THE FUNDAMENTAL PRINCIPLES OF RECUSAL OF A JUDGE AT COMMON LAW: RECENT DEVELOPMENTS

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SUMMARY

The common-law principle that no one should be a judge in his or her own cause is the basis upon which the rule against bias or apprehension of bias was founded. In constitutional parlance, this translates into the requirement that a judge or anyone under a duty to decide anything must be impartial, which is, in turn, the foundation for the recusal of a judge in adjudication. This cardinal principle of adjudication has produced an abundant case law indicating the circumstances in which a judge should, or ought to, recuse him- or herself on the ground of bias or reasonable apprehension of bias in common-law jurisdictions. This article focuses on the fundamental principles guiding the notion of recusal in the common-law courts. There is, first, a presumption of judicial impartiality, which is the preliminary but important hurdle an applicant for recusal of a judge must overcome. The inquiry proceeds no further if this presumption is not successfully rebutted early in the proceeding. The second hurdle is the test for recusal that the facts put forward in support of the allegation of bias or apparent bias must meet. This test is a two-dimensional reasonable standard test of a reasonably informed observer who would reasonably entertain an apprehension that the judge would (not might) be biased towards one party in the case. This test enables a court to determine whether the allegation of lack of judicial impartiality in any given case could lead to the recusal of the judge. The discussion that ensues is based on decided cases selected from specific Commonwealth jurisdictions where such matters have recently been dealt with. Indeed, these cases show that recusal of a judge in adjudication is, in practical terms, the application of the common-law principle of natural justice that a person cannot be a judge in his or her own cause. It is also a clear manifestation of the age-old adage that justice must not only be done, but must manifestly and undoubtedly be seen to be done.

1 INTRODUCTION

According to Black's Law Dictionary, "recusal" is the process "by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self-interest, bias or prejudice".[1] This is a textbook articulation of the principles derived from the common law over the years to the effect that a person cannot be a judge in his or her own cause;[2] or that a judge cannot sit in a case where he or she has financial,[3] or other interests that may raise in the mind of a reasonable observer a reasonable apprehension of bias;[4] or where the conduct of the judge or his or her utterances in adjudication[5] raises an apprehension of bias.[6] It also represents the constitutional requirement that to be properly constituted to hear a case, and in order to accord a fair hearing or trial in the case, the court or tribunal must not only be independent but must also be seen to be impartial.[7] An impartial judge is a fundamental prerequisite for a fair trial;[8] hence, an allegation that a judge should recuse him- or herself is a serious allegation that strikes at the core of judicial impartiality and attacks judicial integrity.[9]

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1 Black and Nolan *Black's Law Dictionary* 6ed (1990) 1277.

2 *Dimes v Grand Junction Canal* [1852] 3 HL Cas 750; *R v Gough* [1993] AC 646 (HL) 661.

3 See the discussion by Okpaluba and Juma "Pecuniary Interests and the Rule Against Adjudicative Bias: The Automatic Disqualification or Objective Reasonable Approach?" 2011 36(2) *Journal for Juridical Science* 97–118.

4 See e.g., *BTR Industries SA (Pty) Ltd v MAWU* 1992 (3) SA 673 (A); *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) (*President of the RSA v SARFU 2*); *SACCAWU v Irvin & Johnson Ltd Seafoods Division Fish Processing* 2000 (3) SA 705 (CC); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL).

5 The Supreme Court of Namibia has held in *S v Ningisa* [2013] 2 NR 504 (SC) that while there was a great degree of latitude with regard to cross-examination, the judge's interference was warranted where the cross-examiner was belabouring irrelevant points. The court found nothing on the record to suggest that a reasonable person might suspect any bias on the part of the trial judge that would result in an unfair trial so as to warrant his recusing himself. See generally, Okpaluba and Juma "The Dialogue Between the Bench and the Bar: Implications for Adjudicative Impartiality" 2011 128(4) *SALJ* 659-685; Olivier "Anyone But You, M'Lord: The Test for Recusal of a Judicial Officer" 2006 27(3) *Obiter* 606–618.

6 The question in *De Sousa v Technology Corporate Management* 2017 (5) SA 577 (GJ) par 94–101 and 112 was whether the defendants' fair trial rights had in any way been compromised by the court's decision to limit cross-examination. It was held that while the right to cross-examine a witness was a fundamental procedural right, it was not an absolute one, and could be limited where continued cross-examination would waste time and add unnecessarily to costs. Whether the limitation infringed a litigant's fair trial rights depended on whether he or she had suffered prejudice as a result, given the circumstances of the case. In the present case, the court was, therefore, fully justified in imposing a time limit on the cross-examination, given the unduly protracted nature of the trial, the defendants' repeated failure to abide by the timetable, and their insistence on cross-examining witnesses on points that were not dispositive of the case. In any event, no prejudice was suffered by the defendants given that it was only the time allowed for questioning that was limited.

7 S 34 of the Constitution of the Republic of South Africa, 1996.

8 *President of the RSA v SARFU 2 supra* par 48.

9 Per Goulding PCJ, *Boalag v R* [2014] CanLII 1235 (NL PC) par 12.

2 SCOPE OF THIS INQUIRY

Despite the already-existing avalanche of case law on this important subject of contemporary constitutional jurisprudence that has been investigated in the course of this decade,[10] there is no slow-down in the frequency with which cases raising the issue of bias, apprehended bias or the requirement of judicial impartiality are canvassed in common-law courts. It is for this reason that the developments of the last six years cannot be accounted for in a single article. Thus, the fundamental principles are dealt with in the present context, whereas the applications of these principles on a case-to-case basis within the respective jurisdictions are covered in the research taken up in separate articles by these authors.[11] Meanwhile, the *dictum* of Ponnan JA in *S v Le Grange*[12] is a clear reminder of the subject matter of this discussion. The learned Justice of the SCA observed:[13]

> "It must not be forgotten that an impartial judge is a fundamental prerequisite for a fair trial.[14] The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this – social order and security depend.[15] Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.[16] Bias in the sense of judicial bias has been said to mean 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'.[17] In common usage bias describes 'a leaning, inclination, bent or predisposition towards one side or another or a particular result'. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."[18]

However, preliminary to discussion of the specifically selected case studies in subsequent articles in this series, it is important, first and foremost, to deal

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10 In addition to the articles on the subject of bias by Okpaluba and Juma 2011 *Journal for Juridical Science* 97–118, already mentioned, see also Okpaluba and Juma "The Problems of Proving Actual or Apparent Bias: Analysis of Contemporary Developments in South Africa" 2011 14(7) *PER/PELJ* 14–43; Okpaluba and Juma "Waiver of the Right to Judicial Impartiality: Comparative Analysis of South African and Commonwealth Case Law" 2013 28(1) *SAPL* 1–21 and Okpaluba and Juma "Apprehension of Bias and the Spectacle of the Fair-Minded Observer: A Survey of Recent Commonwealth and South African Decisions on Prejudgment" 2014 28(2) *Speculum Juris* 19–40.

11 See Okpaluba and Maloka "Recusal of a Judge in Adjudication: Recent Developments in South Africa and Botswana" forthcoming, and "Recusal of a Judge in Adjudication: An Analysis of Recent Developments in Lesotho, Namibia, Seychelles and Swaziland" forthcoming.

12 2009 (2) SA 434 (SCA).

13 *S v Le Grange supra* par 21.

14 *President of the RSA v SARFU 2 supra* par 48.

15 *BTR Industries SA (Pty) Ltd v MAWU supra* 694F.

16 *R v S (RD)* [1997] 3 SCR 484 par 104–105.

17 *S v Roberts* 1999 (4) SA 915 (SCA) par 25.

18 *R v S (RD) supra* par 106.

with some recent cases that have been delivered on the essential aspects of presumption of impartiality and the test to be applied in determining the impartiality of a judicial officer or a non-judicial decision-maker, both of which issues systematically and inevitably arise whenever the subject of recusal is mentioned. The cases selected for the illustration and application of these two interconnected principles are drawn essentially from recent decisions such as the Supreme Court of Canada judgments in *Cojocaru v BC Women's Hospital and Health Centre*[19] and *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General);*[20] and the High Court of Australia case of *Isbester v Knox City Council*.[21] Closely connected with the test is the need to discover the characteristics of the reasonable observer that distinguishes him or her from the ordinary person and enables the proper assessment, application and understanding of the double-reasonableness test. In this context, a number of recent Privy Council[22] and South African[23] cases dealing with the qualities of this gender-neutral and not unduly insensitive person are discussed. After all is said and done, the question sought to be answered in the present context is to what extent these tests have assisted the courts in achieving the primary objective of recusal – namely, for practical purposes, whether contemporary adjudication lives up to the common-law principle of natural justice that a person cannot be a judge in his or her own cause; and whether the result of contemporary adjudication is a clear manifestation of the old adage that justice must not only be done, but must, manifestly and undoubtedly, be seen to be done. In effect, the question is to what extent the constitutional concept of judicial impartiality has enhanced the concept of justice in the adjudication of cases.

3 THE FUNDAMENTAL RULES OF RECUSAL

As reiterated by Canadian courts, the law has been clear for many years that a motion for recusal shall be heard and determined by the judge who has been asked to recuse him- or herself;[24] that the onus of proving the ground for recusal is on the applicant;[25] that a judge must give careful consideration to any claim for his or her recusal on account of bias or reasonable apprehension of bias; that a judge is best advised to remove himself or herself if there is any air of reality to a bias claim; that judges do a disservice to the administration of justice by yielding too easily to a recusal application that is unreasonable and unsubstantiated; litigants are not to pick their judges of choice nor are they entitled to eliminate judges randomly assigned to their case by raising specious partiality claims against those judges; and

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19 [2013] 2 SCR 357.

20 [2015] 2 SCR 282.

21 [2015] HCA 20 (10 June 2015).

22 *Yiacoub v The Queen* [2014] 1 WLR 2996 (PC); *Almazeedi v Penner* [2018] UKPC 3.

23 *Green Willows Properties v Rogalla Investment Co Ltd* [2015] ZASCA 133*; Mulaudzi v Old Mutual Insurance Co Ltd* 2017 (6) SA 90 (SCA)*; S v Longano* 2017 (1) SACR 380 (KZP); and *Sizani v Mpofu* [2017] ZAECGHC 127.

24 *Heffernan v Van Mechanical Contractors Inc* [2017] ONSC 2381 (CanLII) par 11. See also *Beard Winter LLP v Shekdar* [2016] ONCA 493 (CanLII); *Arsenault-Cameron v PEI* [1999] CanLII 641 (SCC).

25 *S v Lamseck* [2017] 3 NR 647 (SC) par 53; *S v Munuma* [2013] 4 NR 1156 (SC) par 15.

that to step aside in the face of a specious bias claim is to give credence to the most objectionable tactics.[26]

There are two very important guiding principles that often crop up when the subject of recusal is discussed. The first is the presumption of judicial impartiality – regarded in Canada as the "cornerstone" of "ancient and sturdy judicial structure"[27] and, in South Africa, as "a cornerstone of our legal system".[28] The second is the test to be applied in determining the circumstances in which the recusal application succeeds or fails. Speaking of these two requirements in *Bernert v ABSA Bank Ltd*,[29] Ngcobo CJ said:

> "What must be stressed here is that which this court has stressed before: the presumption of impartiality and the double requirement of reasonableness.[30] The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer.[31] This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice'.[32] Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.[33] And the requirement of impartiality is also implicit, if not explicit, in section 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution."[34]

The then-Chief Justice held that it must be assumed that through their training and experience, judicial officers have the ability to carry out their oath of office and to disabuse their minds of any irrelevant personal beliefs and predispositions. The effect of this presumption of judicial impartiality is that a judicial officer will not lightly be presumed to be biased. Mere apprehension on the part of an applicant that the court is, or will be, biased, however strongly that feeling might be, will not suffice.[35] Furthermore:

> "The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because a judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting.[36] This flows from their duty to exercise their

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26 Per Doherty JA, *Beard Winter LLP v Shekdar supra* par 10; *Miracle v Maracle III* [2017] ONCA 195 (CanLII) par 7.

27 *Carbone v McMahon* [2017] ABCA 384 (CanLII) par 46–47 esp fn 12–15.

28 *S v Le Grange supra* par 14; *Mulaudzi v Old Mutual Insurance Co Ltd supra* par 47; *Sizani v Mpofu supra* par 11.

29 2011 (3) SA 92 (CC).

30 *SACCAWU v Irvin & Johnson Ltd Seafoods Division Fish Processing supra* par 12–17.

31 *President of the RSA v SARFU 2 supra* par 41–42.

32 S 165(2) of the Constitution of the Republic of South Africa, 1996.

33 See Item 6 Schedule 2 of the Constitution of the Republic of South Africa, 1996; s 9(2)(*a*) of the Magistrates' Courts Act 32 of 1944.

34 *Bernert v ABSA Bank Ltd supra* par 31.

35 *Bernert v ABSA Bank Ltd supra* par 32–34.

36 *President of the RSA v SARFU 2 supra* par 46.

> judicial functions. As has been rightly observed, 'judges do not choose their cases; and litigants do not choose their judges'.[37] An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."[38]

Incidentally, these two guiding principles are related. But, that is not all: while the test to be applied in any given case of recusal is important, another question that often arises is whether the test for recusal applicable to the circumstances of a judicial officer should also apply to a quasi-judicial or purely administrative decision-making process. As in the case of an American judge in *Williams v Pennsylvania*,[39] whose impartiality was in question and who sat in a multi-member bench, the recent Australian High Court judgment in *Isbester v Knox City Council* (discussed in the present article) raises a similar question – that is, what effect would it have on the test used for a recusal assessment if the administrative decision-maker whose bias or apprehended bias is being impugned was part of a multi-member decision-making process?

3 1 Presumption of impartiality[40]

As has been pointed out elsewhere,[41] the courts adopt an approach when they are considering whether legislation is unconstitutional of assuming that the law being impugned was constitutionally enacted until the challenger can show otherwise; so also, in determining whether a judge was impartial or that there was a reasonable apprehension of bias, the courts approach the matter with a presumption of judicial impartiality.[42] In other words, where judicial bias is alleged, then that allegation must overcome the presumption of judicial impartiality and integrity.[43] This strong presumption of judicial impartiality and integrity[44] places a heavy burden on a party seeking to rebut the presumption.[45] Not only is the presumption not easily dislodged;[46] but it also requires cogent or convincing evidence or reason to rebut the

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37 *Ebner v Official Trustee in Bankruptcy* [2000] 205 CLR 337 par 19.

38 *Bernert v ABSA Bank Ltd supra* par 35.

39 579 US 1 (2016).

40 The US Supreme Court held in *Withrow v Larkin* 421 US 35 (1975) 45 that there is a presumption of honesty and integrity in those serving as adjudicators. Some decades ago, Frankfurter J, in *US v Morgan* 313 US 409 (1941) 421 said that judges are assumed to be men and women of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

41 Okpaluba and Juma 2011 *PER/PELJ* 14–43 23.

42 *Mbana v Shepstone & Wylie* 2015 (6) BCLR 693 (CC) par 41; *Bernett v ABSA Bank Ltd supra* par 33 and 86; *S v Basson* 2007 (3) SA 582 (CC) par 42; *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) supra* par 12 and 49; *President of the RSA v SARFU 2 supra* par 41; *Abernethy v Ontario* [2017] ONCA 340 (CanLII) par 18–19; *Carbone v McMahon supra* par 61–63.

43 *Malton v Attia* [2016] ABCA 130 (CanLII) par 82; *R v GRS* [2018] ABQB 4 (CanLII) par 5.

44 *Hefferman v Van Mechanical Contractors Inc* [2017] ONSC 2381 (CanLII) par 14; *Morse Shannon LLP v Fancy Barristers LLP* [2016] ONSC 7574 (CanLII) par 19–21.

45 *SL v Marson* [2014] ONCA 510 (CanLII) par 24–29; *Lloyd v Bush* [2017] ONCA 252 (CanLII) par 113.

46 *Cojocaru v BC Women's Hospital and Health Centre* [2013] 2 SCR 357 par 22.

presumption of judicial impartiality.[47] It does not, however, relieve the judge from the sworn duty of impartiality.[48] Thus, the Ontario Court of Appeal held in *Abernethy v Ontario*[49] that the presumption cannot be rebutted by vague references to current controversies in the public realm, but must be determined in the context of the particular case. The court found absolutely nothing convincing in the appellant's allegations that the trial judge (in demeaning her claim for damages as "a conspiracy theory" rather than treating it as a claim for unlawful conspiracy as defined by law) would be seen by a reasonable and reasonably informed member of the public as biased in these circumstances, taking into account his "conspiracy theory" comment.[50]

The Canadian Supreme Court judgment in *Cojocaru v BC Women's Hospital and Health Centre*[51] clearly illustrates what one needs to know about the application of the presumption of judicial impartiality and integrity and the fact that it is rebuttable, but not lightly so. The question before the Supreme Court of Canada was whether the trial judge's decision should be set aside because his reasons for judgment incorporated large portions of the plaintiff's submissions even though the trial judge did not accept all the plaintiff's submissions.[52] The majority of the British Columbia Court of Appeal held that the trial court's decision should be set aside because of the extensive copying of plaintiff's submissions and ordered a new trial.[53] The judgment of the Supreme Court, which was delivered by McLachlin CJ, held that, as a general rule, it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and to explain in his or her own words his or her conclusions on the facts and the law. However, including the material of others is not prohibited. Judicial copying is a long-standing and accepted practice, although, if carried to excess, it may raise problems. But, the question is: when, if ever, does judicial copying displace the presumption of judicial integrity and impartially?[54] If the incorporation of the material of others is evidence that would lead a reasonable person to conclude, taking into account all relevant circumstances, that the decision-making process was fundamentally unfair, in the sense that the judge did not put his or her mind to the facts, the argument and the issues, and decide them impartially and independently, the judgment can be set aside.[55]

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47 *S v SSH* [2017] 3 NR 871 (SC) par 22. See also *R v S (RD) supra* par 34; *Wewaykum Indian Band v Canada* [2003] 231 DLR (4th) 1 par 59; *President of the RSA v SARFU 2 supra* par 41; *S v Basson supra* par 30; *Christian v Metropolitan Life Namibia Retirement Annuity Fund* [2008] 2 NR 753 (SC) par 32; *S v Munuma supra* par 17.

48 *R v Hnatyshyn et al* [2016] BCPC 452 (CanLII) par 15; *R v S (RD) supra* par 117.

49 *Supra*.

50 *Abernethy v Ontario supra* par 18–19.

51 See Roussy "Cut-and-Paste Justice: A Comment on *Cojocaru v British Columbia Women's Hospital and Health Centre*" 2015 52(3) *Alberta LR* 761–778.

52 *Cojocaru v BC Women's Hospital supra* par 1.

53 See *Cojocaru v BC Women's Hospital and Health Centre* [2011] BCCA 192 (CanLII) par 127.

54 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 30.

55 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 50.

A complaint that a judge's decision should be set aside because the reasons for judgment incorporated materials from other sources is essentially a procedural complaint. Judicial decisions benefit from a presumption of integrity and impartiality – a presumption that the judge has done his or her job as he or she is sworn to do.[56] The party seeking to set aside a judicial decision because the judge's reasons or decision incorporated the material of others bears the burden of showing that the presumption is rebutted.[57] The threshold for rebutting the presumption of integrity and impartiality is high, and it requires cogent evidence.[58] Procedural defects relating to reasons for judgment are many and varied. In all cases, the underlying question is whether the evidence presented by the party challenging the judgment convinces the reviewing court that a reasonable person would conclude that the judge did not perform his or her sworn duty to review and consider the evidence with an open mind.[59] The fact that a judge fails to attribute copied material to the author tells nothing about whether the judge's mind was applied to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment writing; on the contrary, it is part and parcel of the judicial process.[60] To set aside a judgment for failure to attribute sources or lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment writing.[61] The concern about copying in the judicial context is not that the judge is taking credit for someone else's prose, but rather, that it may be evidence that the reasons for judgment do not reflect the judge's thinking. Extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute outside sources do not in themselves rebut the presumption of judicial impartiality and integrity.[62] This will occur only if the copying is of such a nature that a reasonable person apprised of the circumstances would conclude that the judge did not put his or her mind to the evidence and the issues, and did not render an impartial, independent decision.[63]

Having taken account of the complexities of this professional negligence case and accepting that it would have been preferable for the trial judge to discuss the facts and issues in his own words, it cannot be concluded that the trial judge failed to consider the issues and make an independent decision on them. The presumption of judicial impartiality and integrity has not been displaced.[64] On the contrary, the reasons demonstrate that the trial

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56 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 12 and 15; *R v Teskey* [2007] 2 SCR 267 par 19 and 29.

57 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 18; *R v Teskey supra* par 21 and 39.

58 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 20 and 27; *R v S (RD) supra* par 32; *Wewaykum Indian Band v Canada supra* par 59.

59 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 28.

60 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 31 and 36.

61 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 32.

62 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 35–36.

63 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 36.

64 The Federal Court of Appeal was not satisfied in *Apotex Inc v Sanofi-Aventis Inc* [2008] FCA 394 (CanLII) par 6, that the appellant had established "serious" or "substantial"

judge addressed his mind to the issues he had to decide. The fact that he rejected some of the plaintiff's key submissions demonstrates that he considered the issues independently and impartially. The absence in the reasons of an analysis of causation, and the alleged errors the reasons contain, strikes not at procedural unfairness, but to the substance of the reasons – whether the trial judge, having made his own decision, erred in law or made palpable and overriding errors of fact.[65] In order to rebut the presumption of judicial impartiality and integrity, the defendants failed to show that a reasonable person apprised of all the circumstances would conclude that the trial judge failed to consider and deal with the critical issues before him in an independent and impartial fashion.[66] Accordingly, the Chief Justice held that the judgment should not be set aside on the ground that the trial judge incorporated large parts of the plaintiff's submissions and reasons.[67]

3 2 The test to be applied

A judge has a duty to hear a case unless the test for recusal is met.[68] It is universally accepted[69] in modern parlance that the test for establishing judicial bias or apprehension of bias is the "double reasonableness test", which "translates into a two-stage requirement of reasonableness".[70] It is originally based on De Smith's "reasonable apprehensions of a reasonable man".[71] The prevailing test,[72] and under what circumstances it is applied,[73] is clearly brought out in the discussion of recent judgments. It is appropriate to specifically sketch out, albeit in a brief conspectus, the English and South African approaches to the problem.

3 2 1 The characteristics of the reasonable observer[74]

While delivering the judgment of a unanimous House of Lords in *Porter v Magill,*[75] it was Lord Hope who set out the modern test from the perspective of English law, which is entirely consistent with the approach of the European Court of Human Rights to the requirement that a court be impartial, not only in fact, but from an objective viewpoint.[76] Lord Hope stated the test thus: "The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real

grounds necessary to rebut the presumption where the request for recusal was based on the judge's previous encounter with a party, a witness or an issue in his or her judicial capacity.

65 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 74.
66 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 75.
67 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 76.
68 *S v SSH supra* par 22.
69 See e.g., *Livesey v NSW Bar Association* [1983] 151 CLR 288 (HCA) 293–294.
70 Okpaluba and Juma 2011 *PER/PELJ* 14–43 27.
71 De Smith *Judicial Review of Administrative Action* (1973) 230.
72 [2002] 2 AC 357 (HL) par 102–103.
73 See e.g., *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm) QBD (2 March 2016).
74 See, generally, Okpaluba and Juma 2014 *Speculum Juris* 19–40.
75 [2002] 2 AC 357 (HL) par 102–103.
76 *Findlay v UK* [1997] 24 EHRR 221 par 73.

possibility that the tribunal was biased." Lord Hope further clarified the use of the word "biased" when, in the subsequent case of *Millar v Procurator Fiscal (Scotland)*,[77] he said:

> "The appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality."[78]

Their Lordships of the Privy Council applied the foregoing test to the subsequent case of *Yiacoub v The Queen*[79] where the presiding judge found himself not simply appointing a judge to deal with a matter of general concern, but also nominating a judge to hear an appeal from himself. Although there was not the slightest suggestion that the presiding judge actually exercised any influence over the members of the Senior Court Judges (SCJ) who heard the appeal, any more than that there was any suggestion that the members of the appellate court were actually less than independent, the question was whether the presiding judge's administrative function under section 4(3) of the Courts (Constitution and Jurisdiction) Ordinance 2007 for the Sovereign Base Areas of Cyprus regulating the disposition and distribution of the duties of the various judges of the SCJ conflicted in this particular case with the fact that he had been a member of the trial court. Lord Hughes held that it is of the highest importance that courts should not only be actually independent and impartial but that they should also be free from any appearance of the absence of those qualities. Their Lordships were satisfied that, on the facts of this case, there was

> "an appearance of lack of independence and impartiality in relation to the process, viewed as a whole, which would impact on an objective informed observer. It is not difficult to imagine circumstances, under other regimes, in which such a process could be open to abuse of the kind not suggested here to have occurred in fact. The objective observer would, as it seems to [their Lordships], say of such a process 'That surely cannot be right'."[80]

The test enunciated in *Porter v Magill*[81] was applied in *Helow v Secretary of State for the Home Department,*[82] and more recently in *Yiacoub v The Queen*[83] and was subsequently reverted to by Knowles J when the learned Judge asked the question in *W Ltd v M Sdn Bhd*:[84] "[w]hat do the present facts amount to?" This was a case where an arbitrator was a partner in a law firm that earned substantial remuneration from providing legal services to a client company that had the same corporate parent as a company that was a party in the arbitration. The firm neither advised the parent company, nor the

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77 [2002] 1 WLR 1615 (PC).

78 *Millar v Procurator Fiscal (Scotland) supra* par 63.

79 *Supra* par 10–15.

80 *Yiacoub v The Queen supra* par 15.

81 [2001] UKHL 67; [2002] 2 AC 357 (HL).

82 [2008] 1 WLR 2416 (HL) par 39.

83 *Supra*.

84 *Supra* par 17–26 and 42.

party to the arbitration. There was no suggestion that the arbitrator did any work for the client company. Although the arbitrator was a partner, he operated effectively as a sole practitioner using the firm for secretarial and administrative assistance for his work as an arbitrator. The arbitrator made other disclosures where, after checking, he had knowledge of his firm's involvement with the parties and would have made a disclosure here if he had been alerted to the situation. Knowles J did not consider that a fair-minded and informed observer would, on the basis of these facts, conclude that there was a real possibility that the arbitrator was biased or lacked independence or impartiality.

The most recent judgment of the Privy Council in *Almazeedi v Penner*[85] not only applied the well-established test but also returned to the characteristics of the fair-minded and informed observer, which is another formulation of Lord Hope in the House of Lords in *Helow v Secretary of State for the Home Department.*[86] The question before the Privy Council in *Almazeedi* as crisply captured in the judgment of Lord Mance[87] was in the form of a challenge to the independence of a judge sitting in the Financial Services Division of the Grand Court of the Cayman Islands. The challenge was solely on the ground of an alleged lack of independence due to "apparent bias" – on the basis that "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[88] Although there was no suggestion of actual bias, as the Cayman Islands Court of Appeal pointed out, if a judge of the utmost integrity lacks independence, "then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence".[89] There was no doubt that the right of a litigant to an independent and impartial tribunal is fundamental to his right to a fair trial,[90] which is equally applicable to the litigant in the Cayman Islands. This is owing to the fact that the right to a fair trial is entrenched in section 17(1) of the Constitution of the Cayman Islands 2009 to the effect that:

> "Everyone has the right to a fair and public hearing in the determination of his or her rights and obligations by an independent and impartial court within a reasonable time."

Without necessarily getting entangled with the complex facts of this case, it is important to state that in the process of determining whether a fair-minded and informed observer would reasonably apprehend that a distinguished and retired English judge could probably have found himself consciously or unconsciously entangled in a situation where his independence or impartiality could be in doubt, there is the additional issue of the characteristics of the fair-minded and informed observer that their Lordships addressed in this case. In the opening paragraph of his judgment in *Helow v Secretary of State for the Home Department*, Lord Hope said:

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85 *Supra*.
86 *Supra.*
87 *Almazeedi v Penner supra* par 1.
88 *Porter v Magill supra* par 103; *Yiacoub v The Queen supra* par 11.
89 Quoted by Lord Mance, *Almazeedi v Penner supra* par 1.
90 *Millar v Procurator Fiscal (Scotland) supra* par 52.

> "The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women …), she has attributes which many of us might struggle to attain to."[91]

Following Lord Hope's description of this character of the law in *Helow,* Lord Mance said in *Almazeedi* that she or he:[92]

- is a person who reserves judgement until both sides of any argument are apparent;
- is not unduly sensitive or suspicious;[93]
- is not to be confused with the person raising the complaint of apparent bias – an important point in a case like *Almazeedi* where the appellant made some allegations which on any view appear extreme and improbable;
- is not, on the other hand, complacent;
- knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weakness – an observation with perhaps particular relevance in relation to unconscious predisposition;
- "will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially";[94] and
- will also take the trouble to inform themselves on all matters that are relevant, and see it in "its overall social, political and geographical context".[95]

Having so stated, their Lordships of the Privy Council, found themselves in the "invidious position" of having to decide whether the fair-minded and informed observer would see the possibility that the judgement of an experienced judge near the end of his career would be influenced, albeit sub-consciously, by his concurrent appointment, which was at the outset still awaiting its completion by swearing in. The fair-minded and informed observer is, in this context, a figure on the Cayman Islands legal scene, but she or he is a person who will see the whole in "its overall social, political and geographical context". She or he must be taken to be aware of the Qatari background, including the personalities involved, their important positions in Qatar and their relationship with each other as well as the opacity of the position relating to appointment and renewal of a member of

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91 *Helow v Secretary of State for the Home Department supra* par 1.

92 *Almazeedi v Penner supra* par 20.

93 Per Kirby J, *Johnson v Johnson* [2000] 201 CLR 488 (HCA) par 53.

94 *Helow v Secretary of State for the Home Department supra* par 2.

95 *Helow v Secretary of State for the Home Department supra* par 3. See also *Miracle v Maracle III supra* par 3.

the relatively recently created Civil and Commercial Court.[96] With some reluctance, their Lordships came to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence, but it also came to the conclusion that the Court of Appeal was wrong to treat the prior period differently. The judge ought to have disclosed his involvement with Qatar before determining the winding-up petition. According to Lord Mance, supported by the majority of their Lordships,[97] in the absence of any such disclosure, a fair-minded and informed observer would regard the judge as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency that dispels concern, or an alternative might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would appear to be no obstacle.[98]

3 2 2 The test in South Africa since SARFU 2[99]

It is not in doubt that the prevailing test for determining bias or apprehended bias in modern South African constitutional adjudication was enunciated by the Constitutional Court two decades ago in *SARFU 2.* It is also not in doubt that the question is whether the reasonable objective and informed person would, on the correct facts, reasonably apprehend that the respondent has not brought, or will not bring an impartial mind – that is, a mind open to persuasion by evidence and the submissions of counsel – to bear on the adjudication of the case.[100] This test was considered and developed by the same court in *SACCAWU v Irvin & Johnson*[101] and applied subsequently in *Van Rooyen v S*[102] and *Barnert v Absa Bank Ltd*;[103] by the Supreme Court of

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96 *Almazeedi v Penner supra* par 32.

97 Lord Sumption, dissenting, held [par 36] that: "The common law rightly imposes high standards of independence on judges at every level. The present dispute, however, is not about the legal test, but about its application to the facts, and for my part I would have held that the test was not satisfied. In the ordinary course, I would have thought it right to dissent on such a question. But applications based on apparent bias are open to abuse, and the particular problem which arises in this case is uncommon. Retired judges from Commonwealth jurisdictions commonly sit on an occasional basis in other Commonwealth jurisdictions and in tribunals of international civil jurisdiction. The law is exacting in this area, but it is also realistic. The notional fair-minded and informed observer whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious or apt to envisage the worst possible outcome. The main decisions in this field are generally characterized by robust common sense." Citing: *Helow v Secretary of State for the Home Department supra* par 23 per Lord Rodger; *R v S (RD) supra* par 117 per L'Heurex-Dube and McLahlin JJ.

98 *Almazeedi v Penner supra* par 34.

99 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) (*President of the RSA v SARFU 2*).

100 *President of the RSA v SARFU 2 supra* par 48. See also Nwauche "Administrative Bias in South Africa" 2005 8(1) *PER/PELJ* 36–75.

101 *Supra*.

102 2002 (5) SA 246 (CC) 272B–273E.

103 *Supra.*

Appeal in *S v Satchwell*,[104] *S v Dube*,[105] *Green Willows Properties v Rogalla Investment Co Ltd*[106] and *Mulaudzi v Old Mutual Insurance Co Ltd.*[107] It was also extensively considered and applied in at least two recent judgments of the High Court, namely *S v Longano*[108] and *Sizani v Mpofu.*[109] In sum, the test involves a double-reasonableness approach, which entails that the apprehension must be reasonable and that the person apprehending the bias must also be reasonable.

Since the recent recusal cases emanating from the South African jurisdiction are discussed in detail elsewhere,[110] it suffices to illustrate the application of the test with three cases, as follows.[111] The recusal application in *Green Willows Properties v Rogalla Investment Company*[112] was based on the ground that the judge in refusing the application for absolution from the instance made conclusive findings before the end of the trial. It was held that it was true that the judge made certain findings in her judgment on the application for absolution from the instance, but during the debate with counsel, she explained that she could change her finding if evidence was led that could persuade her otherwise. The SCA held that this suggests that the judge was still open to persuasion despite expressing preliminary views on the issue. Accordingly, there was no basis to find that there was a reasonable apprehension of bias in the circumstances of the case. The Labour Court in *Premier Foods (Pty) Ltd (Nelspruit) v CCMA*[113] noted that after considering the recusal principles laid down in *SARFU 2* and *SACCAWU v Irvin and Johnson*, an earlier Labour Court judgment had emphasised that not only must the apprehension of bias be that of a reasonable person in the position of the person being judged who has an objective factual basis for the suspicion, but the apprehension of bias they must have, must be one that the law would recognise as raising a legitimate concern about the adjudicator's impartiality.[114] In light of the aforesaid settled test for recusal, the court in *Premier Foods* held that the second respondent never came close to deciding the issue of his recusal. He did not even allow the issue to be properly ventilated, which in itself could be added to the existence of the requisite apprehension to justify recusal. For a judicial officer deciding a CCMA matter, in the course of the dispute resolution proceedings, to say from the very beginning that a litigating party would lose, and in effect prevent the issue from being ventilated when the arbitration

104 2001 (2) SACR 185 (SCA) par 20.
105 2009 (2) SACR 99 (SCA) par 7
106 *Supra*.
107 [2017] ZASCA 88; 2017 (6) SA 90 (SCA).
108 *Supra* par 8–21.
109 *Supra* par 12–14 and 75.
110 See the forthcoming piece by Okpaluba and Maloka "Recusal of a Judge in Adjudication: Recent Developments in South Africa and Botswana" (2022) *JCLA* forthcoming.
111 See also *Ntuli v S* [2017] ZAGPJHC 294 par 7–23; *S v Bayat* [2013] ZAGPPHC 344 par 19 and 27 where the legality of the magistrate's decision to recuse herself was held to be certainly lawful.
112 [2015] ZASCA 133 par 24–28.
113 [2016] ZALCJHB 426.
114 *Raswiswi v CCMA* (2011) 32 *ILJ* 2186 (LC) par 19 cited in *Premier Foods v CCMA supra* par 23.

started, would surely satisfy the double reasonableness test.[115] Even in spite of the well-acknowledged less formalistic nature of labour arbitration,[116] the Commissioner cannot get involved in discussing the evidence with the parties to the extent of giving his opinion on what the outcome of the arbitration should be. He or she should specifically refrain from giving his or her views on the possible evaluation or determination of that evidence. It is not appropriate for the arbitrator in this case to have expressed any sentiments to the applicant as to the prospects of success of its case before the arbitration commenced and then proceed to the arbitration proceedings and make an award. By doing so, the arbitrator surely put himself in a situation where his impartiality and integrity could be called into question.[117] The arbitrator should have recused himself when the matter was raised, and his refusal to do so rendered the entire proceedings a nullity.[118] In *S v Longano*,[119] the recusal application was based on the fact that the trial's presiding judge should have recused herself from hearing the matter, since she was in possession of evidentiary material (the Willows report) in circumstances that established a reasonable apprehension of bias, and that impartiality was compromised by her being in possession of evidential material that would not form part of the evidence before court.[120] It was held that the integrity of the court was compromised when the State furnished the trial judge with the report, which should not have been given to her if the witnesses were not going to testify. Once the information was given to the judge, there had to be an apprehension that the court would not be able to disabuse its mind of the report.[121]

3 2 3 Isbester v Knox City Council[122]

Following a hearing before the Knox Animals Act Committee/Panel, a decision was made to destroy the appellant's dog, which had earlier been seized by the Council. Section 84P(*e*) of the Domestic Animals Act 1994 (Vic) empowers the Council to destroy a dog where its owner has been found guilty of an offence under section 29 of the Act. The appellant had been convicted of such an offence when her dog had attacked a person and caused "serious injury". The issue before the High Court of Australia in *Isbester v Knox City Council* was whether that decision should be quashed because of the substantial involvement of a member of the Committee/Panel both in the prosecution of the charges concerning the dog and in the decision of the Panel as to the fate of the dog. In other words, the issue in the appeal relates to the content and application of the requirement of absence of the appearance of disqualifying bias in the exercise of power

115 *Premier Foods (Pty) Ltd (Nelspruit) v CCMA supra* par 21–24.

116 On the so-called "reality testing", which has been held to be a proper component of conciliation, see e.g., *Anglo Platinum Ltd v CCMA* (2009) 30 *ILJ* 2396 (LC) par 32; *Kasipersad v CCMA* (2003) 24 *ILJ* 178 (LC) par 27–28 and 34.

117 *Premier Foods (Pty) Ltd (Nelspruit) v CCMA supra* par 29–30.

118 *Premier Foods (Pty) Ltd (Nelspruit) v CCMA supra* par 38.

119 *Supra* par 8–21.

120 *S v Longano supra* par 8.

121 *S v Longano supra* par 20.

122 [2015] HCA 20 (10 June 2015).

under section 84P(*e*) of the Act.[123] However, the discussion of the HCA's judgment in this case follows the discussion of the decisions of the Victoria Supreme Court and the Victoria Court of Appeal.

3 2 3 1 *Isbester* at the Victoria Supreme Court[124]

In an application to review the decision of the Panel on the ground of apprehension of possible bias on the part of Ms Hughes (the Knox Animals Panel member who acted more or less as prosecutor and judge in this matter), the primary judge identified the relevant principle for apprehended bias as that stated in *Ebner v Official Trustee in Bankruptcy*[125] to the effect that

> "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."

In addition, the application of that principle will not be the same for a decision maker who is not a judicial officer.[126] What is required in relation to apprehended bias by prejudgment[127] depends on the circumstances of the case.[128] The primary judge, Emmerton J, held that the requirement of impartiality exists to the extent necessary to give persons affected by a decision under section 84P(*e*) of the Act a genuine hearing. Her Honour referred to the observations of Basten JA in *McGovern v Ku-ring-gai Council*[129] concerning the expectations of decision making by the local government council, where the Justice of Appeal had said:

> "The real question is what, with the appropriate level of appreciation of the institution, the fair-minded observer would expect of a councilor dealing with a development application. The institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers."[130]

3 2 3 2 *Isbester* at the Victoria Supreme Court of Appeal[131]

The Court of Appeal agreed with the primary judge as to the essential requirements of natural justice as identified by her Honour.[132] The Court of Appeal considered the question, whether there was the possibility that Ms Hughes could have pre-judged the decision under section 84P(*e*),

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123 *Isbester v Knox City Council supra* par 1–2 and 56.
124 *Isbester v Knox City Council* [2014] VSC 286.
125 *Supra* 337, 344.
126 *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] 205 CLR 507 (HCA) 563.
127 See generally, Okpaluba and Juma 2014 *Speculum Juris* 19.
128 *Isbester v Knox City Council* [2014] VSC 286 par 85.
129 [2008] 72 NSWLR 504 (CA).
130 *McGovern v Ku-ring-gai Council supra* par 80.
131 *Isbester v Knox City Council* [2014] VSCA 214.
132 *Isbester v Knox City Council* [2014] VSCA 214 par 48, 65 and 69.

separately from the question whether her involvement in the prosecution of charges against the appellant could give rise to an apprehension of conflict of interest.[133] The Court of Appeal concluded[134] that the case did not involve a conflict of interest such as was evident in *Stollery v Greyhound Racing Control Board*[135] and *Dickason v Edwards*[136] where it was held that a person who was an accuser could not also hear and decide the charge in conjunction with other persons. Distinguishing *Stollery*, as the primary judge did, the Court of Appeal identified three grounds, all of which were found not to have involved Ms Hughes personally – that is, (a) the Panel hearing was not a quasi-judicial hearing equivalent to that of the Board in *Stollery*; (b) although Ms Hughes had been in the position of accuser in the Magistrates' Court, she was not in that position at the Panel's hearing; and (c) Ms Hughes had no special or personal interest in the matters in controversy, as had existed in *Stollery* and *Dickason.* And, as Kiefel, Bell, Keane and Nettle JJ put it:

> "Her Honour the primary judge[137] accepted that Ms Hughes participated in every aspect of the Panel decision and that, given her experience and knowledge of the relevant legislation, her views would carry considerable weight. However, her Honour found that the relevant decision to destroy the dog was made by Mr Kourambas, the delegate for this purpose, not the other members of the Panel. The Court of Appeal accepted[138] that the facts found by her Honour may be relevant to the question whether Mr Kourambas had prejudged the matter, but did not[139] base its decision as to the perceived conflict arising from Ms Hughes' involvement in the matter on the fact that she was not a designated decision-maker. It accepted that she had a material part in the decision-making process."[140]

3 2 3 3 *Isbester* at the HCA[141]

Before the High Court of Australia, the Council contended that, given the finding of the primary judge, the Court of Appeal should have found that a fair-minded observer would not reasonably apprehend bias on the part of Mr Kourambas. In their joint judgment, the majority of the HCA commenced by holding that

> "the question whether a fair-minded observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made."[142]

The court then proceeded to restate the applicable governing principle, starting with *Ebner*[143] where a two-step inquiry was established, requiring:

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133 Cf per Spigelman CJ in *McGovern v Ku-ring-gai Council supra* par 25–27.
134 *Isbestor* VSCA *supra* par 69, 78–80.
135 [1972] 128 CLR 509.
136 [1910] 10 CLR 243.
137 *Isbester v Knox City Council* [2014] VSC 286 par 103–105.
138 *Isbester v Knox City Council* [2014] VSCA 214 par 65.
139 *Isbester v Knox City Council* [2014] VSCA 214 par 68.
140 *Isbester v Knox City Council* [2015] HCA 20 par 19.
141 *Isbester v Knox City Council* [2015] HCA 20.
142 *Isbester v Knox City Council* [2015] HCA 20 par 20.
143 *Ebner v Official Trustee in Bankruptcy supra* par 8.

(a) the identification of what it is said might lead a decision maker to decide a case other than on the legal and factual merits and, where it is said that the decision maker has an "interest" in litigation, such an interest must be spelled out; and (b) the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits.[144]

The *Ebner* governing principle has been applied not only to judicial officers but also to non-judicial decision makers and decision-making processes except that in applying the principle, the judge must bear in mind the difference between the two systems with regard to the content of the test for the decision in question.[145] How the principle should be applied would depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision maker. It is an aspect of the wider and ever flexible principles of natural justice, differing according to the circumstances in which a power is exercised.[146] The High Court in *Isbester* held:

> "The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made[147] as well as to have knowledge of the circumstances leading to the decision."[148]

The courts in Australia have, in both *Jia Legeng* and *McGovern,* dealt with the question of what a fair-minded observer may reasonably expect as to the level, or standard, of impartiality that should be brought to decision making by certain non-judicial decision makers. At issue in both cases was the possibility of bias in the nature of prejudgment[149] on the part of the decision makers, which is quite different from what was canvassed in the *Isbester* case, namely the incompatibility of roles.[150]

After an exhaustive review of some leading Australian cases on this subject,[151] the four justices of the HCA, held in their joint judgment:

> "It is true that Ms Hughes' role in this matter did not involve her at quite the same personal level as the manager in *Stollery,* who was subjected to, and affronted by, the alleged bribe; nor was she the target of abuse as in *Dickason*, which was directed to the District Chief Ranger. It may be accepted that these factors added another dimension to the level of involvement of those persons. It cannot, however, be said that this dimension accounted for the disqualification in those cases. The interest identified in *Dickason* and *Stollery* as necessitating disqualification was that of a prosecutor, accuser or

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144 *Isbester v Knox City Council* [2015] HCA 20 par 21; *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 183.

145 *Isbester v Knox City Council* [2015] HCA 20 par 22; *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 181; *Hot Holdings Pty Ltd v Creasy* [2002] 210 CLR 438 (HCA) par 70.

146 *Kioa v West* [1985] 159 CLR 550 612.

147 *Hot Holdings Pty Ltd v Creasy supra* par 68.

148 *Isbester v Knox City Council* [2015] HCA 20 par 23; *Stollery v Greyhound Racing Control Board supra* 519.

149 See generally, Okpaluba and Juma 2014 *Speculum Juris* 19.

150 *Isbester v Knox City Council* [2015] HCA 20 par 24–25 and 49.

151 *Isbester v Knox City Council* [2015] HCA 20 par 31–49.

> other moving party. An interest of that kind points to the possibility of a deviation from the true course of decision-making."[152]

In conclusion, therefore, it was held that a fair-minded observer might, in the circumstances of this case, reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision under section 84P(*e*) of the Act. This decision does not imply how Ms Hughes in fact approached the matter, nor does it imply that she acted otherwise than diligently, and in accordance with her duties, as the primary judge found,[153] or that she was not in fact impartial. In any event, natural justice requires that she should not participate in the decision and because that occurred, the decision must be quashed.[154]

Although agreeing with the plurality that the appeal should be allowed and the order of the primary judge set aside, and that the purported legal effect of the decision made by Mr Kourambas should be quashed by an order in the nature of *certiorari*,[155] Gageler J delivered a separate judgment in which the learned judge addressed the test for appearance of disqualifying bias in an administrative context, which has often been stated in terms drawn from the test for apprehended bias in a curial context.[156] The test is whether the hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the administrator might not bring an impartial mind to the resolution of the question to be decided.[157] Clearly emerging from the test is the acknowledgement that the application of this requirement of procedural fairness "must sometimes recognise and accommodate differences between court proceedings and other kinds of decision-making".[158] Gageler J further held that in order to accommodate a multi-stage decision-making process or a multi-member decision-making body, the test for appearance of disqualifying bias in an administrative context might sometimes more usefully be stated in a form that focuses on the overall integrity of the decision-making process.[159]

> "The test in that alternative form might be stated as whether the hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the question to be decided might not be resolved as the result of a neutral evaluation of the merits. Neutrality in the evaluation of the merits cannot for purpose of that or any other test be reduced to a monolithic standard; it necessarily refers to the 'kind or degree of neutrality' that the hypothetical fair-minded observer would expect in the making of the particular decision within the particular statutory framework."[160]

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152 *Isbester v Knox City Council* [2015] HCA 20 par 45.
153 *Isbester v Knox City Council* [2014] VSC 286 par 115.
154 *Isbester v Knox City Council* [2015] HCA 20 par 50.
155 *Isbester v Knox City Council* [2015] HCA 20 par 71.
156 *Isbester v Knox City Council* [2015] HCA 20 par 57.
157 *Re Refugee Tribunal; Ex parte H* [2001] ALJR 982 989–990; *McGovern v Ku-ring-gai Council supra* par 2 and 71–72.
158 *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 99; *Ebner v Official Trustee in Bankruptcy supra* par 4; *McGovern v Ku-ring-gai Council supra* par 6–13.
159 *Isbester v Knox City Council* [2015] HCA 20 par 58.
160 *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 100, 187 and 192.

Applying the test to the case in hand, Gageler J held that Ms Hughes might have developed, as Ms Isbester's prosecutor, a frame of mind incompatible with the dispassionate evaluation of whether administrative action should be taken against Ms Isbester's in the light of her conviction. Ms Hughes's frame of mind might have affected the views she expressed as a member of the Panel, and the expression of those views might have influenced not only the recommendation made by the Panel, which included Mr Kourambas, but also the acceptance of that recommendation by Mr Kourambas in his capacity as a delegate of the Council. A hypothetical fair-minded observer with knowledge of all the circumstances would be quite reasonable to apprehend all these possibilities.[161] It was held that the reasonableness of the apprehension of these possibilities is not negatived by the circumstances, namely that: (a) Ms Hughes acted throughout in her professional capacity as a Council employee; (b) Ms Isbester pleaded guilty to the offence and that her conviction was on the basis of agreed facts; (c) the question for decision by the Council under section 84P*(e)* of the Act arose subsequently to, and was different from, the question for decision by the Magistrates' Court under section 29 of the Act; and (d) that the evidence as to the course of the Panel hearing did not demonstrate that Ms Hughes took the position of an accuser in that hearing.[162] Finally, and contrary to the decision of the Court of Appeal, Gageler J held that the proper conclusion, was that the involvement of Ms Hughes in the deliberative process, subsequent to the laying of charges and prosecution, resulted in a breach of the implied condition of procedural fairness so as to take the decision of Mr Kourambas beyond the power conferred by section 84P*(e)* of the Act. Gageler J concluded:

> "I would reject the contention that the decision of the Court of Appeal should be affirmed on the ground that a fair-minded observer would not reasonably apprehend bias on the part of Mr Kourambas."[163]

3 2 4 Yukon Francophone School Board[164]

Under Canadian law, the principles surrounding the test to be applied in determining whether a judge should recuse himself or herself were identified in the Supreme Court of Canada in *Committee for Justice and Liberty v National Energy Board*;[165] approved in *Valente v The Queen*;[166] and reiterated in *Wewaykum Indian Band.*[167] The principles were summarised by Donald JA in *Taylor Ventures Ltd (Trustees of) v Taylor*[168] as follows:

(a) A judge's impartiality is presumed.

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161 *Isbester v Knox City Council* [2015] HCA 20 par 68.
162 *Isbester v Knox City Council* [2015] HCA 20 par 69.
163 *Isbester v Knox City Council* [2015] HCA 20 par 70.
164 [2015] 2 SCR 282.
165 [1978] 1 SCR 369 394.
166 [1985] 2 SCR 673.
167 *Wewaykum Indian Band v Canada supra* par 60.
168 [2005] BCCA 350 (CanLII) par 7.

(b) A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified.

(c) The criterion for disqualification is the reasonable apprehension of bias.

(d) The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude.

(e) The test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.

(f) The test requires demonstration of serious grounds on which to base the apprehension.

(g) Each case must be examined contextually, and the inquiry is fact specific.[169]

Meanwhile, the Supreme Court judgment in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*[170] provides a good illustration of the application of these identified principles.[171] The Yukon Francophone School Board is the first and only School Board in Yukon and has responsibility for one French-language school. In 2009, it brought an action against the Yukon government for what it claimed were deficiencies in the provision of minority language education. The trial judge ruled in favour of the Board on most issues. A number of incidents occurred during the trial, which set the stage for a bias argument at the Court of Appeal. They had raised these problems at trial, but the trial judge denied that any reasonable apprehension of bias could be entertained in the circumstances.[172] The Court of Appeal conceded that an apprehension of bias can arise either from what a judge says or does during a hearing, or from extrinsic evidence showing that the judge is likely to have a strong disposition preventing him or her from impartially considering the issues in the case. The Court of Appeal concluded that there was a reasonable apprehension of bias on the part of the trial judge based on a number of incidents during the trial as well as the

[169] In *Bossé v Lavigne* [2015] NBCA 54 (CanLII) par 7, the New Brunswick Court of Appeal has provided what Associate Chief Justice Rooke termed in *Rothweiler v Payette* [2018] ABQB 399 (CanLII) par 15 as "a useful digest of relevant principles that guide how a court evaluates allegations of judicial bias". The NBCA had held that the elements of this objective test are that: (i) the person considering the alleged bias must be a reasonable person, not one who is very sensitive or scrupulous, but rather one who is right-minded; (ii) the person must be a well-informed person, with knowledge of all the relevant circumstances; (iii) the apprehension of bias itself must be reasonable in the circumstances of the case: (iv) the situation must be fully examined, not just the face of it; and, the examination must be one that is both realistic and practical; (v) the enquiry begins with a strong presumption of judicial impartiality and looks to determine whether it has been displaced such that there is a real likelihood or probability of apprehension that the judge would not decide the case fairly on the merits.

[170] *Supra.*

[171] See also *Taylor Ventures Ltd (Trustees of) v Taylor supra* par 8–11; per Joyal CJ of the Manitoba Queen's Bench in *R v Amsel* [2016] MBQB 43 (CanLII) par 14–17.

[172] *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 1–3.

trial judge's involvement as a governor of a philanthropic francophone community organisation in Alberta.[173]

At the Supreme Court of Canada, the Court of Appeal's conclusion that there was a reasonable apprehension of bias requiring a new trial was set aside. It was held that the test for a reasonable apprehension of bias is what a reasonable, informed person thinks.[174] The objective is to protect public confidence in the legal system by ensuring not only the reality, but also the appearance of a fair adjudicative process. Impartiality and the absence of bias have developed as both legal and ethical requirements. Judges are required, and indeed, expected to approach every case with an impartial and open mind.[175] Because there is a presumption of judicial impartiality,[176] the test for a reasonable apprehension of bias requires a real likelihood or probability of bias.[177] The inquiry into whether the conduct of a decision maker creates a reasonable apprehension of bias is "inherently contextual and fact-specific", and there is a correspondingly high burden of proving the claim on the party alleging bias.[178] However, the Supreme Court of Canada has recognised that the conduct of a trial judge, and particularly his or her interventions, can rebut the presumption of impartiality.[179] The court did caution,[180] as did Denning LJ some six decades ago in *Jones v National Coal Board,*[181] and the Supreme Court of Appeal of South Africa in *Take and Save Trading CC v Standard Bank Ltd,*[182] that the times when judges were required to be as passive as a "sphinx" had long gone, and that "a balancing act by the judiciary is required because there is a thin line between managing a trial and getting involved in the fray".[183]

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173 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 5.

174 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 20–21. See also *Committee for Justice and Liberty v National Energy Board* [1976] 68 DLR (3d) 716 (SCC) 735; *R v Valente* [1985] 2 SCR 673, 684–685; *Therrien v Minister of Justice* [2001] 200 DLR (4th) 1 (SCC) par 102; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 par 46; *Wewaykum Indian Band v Canada supra* par 60; *CUPE v Ontario (Minister of Labour)* [2003] 1 SCR 539 par 199; *Miglin v Miglin* [2003] 1 SCR 303 par 26; *Miracle v Maracle III supra* par 2; *Bruzzese v Canada (Public Safety and Emergency Preparedness)* [2017] 3 FCR 272 par 28.

175 *R v Valente supra* 685; *R v S (RD) supra* par 49; *Wewaykum Indian Band v Canada supra* par 57–58.

176 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 25; *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 22.

177 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 25; *Arsenault-Cameron v Prince Edward Island* [1999] 3 SCR 851 par 2; *R v S (RD) supra* par 134; *Ontario (Attorney General) (Re)* [2017] CanLII 60867 (ON IPC) par 32–33.

178 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 26; *Wewaykum Indian Band v Canada supra* par 77; *R v S (RD) supra* par 114.

179 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 27; *Brouillard v The Queen* [1985] 1 SCR 39 44 per Lamer J.

180 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 28.

181 [1957] 2 All ER 155 (CA) 159.

182 2004 (4) SA 1 (SCA) par 4.

183 For more on this aspect of the problem, see Okpaluba and Juma 2011 *SALJ* 659–685, esp. 679.

Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences do not close his or her mind to the evidence and issues.[184] The reasonable-apprehension-of-bias test recognises that while judges must strive for impartiality, they are not required to abandon who they are or what they know.[185] A judge's identity and experiences are an important part of who he or she is, and do not inherently compromise the judge's neutrality or impartiality. Judges should be encouraged to experience, learn and understand "life" – their own and those whose lives reflect different realities.[186] The ability to be open-minded is enhanced by such knowledge and understanding. Impartiality thus demands not that a judge discount or disregard his or her life experience or identity, but that he or she approach each case with an open mind, free of inappropriate and undue assumptions. It was held that the threshold for a finding of reasonable apprehension of bias was met in the present case.[187]

The judge's conduct during trial reveal that several incidents occurred which, when viewed in the circumstances of the entire trial, lead inexorably to this conclusion.[188] First is the trial judge's conduct when counsel for the Yukon attempted to cross-examine a witness based on confidential information contained in files belonging to students. After hearing some argument on the confidentiality issue, the trial judge told counsel he would entertain additional arguments on the matter the following day. However, he started the next day's proceedings with a ruling that was unfavourable to the Yukon and without giving the parties an opportunity to present further argument. While this by itself is unwise, the trial judge's refusal to hear the Yukon's argument after his ruling, and his reaction to counsel, are more disturbing. He both characterised the Yukon's behaviour as reprehensible and accused the Yukon's counsel of playing games. An overall assessment of the entire record reveals the trial judge's conduct as troubling and problematic.[189] Further improper treatment meted out on the Yukons by the trial judge was evident when they requested permission to submit affidavit evidence from a witness who had suffered a stroke. In response, the trial judge accused counsel of the Yukon of trying to delay the trial, criticised him for waiting half-way through the trial to make the application, suggested that the incident amounted to bad faith on the part of the government, and warned counsel for the Yukon that he could be ordered to pay costs personally if he brought the application. There was no basis for the accusations and criticism levelled at counsel and, viewed in the context of

184 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 33.

185 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 34; *R v S (RD) supra* par 29 and 119.

186 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 34–35, citing in support the SA Constitutional Court judgment in *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) supra* par 13.

187 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 38.

188 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 39.

189 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 39–44.

the rest of the trial, this incident provides further support for a finding of reasonable apprehension of bias.[190] A final illustration of the trial judge's conduct is his refusal to allow the Yukon to file a reply on costs, which is even more difficult to comprehend. After the release of his reasons on the merits, the trial judge required each party to file their costs submissions on the same day. To the Yukon's surprise, the Board sought not only solicitor-client costs, but also punitive damages as well as solicitor-client costs retrospective to 2002. The trial judge's refusal to allow the Yukon to file a reply factum is questionable, particularly in light of the fact that the Yukon could not have known the quantum of costs sought by the Board at the time it filed its factum. The Supreme Court held that all these incidents taken together and viewed in their context would lead a reasonable and informed person to see the trial judge's conduct as giving rise to a reasonable apprehension of bias.[191]

4 CONCLUSION

It is submitted that the conclusion that emerges from this study is that the recusal of a judge in adjudication is, in practical terms, the application of that aspect of the common-law principle of natural justice that prohibits a person from being a judge in his or her own cause. It is indeed clear from the reading of the cases that the courts, in adjudicating recusal applications, bear in mind the old adage that justice must not only be done, but must manifestly and undoubtedly be seen to be done. These are the underlying reasons for the principle of judicial impartiality in constitutional parlance.

From the foregoing discussion, it is clear that the determination whether a judge should recuse, or be requested to recuse, him- or herself from sitting and hearing a case is based on the plaintiff's ability to rebut successfully the presumption of impartiality that operates in favour of the judge's duty to sit in a case duly and lawfully assigned to him or her. The requirement of impartiality on the part of a judge or anyone under a duty to decide anything is not only a common-law principle but also a constitutional obligation. Accordingly, removing a judge from adjudication cannot be an easy task. It is therefore an important principle that if recusal of a judge must take place, the first hurdle to scale is rebuttal of the presumption of impartiality, which in turn requires concrete facts, not flimsy allegations or mere suspicion, but cogent evidence that suggests that something the judge has done or said gives rise to a reasonable apprehension of bias. The totality of the circumstances must be considered.[192] The second hurdle is made up of two objective formulations rolled into one test: the requirement of a double-reasonableness test that asks how a reasonable person not necessarily involved in the case but whose perspective may differ from that of an

190 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 45–49.

191 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 50–55.

192 *R v JCS* [2017] BCCA 87 (CanLII) par 44.

affected litigant[193] who is fully apprised of the facts would view the role of the judge in the particular case; and, viewed from the spectacle of this reasonable observer, whether the judge could be seen as one who has a vested interest in the outcome of the case. If so, would that reasonable observer be acting reasonably by viewing the proceeding in that court in that light? These are the questions to ask – whether the complainant is alleging actual bias on the part of the judge, or merely a reasonable apprehension of bias. In either case, the double-reasonableness test applies and the thresholds in both circumstances are high.

[193] *R v Millar* [2017] BCSC 323 (CanLII) par 24; *Stein v BC (Human Rights Tribunal)* [2018] ABQB 399 (CanLII) par 153.