long standing, fundamental common law principle that the outcome of litigation should be final, a principle which is frequently put to the test by claims that fresh evidence has been discovered which, if available during the trial, might have influenced the result. The discomfort which is experienced by a court confronted with such circumstances and the reconciliation which the common law has forged between the interests of finality, on the one hand, and the search for truth, on the other, are expressed in the following passage from the judgment of Lord Wilberforce in ***The Ampthill Peerage*** [1977] AC 547, 569 (quoted at pp. 535-536 of Lord Woolf's judgment):

> Any determination of disputable fact may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry. It is said that in doing this, the law is preferring justice to truth. That may be so: these values cannot always coincide. The law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth (I do not say that this is such a case), and there are cases where the law insists on finality. For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

[12] As Lord Wilberforce pointed out, the common law permitted an unsuccessful litigant to rely on fresh evidence on appeal, provided the conditions set out in ***Ladd v Marshall*** [1954] 1 WLR 1489 were met; and in the case of allegations that the judgment may have been obtained by fraud, a fresh action could be brought to impeach the judgment. As well, as noted above, a court was

free to consider any such matters at any time before its judgment was perfected. Once a judgment was drawn up, however, the court considered its jurisdiction to have been exhausted “because this accords with the fundamental principle that the outcome of litigation should be final.”

[13] The earliest case establishing this principle was ***Flower v Lloyd*** [1877] 6 Ch D 297. The Court of Appeal held that it had no jurisdiction to rehear an appeal on the ground that facts were discovered which tended to show that judgment was obtained by fraud of the court below. The proper way to raise such an issue was by separate action. It is significant, however, that Jessel MR made the following observation (at p. 299):

> If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy.

[14] From quite early, therefore, the English Court of Appeal envisaged the possibility that it might re-open an appeal if there was no other avenue available to redress a perceived injustice. ***Reg. v. Bow Street Magistrate Ex p Pinochet Ugarte*** *(No 2)* [2000] 1 AC 119 was just such a case. The House of Lords agreed to rehear an appeal because of apparent bias on the part of one of its members. It was conceded that the House of Lords had jurisdiction in the appropriate case to rescind or vary an earlier order, a concession which Lord Brown-Wilkinson thought was rightly made. He said (at p. 132):

> In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House. There is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered..... However, it should be made clear that the House will not reopen any appeal save in circumstances where, through no fault of a party, he or she has been subjected to an unfair procedure. Where an order has been

> made by the House in a particular case there can be no question of that decision being varied or rescinded by a later order made in the same case just because it is thought that the first order is wrong.

[15] In ***Taylor v Lawrence***, Lord Woolf recognized that underlying Lord Brown-Wilkinson's preparedness to reopen a decision of the House was the fact that the House of Lords was the final appellate court. The Court of Appeal was not in the same position and accordingly the principle on which Lord Brown-Wilkinson acted did not automatically apply (p. 544). But he appreciated that appeals to the House of Lords could only be pursued by leave of the Court of Appeal or the House itself and that such leave was only given in cases of such importance as would justify the attention of the final appellate court. There would be many cases therefore where there was in fact no appeal to the House of Lords. In such cases, Lord Woolf continued (at p. 545):

> …. it would not be in accord with the purposes for which this court was established for it not to accept the reality of the situation and to decline to recognise a jurisdiction which it would otherwise have, because there is a theoretical, though not a real, right of appeal to the House of Lords. In such a case this court is for practical purposes the final court of appeal and if this court is not prepared to ensure justice is done, justice will not be done.

[16] Starting from the proposition that the Court of Appeal had the implicit jurisdiction, arising from the fact of it being an appellate court, to "correct wrong decisions so as to ensure justice between the litigants involved" and "to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents", Lord Woolf was in no doubt that the Court of Appeal enjoyed the residual jurisdiction to reopen an appeal to avoid real injustice in exceptional circumstances. However, he appreciated that (at p. 547)

> (t)here is a tension between a court having a residual jurisdiction of the type to which we are here referring and the

> need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.

One such case is where there is an allegation that the judgment of the court was vitiated by bias. In such a case, he continued (at p. 547):

> (t)he need to maintain confidence in the administration of justice makes it imperative that there should be a remedy. The need for an effective remedy in such a case may justify this court in taking the exceptional course of reopening proceedings which it has already heard and determined. What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave.

[17] On the question of the procedure to be adopted to ensure that an appeal will only be reopened "when there is a real requirement for this to happen", Lord Woolf proposed that (at p. 547):

> (t)he residual jurisdiction which we have been considering, is one which should only be exercised with the permission of this court. Accordingly a party seeking to reopen a decision of this court, whether refusing permission to appeal or dismissing a substantive appeal, must apply in writing for permission to do so. The application will then be considered on paper and only allowed to proceed if after the paper application is considered this court so directs. Unless the court so directs, there will be no right to an oral hearing of the application. The court should exercise strong control over any such application, so as to protect those who are

> entitled reasonably to believe that the litigation is already at an end.

[18] I find myself in total agreement with the reasoning and conclusions of Lord Woolf. Contrary to Dr Kaseke's submissions, I consider it quite rational and in the interests of justice for this court to reserve unto itself the power to re-open its decisions where a substantive injustice has been done and there is no other avenue of redress. I venture to say, again contrary to Dr Kaseke's submissions, that public confidence in the judicial system would be undermined if this court were to refuse to re-hear appeals in those circumstances. Nothing undermines confidence in the administration of justice more certainly than an injustice left un-remedied. In addition, I am of the view that the rule established in ***Taylor v Lawrence*** is not conducive to uncertainty and will not necessarily result in a proliferation of litigation or of the circumstances in which the court will be prepared to set aside its decisions. Indeed, the rule emanating from ***Taylor*** is fairly tightly drawn and procedural safeguards such as those suggested by Lord Woolf can be implemented to ensure that the jurisdiction of the court is not abused. But even if it turns out that unnecessary litigation is spawned, the chance that injustice might otherwise be tolerated is worth the risk.

[19] Finally, Dr Kaseke sought to distinguish ***Taylor v Lawrence*** on the ground that, given that there is no right of appeal to the Supreme Court, the English Court of Appeal in most cases will be the final appellate court and there would be a danger of injustice if it were precluded absolutely from re-considering its decisions. Dr Kaseke appears to implicitly accept that a rule permitting the re-opening of a decision of a final appellate court where otherwise substantial injustice might occur is a salutary one. But, Dr Kaseke continued, in Belize the Court of Appeal finds itself in a different position in that there was a more generous right of appeal to the Privy Council under section 3 of the Privy Council Appeals Act, as there is now a generous right of appeal to the Caribbean Court of Justice under section 6 of the Caribbean Court of Justice Act No 5 of 2010. For this reason, he submits, there is no good reason to follow ***Taylor***. Dr

Kaseke's argument is flawed in two respects. First of all, a right of appeal to the Privy Council, and now to the Caribbean Court of Justice, from the Belize Court of Appeal is not available in all cases. In some cases, the leave of this Court is required, and in others, access to the final appellate court is only available with the special leave of that court. In cases where leave is required, therefore, the Belize Court of Appeal is in a similar position to its English counterpart. Secondly, the possibility that in any particular case there may be an absolute right of appeal is catered for in the ***Taylor*** ruling since the very existence of a right of appeal would mean that there would likely be an alternative remedy which would oust the Court of Appeal's jurisdiction to re-open its decisions.

[20] In my view, therefore, the rule in ***Taylor v Lawrence*** represents the law in Belize.

Applying Taylor v Lawrence

[21] It was readily apparent to Mr Courtenay SC, who appeared for the respondent, that his client would fail the ***Taylor v Lawrence*** test because he had an alternative remedy to redress his complaint of apparent bias by way of appeal to the Privy Council, to which he was entitled as of right and in respect of which he had obtained final leave before he made his application to re-hear the appeal. In fact, Mr. Courtenay conceded in his written submissions that the Privy Council had jurisdiction to permit a complaint of bias to be raised before their Lordships' board, even where the point was not taken in the Court of Appeal. He cited the case of ***Tibbetts v The Attorney General of Cayman Islands*** [2010] UKPC 8. I agree that Mr. Courtenay's concession was well founded. Ordinarily, this would have brought a speedy conclusion to his application. However, Mr Courtenay deployed a number of arguments in the alternative as to why we should nevertheless hear his application.

[22] Firstly, he submitted that if we did not do so his client's constitutional rights would be infringed. He did not develop this argument fully either in his written or oral submissions, except to refer us to the judgment of Mottley P in the ***Belize Electricity*** case. At paragraphs 25 and 26 of his judgment, Mottley P appears to have found that a litigator's right to the protection of the law entitles him to the right to apply for a re-hearing of an appeal to contend that the decision of a court is vitiated by bias. It is not entirely clear whether Mottley P was of the view that the rule established in ***Taylor v Lawrence*** was inconsistent with the right to the protection of the law and for that reason should be modified or rejected. In any event, given that, as already noted, the point resolved in that case was that the court could entertain an application to re-hear an appeal filed before the perfection of the court's order, a point not considered or contradicted in ***Taylor v Lawrence***, any ruling by Mottley P on the constitutionality of ***Taylor v Lawrence*** would also have been *obiter*.

[23] In my view, the principles enunciated in ***Taylor v Lawrence*** are quite compatible with the right to the protection of law. No doubt, the right to the protection of the law guarantees the right to a fair trial, which includes the right to an impartial tribunal – ***Attorney General of Barbados v Joseph and Boyce*** (CCJ Appeal CV 2 of 2005, 8 November 2006, paras 62-65 of the joint judgment of de la Bastide P and Saunders J). It also guarantees the right of access to a court of law to have complaints of breaches of constitutional rights, including complaints of apparent bias, adjudicated. But in assessing whether a litigant's right to the protection of the law has been infringed, the crucial question is whether the system of justice provides adequate mechanisms whereby such complaints may be ventilated and determined. In assessing the adequacy of such mechanisms, the entire system of justice must be taken into consideration including any avenue of appeal through which redress might be obtained. As Lord Brown said in ***Independent Publishing Company Limited v Attorney General of Trinidad and Tobago*** [2005] 1 AC 190, at para 88, in deciding whether the right to the due process of law (which covers the same grounds as

the protection of the law, per ***Joseph & Boyce,*** supra para 64) has been infringed "it is the legal system as a whole which must be looked at and not part of it." Thus, in that case, a person who was committed to prison for contempt by a high court judge in breach of natural justice was held not to have been deprived of his right to the due process of law since he had a right of appeal to the court of appeal to seek redress and he was released on bail in the meantime. The legal system as a whole, in other words, was fair. It would have been different if, as in ***Maharaj v Attorney General of Trinidad and Tobago (No 2)*** [1979] AC 385, there was no right of appeal to remedy a committal to prison in violation of the right to be heard. Likewise, it would *prima facie* be a violation of the right to the protection of the law if a final appellate court, or an intermediate court of appeal from which no appeal on a particular point is permissible, were to decline to re-open its decision to entertain a compliant of bias.

[24] The rule in ***Taylor v Lawrence*** implicitly recognises that in fashioning a fair rule governing the re-opening of perfected orders of a court of appeal the legal system as a whole must be assessed. By denying itself jurisdiction where there is an alternative remedy on appeal, the Court acknowledges that the avenue of appeal to put right a decision vitiated by bias is itself due process. Likewise, by accepting jurisdiction where there is no other avenue of redress and where there is a real danger that substantial injustice has been done, the rule upholds the right of access to court to remedy violations of natural justice. Whether by way of appeal, or by re-opening its perfected orders where there is no such appeal, ***Taylor v Lawrence*** guarantees access to the court to remedy a compliant of bias.

[25] It is accordingly my view that the rule in ***Taylor v Lawrence*** is consistent with the Belize Constitution.

[26] Next, Mr Courtenay says that his case is distinguishable because his client only discovered the facts supporting his complaint of apparent bias after the perfection of the court's order. Accordingly, he says, ***Taylor v Lawrence*** is

distinguishable. There is no merit in this argument. The fact is that after the respondent uncovered Morrison JA's connection with the RBTT group of companies, he was granted final leave to appeal to the Privy Council and only gave instructions to discontinue that appeal some months afterwards. An avenue of redress was available to him but he chose not to take advantage of it for reasons, the cogency of which I will assess next. I can conceive of a case where exceptionally an unsuccessful litigant, through no fault of his own, discovers long after an order of the court has been perfected, matters which might give rise to a complaint of substantial injustice. It might happen that in those circumstances an appeal to the final appellate court is closed off by the passage of time. In such circumstances, the rule in ***Taylor v Lawrence*** does not preclude the re-opening of an appeal, provided the other caveats set out in Lord Woolf's judgment are satisfied.

[27] Lastly, Mr Courtenay submits that the respondent had no effective remedy before the Privy Council because he could not afford the exorbitant costs he would have to incur in pursuit of that appeal. The respondent originally supported that claim by the bald assertion that he was "not able to afford such costs", but later took the opportunity to provide additional details concerning his financial circumstances. Suffice it to say that while the particulars supplied do not establish that the respondent is a wealthy man, neither is he impecunious. Like Carey JA, I would be prepared on the appropriate occasion to consider finding that, for the purposes of the application of the rule in ***Taylor v Lawrence***, there would be no alternative avenue of redress where an appeal is beyond the litigant's financial means. We should be concerned with real and not fanciful alternative avenues of redress. But I fear that opening this escape route to someone like the respondent who is a professional man, the owner of two properties and has a monthly income of BZ$21,000.00, would effectively eliminate that part of ***Taylor v Lawrence*** which requires that there be no alternative to this Court entertaining the application to re-hear the appeal itself. If

an exception is made for someone in the respondent's circumstances, in other words, it would have to be made for the vast majority of Belizeans.

[28] It is my view therefore that the respondent had an alternative avenue to redress his complaint of apparent bias before the Privy Council and has chosen not to exercise it. On this basis alone I would not be prepared to re-open the appeal.

[29] It is strictly not necessary to consider whether the respondent's argument on apparent bias would have succeeded. However, given that the point has been fully ventilated and the possibility exists that this matter may go further, I will give my views on the bias challenge.

The test of apparent bias

[30] There is no dispute between the parties that the test to be applied is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that Morrison JA. was biased when he delivered his judgment in the appeal. There could hardly be any dispute since the applicable test has been authoritatively determined on a number of occasions – see for example ***Meerabux v Attorney General of Belize*** [2005] 2 AC 513 and ***Tibbetts v Attorney General of the Cayman Islands*** [2010] UKPC 8, para 3.

[31] The application of the test must necessarily begin with an identification of the facts which the putative fair minded and informed observer must consider. It is for this court to determine what those facts are on a balance of probabilities – ***Tibbetts***, para 6. Given that the crux of the respondent's case is that apparent bias has arisen because of Morrison JA's past and his wife's current relationship with the appellant, the precise nature of that relationship must be explored. Having done so, it is for this court to determine whether that relationship would

lead the fair-minded and informed observer to conclude that there was a real possibility that Morrison JA decided the case in favour of the appellant because of that relationship. That exercise necessarily involves an understanding of what it is about that type of relationship which might lead a judge to favour one party rather than the other. As Gleeson CJ, McHugh, Gummow and Haynes JJ said in ***Ebner v Official Trustee in Bankruptcy*** (2000) 205 CLR 337 (at para 8):

> There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

[32] Lastly, the exercise must involve an appreciation of the characteristics of the fair minded and informed observer. Whether the particular observer is more or less suspicious, more or less gullible, or more or less given to hasty conclusions, for example, will all determine how the established relationship between Morrison JA and the appellant would be viewed as impacting the possibility of partiality.

The facts

[33] The facts concerning the relationship between Morrison JA and the appellant are to be derived from three sources, namely, disclosure made by the appellant, information provided by the respondent and a statement provided to the court by Morrison JA at our request.

Disclosure by the appellant

[34] By letter dated 2 June 2010, the appellant disclosed that up until 2008 Morrison JA was a director of RBTT Jamaica and chairman of its subsidiary, RBTT Securities; that he was a partner in Dunn Cox, a firm of attorneys on RBTT Jamaica's panel of Attorneys; that he represented RBTT Jamaica as counsel in one matter and provided a legal opinion to it in another matter but that he never represented or advised RBTT Securities; and that his wife is a partner at Dunn Cox but she had not yet personally advised or represented RBTT Jamaica or RBTT Securities.

Facts gathered by the respondent

[35] The respondent discovered and exhibited what appears to be the home page of the website of the firm of attorneys Dunn Cox. The exhibit was downloaded on 26th June 2010 and it displays a picture in the top right hand corner of Morrison JA. The purport of the exhibit was no doubt to suggest that Morrison JA had some continuing relationship with Dunn Cox, and therefore with RBTT Jamaica and RBTT Securities.

[36] He has also exhibited an extract from the consolidated financial statements of RBC Financial (Caribbean) Limited (RBTT Caribbean) for the year ended 31 March 2009 which contains a list of its subsidiaries. RBTT Jamaica, RBTT Securities and the appellant are all listed as being 100% owned by RBC Caribbean. There are 25 companies in all listed as subsidiaries. They are located in Trinidad and Tobago, St. Lucia, Suriname, St. Vincent and the Grenadines, St. Kitts and Nevis, Grenada, Netherlands Antilles, Aruba, Jamaica, British Virgin Islands and Barbados. It is apparent that RBC Caribbean is the successor as holding company to RBTT Financial Holdings Limited. Whether the number and identify of the subsidiaries of RBTT Caribbean were the same in 2009 as during the period 2005 to 2008 when Morrison JA was involved in the group is not revealed, but it would be fair to assume that it was largely the same.

[37] The respondent has also exhibited a document from the Royal Bank of Canada website 1995-2010, captioned "RBTT Financial Group, Corporate Profile", which records that on 16 June 2008, the Royal Bank of Canada completed the acquisition of the RBTT Financial Group which resulted in the creation of "one of the most extensive financial networks in the Caribbean, offering the full range of banking services in 18 jurisdictions from Bahamas in the North to Suriname in the South, with a network of 126 branches and 326 ATMs." The profile continues:

> Through its many subsidiaries, RBTT provides a comprehensive range of financial services and solutions relevant to the needs of individuals, small businesses, general commercial entities, regional and multinational corporations, as well as governments. In addition to personal, business and corporate banking, services include investment banking, trust and asset management, project financing, securities trading and stock-broking. The Group also offers insurance, mutual funds, credit cards, and electronic banking.
>
> With more than US$13.7 billion in assets, RBTT and RBC Caribbean operates 125 branches across the Caribbean, with 6,600 employees serving more than 1.6 million clients.

[38] Lastly, the respondent exhibited an extract from RBTT Financial Holdings 2005 Annual Report listing the Board of Directors of its major subsidiaries. RBTT Jamaica and the appellant are included. Morrison JA is listed as a director of RBTT Jamaica. A cursory examination of the list shows a not insignificant number of instances of the same directors serving on a number of different boards in the group.

[39] The appellant has not challenged the authenticity of these documents nor has it attempted to put any gloss on the picture which these documents portray. What emerges is a picture of one large bank operating across the Caribbean with branches in the individual territories where the bank has a presence. This is not

unlike a large bank operating in one country with branches in different cities. The difference is that in each territory there was no doubt the need to incorporate separate companies to run the branches located there, each with its own board of directors and management structure. Thus, while strictly speaking Morrison JA performed his duties as director in a legal entity separate and apart from the group owner and it subsidiaries, and would have been concerned primarily with the issues facing RBTT Jamaica and the branches in Jamaica under its purview, he was in practical reality involved in a much larger banking enterprise spanning the Caribbean. And even though he would not likely have been expected to be concerned with the day to day affairs of the other subsidiaries and their branches, he no doubt would have been required to implement group policy in relation to Jamaica.

[40] In his affidavit filed in support of his application to set aside the court's judgment, the respondent pointed out that much of the dispute between himself and the appellant unfolded while Morrison JA held positions with the RBTT group of companies and while he or his firm acted for companies within that group. The respondent was appointed receiver of Intelco on 1 November 2004 and his appointment ended on 14 January 2005. He tendered his invoice for services rendered as receiver on 18 January 2005. He commenced proceedings in the Supreme Court on 18 April 2006. His claim was tried in October 2007 and Awich J. delivered judgment on 10 October 2008. In addition, during the period from April 2006 until April 2008, when he resigned his position with RBTT Jamaica and RBTT Securities and as partner of Dunn Cox, Morrison JA was both a judge of the Court of Appeal of Belize, a director and chairman of RBTT Bank Jamaica and RBTT Securities respectively, and a partner in a firm of attorneys acting for these two companies.

Morrison JA's statement

[41] On 21 June 2011, Morrison JA provided a statement relative to the objection made by the respondent at the request of the Court made through the Registrar. The following is a summary.

[42] In early 2005, Morrison JA was approached by the then managing director of RBTT Jamaica to join the board of the bank as a director. He was asked to join because of his background and experience in industrial relations and in particular because he previously dealt with the trade union which had representational rights for the majority of staff at the bank. At the time, the bank was going through a period of unrest in its staff and union relations and it was thought that Morrison JA might be able to advise the bank on these matters. Up until his resignation in 2008, his major contribution to the board and the bank was in respect of staff and union related matters.

[43] For approximately one year between 2005 and 2008, he was a director and chairman of RBTT Securities which was a wholly owned subsidiary of RBTT Jamaica. He was a non-executive director of both companies for which he was paid nominal director's fees and travelling expenses. Other than mentioned above, he had no connection or interaction of any kind with the management of the group itself or with any member companies outside of Jamaica, including the appellant.

[44] At no time did he hold any financial interest of any kind, whether by way of shareholding or otherwise, with any of the companies in the RBTT group, including in the Jamaican companies. Neither was he at any time a client of nor borrower from either company, save for a credit card which was issued by RBTT Jamaica to all directors. That card was surrendered subsequent to his resignation and the account is closed.

[45] He accepts that he was a member of the firm of Dunn Cox for twenty years and retired as partner at the end of April 2008 when he took up an appointment as a judge of the Court of Appeal of Jamaica. He accepts also that

Dunn Cox was one of the firms which from time to time represented and provided advice to RBTT Jamaica and probably RBTT Securities, but his firm was not the bank's dedicated firm of attorneys and was not on a general retainer with the bank. He accepts further that he provided advice to the bank from time to time and represented the bank before the Industrial Disputes Tribunal but he does not recall appearing on behalf of the bank in court.

[46] He accepts further that his wife continues to be a partner in the firm, but asserts that otherwise he has had no connection of any sort with the firm since his retirement and receives no financial benefit of any kind from the firm. He says that he did not know that a picture of him still appeared on the firm's website until he saw reference to it made in the respondent's affidavit. The picture was taken before his retirement. He has since asked that his picture be removed. He was told that its continued use was an oversight.

[47] He asserts that he was not aware that the respondent had filed a claim in the Supreme Court in 2006 and indeed that the first time he became aware of the matter was shortly before the hearing of the appeal in March 2009.

The status of Morrison J's statement

[48] The approach which a court should take to a statement by a judge whose impartiality is impugned was explored in ***Locabail (UK) Ltd v Bayfield Properties Ltd*** [2000] QB 451. Lord Bingham CJ, Lord Woolf MR and Sir Riche Scott VC said (at para 19):

> While a reviewing court may receive a written statement from any judge, lay justice or juror specifying what he or she knew at any relevant time, the court is not necessarily bound to accept such statement at its face value. Much will depend on the nature of the fact of which ignorance is asserted, the source of the statement, the effect of any corroborative or contradictory statement, the inherent probabilities and all the circumstances of the case in question. Often the court will have no hesitation in accepting the reliability of such a statement; occasionally, if rarely, it may doubt the reliability

> of the statement; sometimes, although inclined to accept the statement, it may recognise the possibility of doubt and the likelihood of public scepticism. All will turn on the facts of the particular case. There can, however, be no question of cross-examining or seeking disclosure from the judge. Nor will the reviewing court pay attention to any statement by the judge concerning the impact of any knowledge on his mind or his decision: the insidious nature of bias makes such a statement of little value, and it is for the reviewing court and not the judge whose impartiality is challenged to assess the risk that some illegitimate extraneous consideration may have influenced the decision.

See also ***Helow v Secretary of State for the Home Department*** [2008] 1 WLR 2416 – per Lord Mance at para 39.

[49] At first blush, there are three areas where there appear to be conflict between the statement provided by Morrison JA and the information supplied by the appellant in answer to the respondent's request for disclosure and that which the respondent was able to discover via the internet. In the one instance, the appellant disclosed that Morrison JA represented RBTT Jamaica as Counsel in one matter and provided a legal opinion to it in another matter. For his part, Morrison JA could not "actually recall ever myself appearing in court, in Jamaica or elsewhere, as the bank's counsel", but he does nevertheless accept that he represented RBTT Jamaica on two occasions before the Industrial Disputes Tribunal. Exactly why that does not constitute appearing as counsel is not stated. Secondly, the appellant disclosed that Morrison JA was chairman of RBTT Securities up until 2008 while Morrison JA maintains that he was a director and chairman of RBTT Securities for approximately one year during the period 2005 and 2008. Lastly, Morrison JA asserts that save for his contribution to the board of RBTT Jamaica mainly in the field of industrial relations, he "had no connection or interaction of any kind with the management of the RBTT Group itself, or with any of its member companies outside of Jamaica, including RBTT Trust Limited (the appellant)." While there is nothing to contradict this statement, a more complete picture appears from the extract from the 2005 Annual Report

of RBTT Financial Holdings which reveals that five of the eight directors on the board of RBTT Jamaica also sat as directors on one or more of the boards of companies in the group and that Mr Suresh B. Sookoo, who was a director on 13 other boards within the group including RBTT Jamaica, was also the CEO and Managing Director of the appellant.

[50] Despite these 'blemishes', I have no difficulty in accepting Morrison JA's statement as reliable, so far as it goes. The fact is that he has fleshed out in great detail the bare bones of the information provided by the appellant and the respondent and was quite forthcoming as regards the circumstances under which he joined RBTT Jamaica and RBTT Securities as director and the advice and representation he provided to RBTT Jamaica, in some instances providing more information than the appellant did. The thrust of his statement, as I understand it, which is not contradicted by any other information before us, is that he had little to do with the day to day running of the bank and had no connection with the management of the group companies and in particular the appellant. Moreover, he knew nothing of the respondent's dispute with the appellant until it came before him in his capacity as an appellate judge. On the other hand, he has not contended that he did not associate with directors who sat on other boards in the group or that, as one would expect, he would have discussed issues affecting the group of which RBTT Jamaica was a part.

[51] However, I pay no attention to his concluding statement that in delivering his judgment he was "completely unaffected by anything other than that which can be found in the record of appeal and my understanding of the applicable law." There is no allegation of actual bias against Morrison JA. We are concerned only with the real possibility of bias and with the risk that he may have been unconsciously influenced by his past associations. The judge's own assessment of whether any of these matters influenced his determination is accordingly and logically irrelevant. As Devlin LJ noted in ***R v Barnsley***

Licensing, Ex p. Barnsley and District Licensed Victuallers' Association [1960] 2 QB 167, 187:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may allow it unconsciously, to do so.

Summary

[52] In summary, I find the following established on the evidence.

i) Morrison JA was a director of RBTT Jamaica between 2005 and 2008;

ii) He was also the chairman of RBTT Securities for at least one year during that period. Nothing turns on the precise period of time he acted as a member of the board of RBTT Securities;

iii) During this period he was also a partner in the firm Dunn Cox which provided legal services to RBTT Jamaica and RBTT Securities. Dunn Cox was on a panel of attorneys and not RBTT Jamaica's or RBTT Securities' exclusive attorneys and was not on retainer;

iv) While at Dunn Cox, Morrison JA personally provided legal advice to RBTT Jamaica and represented RBTT Jamaica before the Industrial Disputes Tribunal and probably as counsel in the Supreme Court;

v) Morrison JA's main duties on RBTT Jamaica's board was in relation to industrial relations matters;

vi) He was a non-executive director and had nothing to do with the day to day running of the enterprise;

vii) He had no connection with the management of any other company in the group, including the appellant;

viii) However, he served on the board of RBTT Jamaica alongside five persons who were members of the boards of other companies in the group;

ix) In particular, he served alongside Mr. Suresh Sookoo who was, in 2008 at least, the chairman of the appellant;

x) Further, her served as part of one large bank stretching across the Caribbean, of which the appellant was a part, and would have been responsible for implementing group policies in Jamaica, although he would only have been concerned with the affairs of the branches run by RBTT Jamaica and would not have been concerned with the operations falling under the appellants' purview;

xi) Morrison JA resigned his position as director of RBTT Jamaica and as chairman of RBTT Securities (if he still held the post then) in April 2008 when he took up his position on the Court of Appeal of Jamaica;

xii) The respondent was engaged by the appellant in 2004 as receiver of Intelco and his dispute with the appellant concerning his remuneration as such receiver developed and was pursued in the High Court of Belize during the period when Morrison JA sat as a director of RBTT Jamaica and for part of the time while he was a Justice of Appeal of the Belize Court of Appeal;

xiii) However, Morrison JA was not aware of and had no connection with the respondent's dispute with the appellant until he became apprised of it after the appeal had been filed against the judgment of Awich J;

xiv) At no time did Morrison JA have any shareholding or any other financial interest in the appellant or RBTT Jamaica or any other company in the group;

xv) Morrison JA's wife continues to be a partner at Dunn Cox which continues to provide legal services to RBTT Jamaica and RBTT Securities.

[53] In short, Morrison JA had no direct relationship with the appellant as a separate legal entity and as a separate banking operation. He did provide legal services to and was once on the board of directors of two companies which were related to the appellant in that they shared one owner and were accordingly part of a group of companies. It could be said as well that while it lasted he was part of a larger banking enterprise. He also served alongside the chairman of the appellant. However, there is no evidence of the depth of any personal relationship he may have had with Mr Sookoo. Further, his wife's firm continues to provide legal services to companies related to the appellant. Lastly, such relationship as Morrison JA did have with the appellant's related companies ceased some 10 months before Morrison JA became seized of the respondent's matter.

[54] The question is whether the fair-minded and informed observer, having considered the past relationship between Morrison JA and companies related to the appellant and Morrison JA's wife's current relationship with those companies, would conclude that there was a real possibility that Morrison JA did not bring an impartial mind to the resolution of the dispute between the appellant and the respondent.

The fair-minded and informed observer

[55] The attributes of the fair-minded and informed observer have been explored in a number of cases. I have paraphrased relevant extracts from these cases in the following summary.

[56] The fair-minded observer is the sort of person who always reserves judgment on every point until he has seen and fully understood both sides of the argument – ***Helow v Home Secretary*** [2008] 1 WLR, 2416, 2418, para 2. His approach must not be confused with that of the person who has brought the complaint. The "real possibility" test ensures that there is this measure of detachment. The assumptions that the complainer makes are not necessarily to

be attributed to the observer, unless they can be justified objectively - ***Helow***, para 2. This is particularly important in this case where, as explained below, there is no obvious, objective basis for supposing that Morrison's JA's past association with the appellant's related companies has engendered in him a bias in favour of the appellant. The respondent may genuinely think that this is the case, but his subjective beliefs must be discounted in preference for objectively established facts and certainly cannot be decisive as to what the fair-minded and informed observer would conclude.

[57] The putative fair-minded and informed observer is not unduly sensitive or suspicious - per Kirby J in ***Johnson v Johnson*** (2000) 201 CLR 488, 509, para 53; ***Helow***, para 2. The mere fact that there is a past relationship between Morrison JA and the appellant's related companies would not, without more, create a real possibility of bias in her mind. Our putative observer would require some objective justification for making that connection. Nevertheless, the observer is not complacent. She knows that fairness requires that a judge must be, and must be seen to be, unbiased - ***Helow***, para 2. She also knows that judges, like anybody else, have their weaknesses. Accordingly, she will not shrink from the conclusion that Morrison JA's past association with the appellant's related companies may have made it difficult for him to judge the case before him impartially, if such a conclusion can be justified objectively - ***Helow***, para 2.

[58] The observer must be informed and accordingly before he takes a balanced approach to any information he is given, he will take the trouble to inform himself on all matters that are relevant. - ***Helow***, ibid. para 3. In this context, he will bear in mind not only that Morrison JA as director of RBTT Jamaica and RBTT Securities would have been primarily concerned with those companies' affairs and not those of the appellant, but also that Morrison JA served companies which were part of a larger banking enterprise and most probably was required to implement the policies of the group.

[59] The observer will assume that a judge, by virtue of his office, is intelligent and well able to form his own views and be capable of detaching his own mind from things that he does not agree with - ***Helow***, ibid. para 8. The informed observer can also be expected to be aware of the legal traditions and culture of this jurisdiction and that those legal traditions and that culture have played an important role in ensuring high standards of integrity on the part of the judiciary – ***Taylor v Lawrence*** [2003] QB 528, 548, para 61; ***Jones v Das Legal Expenses Insurance Co Ltd*** [2003] EWCA Civ 1071, at paras 25-27. However, the fair-minded and informed observer would be tending towards complacency if she treated the fact of a judge having taken the judicial oath as a panacea - ***Helow***, ibid. para 27. The fair-minded and informed observer is not an insider (i.e. another member of the same tribunal system). Otherwise, she would run the risk of having the insider's blindness to the faults that outsiders can so easily see - ***Gillies v Secretary of State for Works and Pensions*** [2006] 1 WLR 781, para 39. Although she will have a general appreciation of the legal professional culture and behavioural norms, therefore, she may not so readily take for granted, as judicial officers might, a judicial officer's ability to compartmentalize his mind and ignore extraneous information or circumstances - ***Panday v Virgil*** (Mag. App. 75 of 2006), per Archie JA (as he then was), para 10. As such, the judicial oath is more a symbol than of itself a guarantee of the impartiality that any professional judge is by training and experience expected to practise and display. Thus, a judge's professional status and experience is only one factor which a fair-minded observer would have in mind when forming her objective judgment as to the risk of bias - ***Helow***, ibid. para 57. The proper point of departure, therefore, is the 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 onus of rebutting that presumption and demonstrating bias lies with the person alleging it. Mere suspicion of bias is not enough; a real possibility must be demonstrated on the available evidence - ***Panday v Virgil***, para 9.

Logical connection between association and bias

[60] Paraphrasing ***Ebner***, the question is how might Morrison JA's past relationship to the appellant's related companies and his wife's firm's ongoing provision of legal advice to those companies be thought by the fair-minded and informed observer, possessing the attributes referred to above, possibly to have diverted Morrison JA from deciding the case on the merits. Put differently, what is it about that relationship which could possibly have prevented Morrison JA from bringing an objective judgment to bear on the case? – ***Davidson v Scottish Minister*** [2004] UKHL 34, para 6.

[61] In assessing, firstly, whether Morrison JA's past relationship with the appellant's related companies could possibly have prevented him from deciding the case impartially, I have found it helpful to avoid describing the relationship between the appellant and the companies Morrison JA represented and served as if they were part of a human family. To be sure, it is customary in common parlance to refer to subsidiaries in a group of companies as being part of a family of companies, to describe their common owner as being their parent and to refer to them as being sisters, though never brothers. But the danger of describing the relationship between subsidiary companies in this way for the purposes of applying the test of apparent bias is that human emotions and connections might unwittingly be brought to bear on and influence the exercise. It is not difficult, for example, to imagine that a judge who has a close relationship with a sister of a party to litigation before him might in a general sense wish the best outcome for that party. In such circumstances, the fair-minded and informed observer may be justified in concluding that there was a real possibility that the judge would be incapable of putting aside his natural feelings of affection towards his close friend's sister. In the ***Belize Electricity*** case, Carey JA thought that the fair-minded and informed observer would instinctively think that there was a real possibility that a judge would be unable to fairly decide a case in which his son was a member of the governing body of one of the parties. Close friendships and

consanguinity are assumed to affect, even if subconsciously, a judge's capacity to be impartial. Can the same be said of a judge's relationship with a company that is related in a corporate sense to a party to the proceedings?

[62] Morrison JA worked for and served companies which were part of a group of companies, including the appellant, engaged in a common enterprise. In the absence of some evidence of a corporate culture which would produce a natural inclination to seek after or wish for the well being of each of the members of the group, 10 months after any connection with the group has been severed, I am unable to appreciate how that past relationship could influence, even unconsciously, Morrison JA's decision making process. He had no financial interest in the appellant or the group or in the outcome of the case. He had no knowledge of the respondent's dispute with the appellant and was not involved in any way with the issue while he served members of the group. There is no evidence that he was required to or gave any advice on the legal issues involved in the case. In other words, he had no vested interest one way or the other in the outcome of the case. He did not work for or serve the appellant and he had nothing to do with the appellant's operations. His connection to the appellant is entirely through the appellant's and RBTT Jamaica's relationship to a common owner in a common enterprise. There is nothing in the experience of this court which would suggest that there would be a natural, ongoing, subconscious impulse on the part of Morrison JA to favour the interests of the appellant in its case against the respondent, solely because of his past association with the appellant's related companies, even taking into account his participation in what I have described as a common enterprise, but bearing in mind that he was engaged entirely with the affairs of the related companies he served and not those of the appellant. In the absence of any evidence that such an impulse might arise, I cannot assume that the fair-minded and informed observer would conclude that such an impulse is objectively justified.

[63] The possibility that Morrison JA's wife's firm's relationship with RBTT Jamaica and RBTT Securities could have affected his impartiality is even more tenuous. There is no evidence that Dunn Cox's relationship with the appellant's related companies might be affected by the outcome of the case. Even if there was such evidence, there is no evidence that loss of work from those companies would affect the fortunes of Dunn Cox in any material way. It is not known, for example, whether RBTT's portfolio constitutes a substantial portion of Dunn Cox's work – see in this regard ***Jones v DAS Legal Expenses Insurance Co. Ltd***. [2003] EWCA Civ. 1071, paras 28-30. The respondent's case accordingly boils down to the possibility that Morrison JA's impartial disposition of the case would have been affected by the mere fact that his wife's firm provides legal services to companies related to the appellant. Again, in the absence of any evidence of a corporate or legal culture which would engender in a judge feelings of empathy towards the appellant in such circumstances, I find it impossible to conceive that a judge's ability to decide a case fairly on its merits could be affected by his wife's association in this particular way with companies related to a party.

[64] As to the fact that a picture of Morrison JA appeared on the Dunn Cox website, I accept that this was a matter of inadvertence and did not reflect any continuing relationship with Dunn Cox, far less RBTT Jamaica, and even far less the appellant. The fair-minded and informed observer would know this and would discount this happenstance altogether.

[65] Mr Courtenay drew our attention to a passage from the judgment of the Court in ***Locabail*** (at para 25), portions of which are worth quoting:

> ... a real danger of bias might well be thought to arise if there were personal friendship or animosity between the judge and any member of the public involved in the case; or if the judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case; ..... or if, 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..... In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat: every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

[66] He submitted that Morrison JA was "closely acquainted" with the appellant having regard to his past associations with the appellant's related companies and his wife's firm's continued relationship with those companies, that having regard to these matters there was "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 issue before him", and that there was a relatively short "period of time between the event relied on as showing a danger of bias and the case in which the objection is raised." The difficulty with his argument, as forcefully and clearly as it might have been put, is in discerning how prejudices, predilections and extraneous considerations could have or did develop as a result of these past or continuing relationships. Mr. Courtenay assumed that which I think must be proved, that the provision of legal services to and membership on the board of directors of companies related in a corporate sense to a party would create a predilection towards deciding the case in favour of that party, or a prejudice against any party opposing the related company and would so give rise to extraneous considerations. I have been unable to conceive of how such predilections or prejudices would naturally arise from a past relationship with a company related to the appellant, even one terminated only 10 months ago, and even less so from a judge's wife's professional relationship with such a related company.

[67] It must be remembered and emphasised that the fair-minded and informed observer would be aware of the legal traditions and culture of Belize, and even

as she would not be "wholly uncritical of that culture" (per Lord Bingham in ***Lawal v Northern Spirit Limited*** [2003] UKHL 35) and would not be complacent, she would appreciate that a trained and experienced judge such as Morrison JA would not "so far forget or disregard the obligations imposed by his judicial oath as to allow himself, consciously or unconsciously" (per ***Taylor v Lawrence***, para 69) to be influenced by the fact that he once served on the board of and provided legal services, and his wife's firm continues to provide legal services, to companies which are part of a group of companies to which the appellant belongs.

[68] In my view, therefore, the fair-minded and informed observer would not conclude that there was a real possibility that Morrison JA was biased when he delivered his judgment in this appeal.

[69] For all of these reasons, I would dismiss the respondent's application to reopen this appeal, with costs.

[70] Justice of Appeal Brain Alleyne, who recently demitted office, has asked me to record his agreement with the judgment that I have just delivered and with the judgment of Carey JA which follows.

_____

MENDES JA

CAREY JA

[71] In this application, counsel Mr Courtenay SC, moves for leave to rehear this appeal which was determined by this court (Sosa P Morrison and Carey JJA) on 30 October 2009, before a panel which does not include Morrison JA. The ground of the application is that the decision of the court was affected by the appearance of bias in respect of that judge.

[72] Dr Kaseke challenges this application by way of a preliminary objection on the ground that the order of the court, having been perfected, the court became *functus officio*, and as such cannot hear this application.

[73] This judgment will consider the two issues which now fall to be discussed, namely, the jurisdictional point and then, should the jurisdiction, if found to exist, be exercised.

The jurisdiction point

[74] Dr Kaseke founded his objection on, I fear, a misreading of certain observations of mine in **Belize Electricity Limited v Public Utilities Commission (No. 1)** (unreported) dated 8 October 2010. In that case, having referred to the headnote in **Taylor v Lawrence [2002] 3 WLR, 640**, I stated as follows:

> As a Court of Appeal we equally have an implicit jurisdiction to do what is necessary to correct wrong decisions and ensure public confidence in the administration of justice. For this reason, I would say that we have the jurisdiction to re-open an appeal which has been decided.
>
> An important point to note is that this restricted power to re-open an appeal is exercisable only before the order is drawn up or perfected."

This observation must be seen in the context in which it was made. In that matter counsel's contention was, that once the court had determined a matter, it was *functus officio*. As a matter of fact, the application to rehear the appeal had been made prior to the order being perfected. Even the most superficial reading of the judgments, would show that the court was in no way departing from **Taylor v Lawrence** (supra) which had held that the jurisdiction was exercisable in certain exceptional circumstances.

[75] Strictly speaking, a discussion of **Taylor v Lawrence** (supra) was not required having regard to the fact that the application in **Belize Electricity Limited v Public Utilities Commission** was made before the judgment was perfected. It is trite that a judgment may be recalled before it has been perfected and that case is, essentially, an illustration of the application of that principle.

[76] For this reason, the preliminary objection fails. In fairness to Dr. Kaseke, it is right to say that he did not press the point with his customary enthusiasm.

The merits

[77] Since **Taylor v Lawrence [2003] QB 528**, it is now accepted that the Court of Appeal has jurisdiction, in exceptional circumstances, to re-open an appeal it has determined. An illustration of an exceptional circumstance is provided in that case. Where there is an allegation that a decision is invalid because the court which made it, is biased, that circumstance would justify the court "in taking the exceptional course of reopening proceedings." (at p. 541). The court then added two riders, namely that it should be clearly established that a significant injustice had probably occurred and there was no alternative effective remedy. This court in **Belize Electricity Limited v Public Utilities Commission** (supra) was in no way departing from **Taylor v Lawrence** (supra).

[78] In this case, the appearance of bias having been advanced, there was an onus on the applicant to make good this allegation and to prove as well that there was no alternative remedy.

[79] I begin then with a consideration of the crucial question whether the facts as ascertained by the fair minded and well informed observer, would lead him to conclude that there was a real possibility that Morrison JA was biased or to be precise, gave the appearance of bias. Mr Courtenay SC disavows any claim for actual bias. He contends the facts he has put forward, give rise to apparent bias. We requested and were provided with a statement from the judge explaining his links with RBTT Bank Jamaica Ltd and RBTT securities Jamaica Ltd.

[80] The approach to this exercise was laid out in the advice of Lord Clarke in **Tibbetts v The Attorney General of the Cayman Islands [2010] UKPC 8**, helpfully cited to us by Mr Courtenay SC, -

> "The court must approach the issues in two stages. First, it is for the court to find the facts on the balance of probabilities. It is then for the court to decide on the balance of probabilities whether with knowledge of the facts so found, the putative observer would conclude (that apparent bias could be attributed to the judge.)"

[81] I pass to the facts –

The applicant was appointed the receiver of the charged assets of Intelco on 1 November 2004 by RBTT Trust Limited. The appointment was terminated on 14 January 2005.

During that period Morrison JA was a member of the Board of Directors of RBTT Bank Jamaica Limited and chairman of RBTT Securities Jamaica Limited. These companies are part of the RBTT Group of companies which includes the appellant.

> The judge at the time of the trial of the action. Morrison JA, was a practising attorney and a partner in a Jamaican firm of attorneys, Dunn Cox & Orrett. He has ceased to be such. His wife is a partner in the firm.
>
> A picture of the judge appears on the internet home page of the firm. The significance of this tidbit, is, I confess, far to seek.
>
> RBTT Bank Jamaica Ltd. and RBTT Securities Ltd. continue to be clients of the firm.
>
> Morrison JA was a member of the panel hearing the appeal "less than one year" after severing his connection with the Jamaican companies and this former firm.
>
> The judge was invited in 2005 to join the board of RBTT Jamaica Ltd. as a director. His major contribution to the board was in respect of staff and union related matters. He had no connection or interaction of any kind with the management of the RBTT Group itself or with any of its member companies outside of Jamaica, including RBTT Trust Ltd.

[82] The fair-minded and informed observer taking a balanced approach to this material, would note at once that there is no direct link between the judge and RBTT Trust Limited: the link which it is sought to fashion, is indirect. RBTT Trust Limited forms part of a group which includes RBTT Bank Jamaica Ltd. Because the fair-minded observer is also informed, he would appreciate that Morrison JA had no connection or interaction of any kind with the management of the RBTT Group itself or with any of its member companies outside of Jamaica, including RBTT Trust Limited. This factor makes the degree of separation that much wider than it might, at first blush, appear to have been. In other words, the alleged connection which it is sought to make between Morrison JA and RBTT Trust

Limited becomes factually, remote, and in my opinion, militates against a conclusion by the fair-minded and informed observer that there was a real possibility of bias in the judge.

[83] It is a fact that Morrison JA was a member of the law firm Dunn Cox, which from time to time provided advice to RBTT Bank Jamaica Ltd. but it was not the bank's dedicated firm of attorneys. The judge cannot recall ever appearing in court for the bank. His main area of advice as noted earlier, was in industrial and labour relations generally. On two occasions, he represented the bank before the Industrial Disputes Tribunal in Jamaica. The balanced approach which is an attribute of the fair-minded and informed observer, would incline that person to find that although RBTT Bank and RBTT Securities were part of the RBTT family, Morrison JA, vis-à-vis RBTT Trust Limited, would be a very distant relative indeed. The link sought to be devised, is, as Dr. Kaseke argues, so tenuous, as to be virtually non-existent.

[84] Where bias or apparent bias is being considered, the case of **Locobail (UK) Ltd. v Bayfield Properties [2000] QB 451** is the *locus classicus*. The judgment of the court was delivered by Lord Bingham of Cornhill, CJ (as he then was). The other members of that court were the then Master of the Rolls, Lord Woolf and the Vice-Chancellor, Sir Richard Scott. In the course of the judgment, Lord Bingham observed –

> "In considering whether there is a real danger of bias on the part of a judge, everything depends on the facts, which may also include the nature of the issue to be decided. However, a judge's religion, ethnic or national origin, gender, age, class, means or sexual orientation cannot form a sound basis of an objection. Nor, ordinarily can an objection be soundly based on the judge's social, sporting or charitable bodies; his Masonic associations; his previous judicial decisions; his extra-curricular utterances; his previous receipt of instructions to act for or against any party, solicitor or advocate engaged in a case before him; or his membership of the same Inn, circuit, local Law Society or chambers."

It is tolerably clear that the past association of the judge with the RBTT family is a fact upon which this superstructure of apparent bias is being raised. But as I have endeavoured to demonstrate, there are many degrees of separation between the judge and RBTT Trust Limited. The lack of any interaction between the appellant and the judge does not, in my judgment, provide a soundly based objection for apparent bias. There must exist as **Locobail** shows, that "there is a real ground for doubting the judge's ability to ignore extraneous considerations, prejudice and predilections and his ability to bring an objective judgment to bear on the issue." In assessing the reasonableness of the apprehension, the court, as the embodiment of the fair-minded and informed observer, must do so in the light of the oath of office taken by the judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. The court must also take into account the fact that the judge has a duty to sit on any case in which he is not obliged to recuse himself. See the observations of the Constitutional Court of South Africa in **President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147** at 177 and cited with approval in the **Locobail** case. It has not been suggested in the instant case, that Morrison JA was obliged to recuse himself.

[85] It was also said that although Morrison JA had ceased to be a partner in Dunn Cox, his wife continues to be such. Mr. Courtenay strove mightily to show how that fact could cause the fair-minded and informed observer to conclude that an apprehension of bias in Morrison JA arose. Counsel suggested that a fair-minded person must ask himself the question whether the question of the case ever came up in conversation between husband and wife, either while Morrison JA was a director or acting as counsel for the Jamaican company, and even after he had severed his links with the company and the firm but the wife remained a partner. This fair-minded person, it must not be forgotten, is also well informed. The judge said there was no interaction between the Jamaican company and the sister companies. He was quite unaware of the Supreme Court trial until he sat to hear the appeal. There is no factual basis from which any inference can be

drawn that a discussion could possibly take place between Morrison JA and his wife on the topic of the trial. The suggestion of a possible discussion would be wild speculation and thus, not based on any fact nor derived from fact.

[86] It is to be borne in mind that it is the judgment of the fair-minded and informed observer which is crucial. Lord Hope in **Helow v Secretary of State for the Home Department [2008] UKHL 62**, characterized this new personality in "our legal village" as –

> "The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious as Kirby J observed in Johnson v Johnson (p. 509, para. 53). Her approval must not be confused with that of the person who has brought the complaint. The 'real possibility' test ensures that there is this measure of detachment. The assumptions that the complainer makes are not to be attributed to the observer unless they can be justified objectively. Bur she is not complacent either. She knows that fairness requires that a judge must be, and must be seen to be, unbiased. She knows that judges, like anybody else, have their weaknesses. She will not shrink from the conclusion, if it can be justified objectively, that things that they have said or done or associations that they have formed may make it difficult for them to judge the case before then impartially."

In a Canadian case, **Wewaykum I.B. v R, 2003 SCC 45**, it was said that the test of appearance to a reasonable neutral observer (the Canadian equivalent of the fair-minded and informed observer) does not include the very sensitive or scrupulous conscience.

[87] The authorities constrain the court to take a robust approach when considering the apprehension of bias. There is not the slightest suggestion that Morrison JA has done or said anything to make it difficult for him to judge the case which was before him. Reliance is being sought from the fact that the wife of the judge remains a partner in Dunn Cox, which in the past represented the

Jamaican member of the group and the judge and his wife may have discussed the case. I have demonstrated earlier in this judgment that there is no basis whatever for any discussion to have taken place and that there was no interaction between the judge and the other members of the RBTT group. In the event, the separation makes the purported association remote and tenuous in the extreme.

[88] In the event, I am not persuaded that there is a serious or substantial ground for holding that there was a real possibility that Morrison JA was biased. In my opinion, that is sufficient to dispose of this application. It becomes wholly unnecessary in the circumstances to consider the effective remedy point. The power to re-open an appeal arises for example where bias has been established and there is no alternative remedy. **Taylor v Lawrence [2002] EWCA Civ 90**.

[89] However, in case I am found to be in error, I propose to deal with the effective remedy point so that a higher court would have the benefit of my point of view.

The effective remedy point

[90] Mr Courtenay SC contended that there was no effective remedy because the applicant was impecunious. The applicant he said deposed that he could not afford the two thousand dollars which he was advised was the cost of prosecuting the appeal. He acknowledged that there was no authority to support impecuniosity as a ground for the rehearing of an appeal. Dr. Kaseke agreed there was no case in point. It could scarcely be a ground in England where persons are assisted to access the courts. We were being asked to extend the limits of **Taylor v Lawrence** (supra).

[91] I did not understand Dr. Kaseke to argue that in the Belizean context, impecuniosity could not be held to be a consideration in a rehearing application. He did not demur to the observation of a member of the court that we were bound by **Taylor v Lawrence** (supra) in all respects. In the curial hierarchy, as respects the Court of Appeal of England and Wales, the House of Lords was, (at the time of **Taylor v Lawrence**), the higher court. It was natural then, for that court to discuss an appeal to the House of Lords as the alternative remedy. This court can and must discuss that issue in relation to an appeal to the Privy Council. The grounds upon which an appeal lies to these two bodies are quite different. In Belize, appeals are, as of right in Constitutional matters, and where the awards exceed the sum of $500 or by leave in other matters. The geographical fact that this court is far across the seas from London, England is a highly significant factor in relation to the cost of litigation. Where an injustice has been proven, such as a decision infected by bias, and the litigant has not the means to prosecute an appeal to the Privy Council, this court will effectively constitute the litigant's only recourse for redress. Such a person should not be driven away empty handed.

[92] Although the abolition of appeals to the Privy Council, is likely to make impecuniosity as a consideration of little importance in the future, in this case I am prepared to hold that in so far as appeals to the Privy Council are concerned, impecuniosity should be a consideration.

[93] In the instant case, the burden was on the applicant to establish this condition. It is a fallacy however, to assert that this ground is established by merely deposing - “the likely costs will exceed $200,000. I am not able to afford such costs.” and arguing, that that statement is under oath, and has not been challenged. It has little, if any weight.

[94] Counsel, in the event, sought and obtained leave to file a supplemental affidavit as to the applicant’s means. Dr. Kaseke was very critical of this affidavit,

and suggested that the court should take it with a degree of circumspection because it was prepared after the court had criticised the earlier effort.

[95] In this latter affidavit, the applicant did give some details of his financial situation. Receiverships although a part of his business, does not form the major part. Two previous receiverships in which he was engaged, lasted no less than two years. When so engaged, he was paid on a commission basis. The current charge on an hourly basis, by his firm, is $350 to $400. His average monthly billings and rental income, he put at $21,000.00. He gave his monthly expenditures as varying between $15,000 and $25,000 in respect of his office and home. He owns two houses. His average overdraft balance is $27,000, and his checking account $7,500.

[96] Impecuniosity perhaps like beauty or the lack of it, is, in the eye of the beholder. The applicant who is an accountant, collated this information as to his financial status. What has been extracted as appears above, represents the essential aspects of the material. The figures and amounts he has detailed are intended to meet the ground of impecuniosity which he has the onus of proving. It is by no means easy to appreciate how these figures and amounts he has chosen to provide, portray an impecunious man. He owns two houses, maintains two bank accounts, one in credit, the other in constant overdraft and spends between $15,000 and $25,000 monthly for house and office expenses. Banks are not known to provide overdraft facilities to impecunious persons. He has not stated with precision what the cost of an appeal to the Privy Council would be. He speaks to the fact of the impact on his earnings while he is away, but there is no need for his presence in London during the hearing. The cost he envisages to prosecute the appeal is based, as can be gathered from his affidavit, on speculation.

[97] In these circumstances I would hold that the ground has not been made out.

Disposition

[98] For these reasons, I would refuse the application to rehear the appeal and order that costs to the respondent be taxed, if not agreed.

_____

CAREY JA