



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 68

**IN THE MATTER OF THE SUPREME COURT ACT 1905
AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
AND IN THE MATTER OF A DETERMINATION OF PROFESSIONAL CONDUCT COMMITTEE OF
THE BERMUDA BAR ASSOCIATION
COMMUNICATED BY LETTER DATED 21 DECEMBER 2023**

BETWEEN:

METIS

Applicant

and

THE BERMUDA BAR ASSOCIATION

Respondent

JUDGMENT (ANONYMISED)

(Judicial Review of statutory confidential disciplinary proceedings, Confidentiality of the Judicial Review proceedings, Jurisdiction of the Court to intervene at the filtering stage, Whether bias or apparent bias of a member of the filtering committee due to previous representation)

Date of Hearing: 24 September 2025

Date of Judgment: 2 September 2026

Date of Anonymised Version: 29 September 2026

Appearances: Delroy Duncan, KC, Trott & Duncan Limited, Paul Harshaw,
Canterbury Law Limited, for Applicant

**Alex Potts KC, 4 Pump Court, John Hindess, Wakefield Quin Limited,
for Respondent**

JUDGMENT of Mussenden CJ

The Parties

1. The Applicant in this matter is a lawyer who has been involved in very substantial and acrimonious litigation in respect of a Bermuda trust (“**BT**”).
2. The Respondent is a public body, the Professional Conduct Committee (the “**PCC**”) of the Bermuda Bar Association (the “**BBA**”), as established by section 18 of the Bermuda Bar Act 1974 (the “**1974 Act**”).

The Judicial Review Application

3. The decision being challenged is the determination of the PCC communicated by letter dated 21 December 2023 (the “**Letter**”) to lay charges against the Applicant (the “**Determination**”).
4. The Applicant seeks the following relief:
 - a. An order of certiorari in respect of the Determination and an order quashing the said Determination and the matter be remitted to a differently constituted, unconflicted PCC¹.
 - b. A declaration that the Determination is void by reason of bias or the appearance of bias on the part of the Chairman, Mr. Saul Froomkin KC²;
 - c. A direction that all further proceedings in any way related to the Determination be stayed until further order of this Court;
 - d. An order that this cause be entered in the Cause Book of the Supreme Court in anonymized form in order to protect the confidentiality of the underlying

¹ The words ‘*and the matter be remitted to a differently constituted unconflicted Professional Conduct Committee*’ added by amendment dated 24 September 2025.

² Counsel were Queen’s Counsel at relevant times, but then became King’s Counsel. For convenience, I use King’s Counsel throughout the Judgment.

proceedings and so as to not prejudice future proceedings, either in this Court or pursuant to the 1974 Act and Rules made thereunder;

- e. An order that the Supreme Court file in respect of this cause be sealed and not available for inspection by any person not a party to this cause without the written consent of all parties to this cause or an order of this Court;
 - f. An order that all hearings in this cause be held *in camera*; and
 - g. An order that the BBA do pay the costs of and occasioned by this application.
5. The Respondent opposes the application for judicial review and invites the Court to strike out and/or dismiss the application.

The Issues

6. The issues before the Court are as follows:
- a. Whether these proceedings should continue on a confidential basis, given the confidentiality of the BBA Disciplinary processes;
 - b. Whether the Court has the jurisdiction to intervene at the PCC stage in respect of the apparent bias of Mr. Froomkin KC, or whether the Disciplinary Tribunal (the “DT”) can deal with the issue of bias at the full hearing of the Complaint; and
 - c. Whether the PCC suffered from ‘apparent bias’ due to the presence of Mr. Froomkin KC as one of its members, thus requiring the Determination to be quashed and the matter to be remitted to a differently constituted unconflicted Professional Conduct Committee.

Background

7. There is no factual dispute, with counsel accepting that the factual position is sufficiently addressed in the affidavit of Mr. Harshaw. He filed an Affidavit sworn 14 March 2024 along with exhibits in which he set out the background and provided documentary evidence. The Respondent did not file any affidavit evidence of its own because: (i) the Applicant had not filed an affidavit, instead relying on the affidavit of Mr. Harshaw which they described as partisan, hearsay and argumentative; and (ii) the Applicant’s application

was misconceived as a matter of law, having regard to the correspondence and documents relied upon in Mr. Harshaw's exhibit.

8. The background is taken from Mr. Harshaw's evidence.
9. Law enforcement agencies of a foreign government were engaged in an investigation of criminal conduct by certain of its citizens, including a man, "**Mr. F**".
10. Between the period 2018 and 2020, there were a series of events that took place which included the Attorney General's Chambers, the Bermuda Police Service, the execution of a search warrant in Bermuda, the seizure of evidence from various locations. In 2018, a trustee company for the BT, ("**TC1**"), commenced proceedings against the Applicant in the Supreme Court of Bermuda involving directors and trustees, and ancillary proceedings in other countries seeking orders for delivery up of certain documents and to obtain undertakings that the Applicant would preserve confidentiality and/or privilege of certain documents and information. Further proceedings ensued. The sequence of trustees for the BT was TC1 until December 2019, then a second trust company ("**TC2**") until May 2021 and then a third trust company ("**TC3**").
11. On 5 April 2022 Carey Olsen Limited, on behalf of TC3, wrote to the PCC to file a complaint against the Applicant (the "**Complaint**"). The Complaint concerned evidence given by the Applicant, on cross-examination, in a foreign jurisdiction. The relevant part of the cross-examination, was provided with the Complaint. It records that the Applicant stated, *inter alia*, that: (i) he had created a document that referred to a conversation, and where he had added some 'stuff', that did not happen, to the conversation; (ii) the document contained false information; and (iii) there were reasons for doing so.
12. On 19 April 2022, the PCC wrote to the Applicant giving him notice of the Complaint of improper conduct made against him. On 3 May 2022, the PCC chairman Mr. Jeffrey Elkinson wrote to the Applicant to inform him that the Complaint had some merit and may constitute improper conduct. However, Mr. Elkinson had headed the Conyers Dill &

Pearman team which had represented an entity, who had been a director of trustees TC1 and TC2. The PCC advised that the use of Mr. Elkinson's name was an administrative error and that a new letter would issue under the name of the non-conflicted Chairman Mr. Froomkin KC.

13. On 15 February 2023, Mr. Froomkin KC sent the Applicant a letter in similar terms to the letter sent by Mr. Elkinson. On 22 February 2023 the identity of the Committee members said to be considering the Complaint was disclosed. Thereafter, the Applicant or counsel on his behalf wrote to the PCC setting out the disability the Applicant faced in substantively responding to the Complaint. Correspondence also flowed between various parties in respect of seeking a variation of an order, in respect of the Applicant preserving confidentiality and privilege of information, made by a foreign Court. Correspondence flowed between Mr. Froomkin KC and the Applicant and/or his counsel with the PCC taking the view, on 14 August 2023, that access to the confidential information that would support the Applicant's response to the Complaint was not necessary despite the Applicant's repeated position that the Complaint deals with confidential activities that the Applicant was not allowed to explain without risking contempt of court proceedings in the foreign Court and the Supreme Court of Bermuda.
14. On 21 December 2023 the PCC issued the Letter and Determination to lay charges arising out of the Complaint.
15. In 2024 Hurron & Associates Ltd. filed in Court a Bill of Costs relating to a hearing that took place in 2021. TC1 was a party in that hearing and the Applicant was a respondent. The Bill of Costs disclosed that Mr. Froomkin KC had been acting for Mrs. F from at least November 2020. On 4 January 2024 Canterbury Law Limited wrote to the PCC setting out the Applicant's complaint that the 'non-conflicted Chairman' of the PCC considering the Complaint had in fact acted adversely to his interests and was infected by bias or the appearance of it. To that point correspondence flowed from Trott & Duncan Limited, also counsel for the Applicant, to the effect that if the Determination was not withdrawn within

a specified timeframe, then judicial review proceedings would issue. The PCC did not withdraw the Determination.

16. On 15 February 2024, Mr. Froomkin KC wrote to explain why his representation of Mrs. F, together with Hurriion & Associates Ltd., did not give rise to any ‘*bias in fact or law to suggest [Mr. Froomkin KC] had or have a conflict of interest in the matter before the PCC*’. He stated that he had never met Mrs. F, had never spoken to Mrs. F, never had taken instructions from Mrs. F and he had never acted for Mrs. F. He explained that he had been contacted by Hurriion & Associates to take a holding brief, if necessary, at a Registrar’s Summons, where their client Mrs. F was, by consent, to be added as a defendant. It turned out to be unnecessary as Mrs. Hurriion attended herself by telephone. Thus, his involvement was for 6.2 hours for the period over two days in November 2020 when he had telephone conversations with Mrs. Hurriion and reviewed documents relating to the consent application before the Registrar. He had no other involvement in the matter. He further explained that the facts of the proposed charges, arising from the Complaint, had nothing to do with Mrs. F.

17. Mr. Harshaw stated that (i) Mr. Froomkin KC did not disclose what information relating to the Applicant was imparted to him as part of his instructions for Mrs. F; (ii) in the hearing involving Mrs. F, her advisors (which he stated included Mr. Froomkin KC) submitted to the Court that the Applicant appeared to want to regain control of the BT, that he is a “hostile party”, and that he was in a position of “irreconcilable conflict”; and (iii) the Applicant does not believe that he can put the events complained of in context without risking a breach of the order and the undertaking as counsel had tried to explain to the PCC.

Confidentiality

The Legal and Policy Framework

18. The principle of open justice is an important one. The Bermuda Constitution at section 6(9) sets out that “*All proceedings instituted in any court for the determination of the existence of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*” As Lord Hewart CJ stated in *R v Sussex Justices, ex parte*

McCarthy [1924] 1 KB 256 “*It is not merely of some importance but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done*”. This has long been recognised and reinforced in cases such as *Hodgson v Imperial Tobacco Ltd* [1998] 1 WLR 1056 where [at 1069] it referred to Sir Jack Jacob’s Hamlyn Lecture, “*The Fabric of English Civil Justice*” (1987), pp 22 – 23.

19. However, it is also set out in the Constitution at section 6(10) that there is a public interest in some cases to hold confidential hearings. In *Scott v Scott* [1913] A.C. 417 Earl Loreburn [at 446] opined that the public could be excluded from a case on the principle that the “*administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.*” In the same case, the Earl of Halsbury set out [at 437-438] that the principle of open justice was subject to exceptions which “*are themselves the outcome of a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done.*”
20. In respect of confidentiality in the Bermuda Bar disciplinary proceedings, section 18A of the 1974 Act sets out the general powers of the PCC and section 25 provides that ‘*Every disciplinary proceeding under this part of the Act shall be treated as confidential by every person having access thereto*’. The Complaint Procedure Guideline 1998 published by the BBA also sets out that the fact of a complaint and the disciplinary proceedings are strictly confidential with publication of penalties (if more severe than admonishment) only after appeal rights have been exhausted. Thus, the PCC and the DT proceedings are confidential. To that point, the DT proceedings are held in private unless the respondent makes an application that the hearing shall be in public and that the public interest does not require the hearings to be in private.
21. The confidentiality of PCC and DT proceedings does not automatically extend to the judicial review proceedings. However, *De Smith’s Judicial Review Ninth Edition* (2023) [at 9-095] and the *Supreme Court Practice* 1999 [at 33/4/6] make reference to the Court’s

discretion to exclude the public from hearings, although they should not be excluded to any greater extent than is necessary.

22. In the case of *Director of Public Prosecutions v Clarke* [2019] CA (Bda) 8 Civ there were disciplinary proceedings initiated by the Director against the Deputy Director. The hearings in the Supreme Court took place in private, as the Judge took the view that public civil service disciplinary matters are conducted in private, and it was not appropriate to interfere with the privacy regime by making the proceedings or the judgment public. Kay JA [at 5-6] referred to the principles of open justice and to exceptions where publicity would itself be productive of injustice. He referred [at 8] to the case of *R (on the application of Willford) v Financial Services Authority* [2013] EWCA Civ 674 which was also concerned with an application for judicial review in the context of disciplinary proceedings, that were taking place in private. He referred to the judgment of Moore-Bick LJ [at 9] who in considering the interests of justice concluded that: (i) it was not necessary to protect the respondent's identity; (ii) although the disciplinary proceedings were private, once the respondent stepped outside those proceedings by making a claim for judicial review, he brought the matter into the public forum where the principle of open justice applied; and (iii) when one party invokes the assistance of the Court, the Court will not normally take steps to preserve confidentiality of the proceedings or their subject matter.
23. Kay JA also found that: (i) the size of Bermuda as a small jurisdiction was not a factor to invoke confidentiality; (ii) in reference to the Bermuda Constitution and the United Kingdom Human Rights Act 1998, the interests of justice would not be prejudiced by open proceedings, even if one of the parties would be disadvantaged by them; (iii) where a dispute between senior wielders of state power existed, the public had a right to know – rejecting the notion of an indulgence for legal practitioners and judges which was not extended to other professions or spheres of operation; (iv) there was no fear that if the Court upheld a finding of apparent bias, then it could lead to further bias in the resumed disciplinary proceedings; and (iv) the argument that confidentiality of the internal disciplinary proceedings should be preserved when they are subjected to judicial review should be rejected, as it was in *Willford*.

24. Thus, in resolving the issue of confidentiality in this matter, the Court must balance the principles of open justice as against the privacy interests of the Applicant and the disciplinary process.

Applicant's Submissions

25. Mr. Duncan KC made a number of submissions in support of confidentiality as follows:

- a. If the judicial review proceedings were to take place in public, they would disclose the confidential information before the PCC and potentially risk prejudicing any DT that might be appointed;
- b. The Determination was made in confidential proceedings which was to prefer a charge against the Applicant in private;
- c. The confidentiality of the PCC proceedings would be undermined if the judicial review were to be in public and the ability of the Chief Justice to appoint a DT unaffected by a public judgment in the contemplated judicial review would likely be diminished;
- d. The Determination may be quashed and a differently constituted PCC may take a different view of the Complaint. Reference was made to the letter dated 15 February 2024 wherein the 'biased' PCC already found the Applicant guilty without hearing the Applicant's version of events. Thus, if incorrect statements were to be made public, then it could be ruinous of the Applicant's career and those connected to him, including his family;
- e. The Supreme Court is a superior court of unlimited jurisdiction, with the ability and duty to protect its own process and to sit *in camera* when the ends of justice required it to do so;
- f. It would be anomalous and contrary to the intentions of Parliament if the judicial review of a decision of an inferior tribunal that is required by statute to keep its proceedings confidential, were exposed to the world by judicial review of those very confidential proceedings.

Respondent's Submissions

26. Mr. Potts KC submitted that the Respondent did not take an active position with the Applicant's application for wide-ranging confidentiality relief, noting it was a matter for the Court to determine in the exercise of its discretion, having regard to the Constitutional principle of open justice and the limited exceptions to the principle.
27. Mr. Potts KC referred to the confidentiality order dated 7 May 2024 by Wheatley AJ which was granted on an *ex parte* basis *in camera*. He submitted that it had profound consequences as: (i) the Respondent cannot inform the complainant about the proceedings; and (ii) what does the Respondent explain to its membership about any audit reports showing litigation costs items. In any event, he queried why there was a need to keep this matter confidential in light of all the other litigation involving the Applicant.

Analysis and Discussion

28. It is clear that the starting point is open justice under section 6(9) of the Constitution in that Court hearings are public. However, section 6(10) provides that the public may be excluded in limited circumstances as confirmed in *Scott v Scott*. The disciplinary process for the Bar is based on a statutory confidentiality regime of the 1974 Act, the PCC Rules and the DT Rules. That regime does not automatically extend to judicial review as *DPP v Clarke* and *Willford* set out a number of factors as to why the Court would not normally take steps to preserve confidentiality, once the assistance of the Court was sought. However, I do not think that Kay JA was setting down a rigid rule, as the Court always retains its inherent jurisdiction to protect its own process, and in this case the protection afforded to parties by the statutory disciplinary regime.
29. I turn first to some arguments raised by Mr. Duncan KC. I disagree with him that if the judicial review process took place in public, then the disclosure of confidential information which was put before the PCC would risk prejudicing any DT that might be appointed. In my view, the DT is a professional tribunal that can disregard irrelevant material, such that prejudice is unlikely. I also disagree with Mr. Duncan KC that the ability of the Chief Justice to appoint a DT would in any way be diminished.

30. I take into consideration the principle set out by Earl Loreburn in *Scott v Scott* that parties may be deterred from seeking access to the Courts. In my view, there is a real risk that parties may be deterred from seeking judicial review or the assistance of the Court if they were to lose their statutory confidentiality. Thus, some level of confidentiality should continue through the Court proceedings.
31. In respect of the factors set out by Kay JA in *DPP v Clarke*, in the present case, in my view, Bermuda's small size is not a factor to take into account and there is no fear that if the Court upheld a finding of apparent bias that it would lead to further bias. Further, the fact of public proceedings would be a disadvantage to the Applicant, but in my view, that would not prejudice the interests of justice. To that point, Kay JA set out that when the parties are public figures who wield significant state power, then the public have a right to know about the dispute and the proceedings. In the present case, the Applicant is not a public figure wielding such state power, although he still has important duties to his clients, the Courts and the profession.
32. I accept Mr. Potts KC's submission that the existing confidentiality order has profound consequences. In my view, in the interests of justice, the Respondent should be able to inform the complainant about the proceedings, otherwise the complainant may conclude that no action has been taken in respect of the Complaint, properly filed. Also, the Respondent should be able to inform its membership about its expenditure in respect of no doubt costly litigation, to a certain extent that maintains confidentiality of proceedings but provides accountability.
33. I have considered the wider interests of justice. A blanket confidentiality order denies the public information about disciplinary proceedings and any relevant judicial review in the Court. In my view, a wide range of individuals and organisations would no doubt benefit from the jurisprudence of the proceedings.
34. I have considered *De Smith's Judicial Review* and the *Supreme Court Practice 1999* as set out above that the Court has a discretion to exclude the public, although they should not be excluded to any greater extent than is necessary. In my judgment, to achieve such an

appropriate balance of preserving the Applicant's anonymity while permitting public access to anonymized proceedings and judgments, a specific tailoring of an order, on a case by case basis is required. In light of the above reasons, in my view, the blanket confidentiality order should be varied, for the purpose of not excluding the public to any greater extent than is necessary, such that: (i) the Applicant's identity shall remain confidential; (ii) the proceedings, judgments, rulings and orders, shall be anonymized; (iii) the proceedings and anonymized materials shall be publicly accessible; and (iv) the Court file shall be sealed except with the consent of the parties or order of the Court.

Jurisdiction

The Legal Framework

35. The PCC of the BBA is a public body established by section 18 of the 1974 Act. Section 18A sets out the general powers of the PCC which, in accordance with Rules, includes conducting inquiries into and investigations of complaints of improper conduct; taking measures after inquiry/investigation if no *prima facie* case of improper conduct has been made out; taking informal or formal measures if it is determined that a *prima facie* case has been made out; making administrative arrangements for the presentation of a case before the DT; and making recommendations on matters of improper conduct to the Bar Council as it may think appropriate.
36. The conduct of the PCC is governed by the PCC Rules 1997 (the “**PCC Rules**”), promulgated under section 9(1)(c) of the 1974 Act. By Rule 12(2)(a) the DT is authorised to hear and determine the charge, and by Rule 15, a respondent can object to members of the DT to the Chief Justice.
37. The Bar Disciplinary Tribunal Rules 1997 (the “**DT Rules**”) include: Rule 3 – authorises the DT to hear evidence in respect of a charge until it has arrived at a finding in respect of the charge. Rule 11(1) – provides that the DT proceeding shall be governed by the rules of natural justice; Rules 17(1), (2) and (3) provide for the DT to pronounce its finding and/or sentence in writing as signed by the members and to proceed to sentencing, and where the charge has not been proved, then no action is to be taken and the charge dismissed.

38. In *R v General Council of the Bar, ex parte Percival* [1991] 1 QB 212, the High Court of England and Wales held that the Professional Conduct Committee was amenable to the supervisory jurisdiction of the Divisional Court by way of Judicial Review. In *re P (A Barrister)* [2005] 1 WLR 3019, issues of bias were addressed as a preliminary issue.
39. Counsel for the Applicant cited the case of *Holmes v Royal College of Veterinary Surgeons* [2011] UKPC 48 where the Privy Council had considered earlier cases of *Tehrani v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2001] 1 IRLR 208 and *Preiss v General Dental Council* [2001] 1 WLR 1926 for the principle that public authorities have a duty to carry out their statutory functions fairly. Lord Mustill summed up those common law duties of fairness, including flexibility, context and disclosure in *R v Secretary of State for the Home Department, ex parte Doody* [1994] 1 AC 531, 560, which were cited extensively with emphasis by Sir Geoffrey Vos, M.R. in *R (Thomas) v Judicial Appointments Commission* [2025] EWCA Civ 912. *Doody* was also cited by Lady Hale in the Privy Council case of *The Honourable Chief Justice of Trinidad & Tobago Mr. Justice Ivor Archie O.R.T.T v The Law Association of Trinidad & Tobago* [2018] UKPC 23 where she stated [at 38] “... even if the rules of natural justice applicable to the decisions of a judicial or quasi-judicial body do not apply, public authorities do have a duty to carry out their statutory functions fairly.”
40. Counsel for the Applicant referred to the case of *O'Connor et al., Re an application for Judicial Review* [2005] NIQB 40 for the principle that as allegations of apparent bias can go to the very essence of the system for the conduct of disciplinary proceedings, the Court should intervene at an early stage of such proceedings.

Applicant's Submissions

41. Mr. Duncan submitted a number of reasons why judicial review is amenable at this stage:
- a. Rule 3 does not authorise a DT to regulate or adjudicate upon the conduct of the PCC;
 - b. Rule 11(1) – the rules of natural justice are not for the proceedings in the PCC and they should not replicate the power of the Chief Justice to accept a respondent's

request for a panel member to be removed. Thus, the DT does not have the power to determine questions of bias in the PCC;

- c. Rule 17 does not speak to discretionary powers to stay PCC proceedings for bias or any other impropriety;
- d. The PCC is amenable to judicial review in relation to carrying out its statutory functions.

Respondent's Submissions

42. Mr. Potts KC submitted a number of reasons why judicial review should be rejected at this stage.

- a. He referred to the cases of *Sharma v Brown Antoine* [2007] 1 WLR 780 and *Director of Public Prosecutions v Durham (Deceased)* [2024] 1 WLR 3900 to say that the applicant is precluded from making an application for judicial review because, having regard to the legislative framework contained in the 1974 Act, the proper time and method for the Applicant to seek to contest, or to apply to stay, any professional disciplinary charges levelled against him is before the DT in due course; and then if necessary and appropriate by way of statutory appeal to the Court. Mr. Potts KC relied on the cases of (i) *R (Glencore Energy UK Ltd) v Revenue and Customs Comrs* [2017] 4 WLR 213 [at 55 – 58] where Sales LJ commented on the use of judicial review as a remedy of last resort; and (ii) *Harper v Commissioner of the Bermuda Police Service* [2021] SC Bda 71 Civ where Hargun CJ [at 18 – 25] commented on the undesirability of concurrent judicial review proceedings and criminal proceedings.
- b. There was no obligation on the part of the various members of the PCC, acting as an administrative decision-maker, exercising a prosecutorial function, to be free of all possible conflicts of interest, given a number of factors including: (i) the allocation of functions as between the PCC, the DT and the Courts; (ii) the inherent likelihood that some or all members of the PCC will have some degree of connection with various parties, due to the size of both the Bermuda Bar and population; (iii) the doctrine of necessity citing *Meerabux v Attorney General of Belize* [2005] UKPC 12; and (iv) the fact that the PCC performs an administrative, investigative and prosecutorial function rather than a judicial or quasi-judicial

function as performed by the DT, citing the case of *P (A Barrister)*; and (v) the Applicant's express waiver as to any concerns regarding any potential conflicts of interest on the part of Mr. Froomkin KC by letter dated 10 May 2022.

- c. The question of potentially 'staying' any disciplinary proceedings is not for the PCC or the BBA but would be for the DT or the Court in due course, if there were grounds for doing so, citing *Guest v DPP* [2009] EWHC 594 (Admin) and *DPP v Durham* [2024] UKPC 21.
- d. The Applicant's judicial review proceedings relate to a professional conduct complaint made against him by a third party complainant, TC3, which no doubt has its own legitimate expectation that the complaint will have been considered and addressed by the PCC and DT within a reasonable timeframe, citing the English Court of Appeal case of *R (ex parte Leathley) v Visitors to the Inns of Court* [2014] EWCA Civ 1630 where Jackson LJ [at 81] commented on the high public interest in protecting parties against misconduct by barristers, noting that the court will be slow to strike down any regulatory system which protects that public interest, only doing so where illegality has been demonstrated.

Analysis and Discussion

- 43. In my view, I find that the Court has jurisdiction to hear this matter on judicial review for several reasons. First, the PCC is a filtering committee, whose statutory powers as set out in Section 18A, are confined to inquiring into and investigating complaints and then taking steps, depending on whether or not it finds that there is a *prima facie* case of improper conduct. It can then proceed to make administrative arrangements for a DT. The PCC Rules then assign responsibility to the DT to adjudicate the complaint, and the DT Rules provide for the DT to hear and determine the case, including sentencing if the case is proved. The line of cases of *Holmes*, *Doody* and *The Honourable Chief Justice of Trinidad & Tobago* establish that the PCC must act fairly in its functions. In my view, there is no provision or authority permitting the DT to exercise jurisdiction over the PCC in respect of its conduct or its duty of fairness in the filtering process.

44. Second, I disagree with Mr. Potts KC that the statutory framework provides for the DT to seek to contest or apply to stay any charges is at the DT stage. In my view, the statutory framework supports the position of the Applicant for intervention at this stage by way of judicial review because the DT cannot address the issue of fairness of the PCC. Thus, leaving the issue of fairness and bias to the DT, is not an appropriate or available alternative remedy. To that point, if the functions of the PCC have been infected by bias, then applying the principles as set out in *O'Connor*, that bias can go to the very essence of the system of conduct of disciplinary proceedings. Thus, I disagree again with Mr. Potts KC when he sought to distinguish the administrative, investigative and prosecutorial functions of the PCC from the judicial or quasi-judicial functions of the DT.
45. Third, I have considered the submissions of Mr. Potts KC in respect of the cases of *Sharma* and *Durham*. I disagree that they apply here as they address the circumstances of judicial review in criminal cases and prosecutorial discretion, and as such they do not address the statutory functions of the PCC and the DT. I take the same view in respect to the case of *Harper* where it set out the undesirability of concurrent criminal and judicial review proceedings. Those cases underscored the principle that most matters arising in criminal cases should be dealt with in the criminal trial. Thus, in my view, the only jurisdictional forum to address any assertion of bias by the PCC is the Court and significantly, at this stage. Otherwise, leaving an issue of bias at the PCC stage to the DT, would risk compromising the fairness of the disciplinary process.
46. Fourth, I have considered the submissions of Mr. Potts KC that there was a waiver by the Applicant as set out in the Canterbury Law Limited letter dated 10 May 2022. That letter set out the conflict of interest as it was then understood as it related to Mr. Elkinson. It went on to state “*There is only one member of the standing PCC that is not conflicted in this matter, that is Mr. Saul Froomkin QC.*” In my view, that was a waiver at that time, limited to the information available at that time. Thus, I disagree that this was a waiver to the participation of Mr. Froomkin KC once it became known that he had some participation in some aspect of the wider proceedings. To my mind, the issue of conflict became live again.

47. In light of the reasons set out above, I conclude that the PCC's Determination is amenable to judicial review and that the Court has jurisdiction to intervene at this stage.

Bias

The Law on Bias

48. The leading authority in Bermuda in relation to bias and the appearance of bias is the Court of Appeal case of *R v Wallington* [2022] CA (Bda) 3 Crim where Clarke P [at 33] set out the test for recusal as undoubtedly the test in the well-known case of *Porter v Magill* [2001] UKHL 67, namely "*whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility of bias*". In respect of guidance as to the characteristics of the notional observer, he referred to the case of *Helow v Home Secretary* [2008] UKHL 62 where Lord Hope of Craighead pointed out [at 2] that the fair-minded observer "*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 ... Her 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.*" And then [at 3] "*Then there is the attribute that the observer is informed. It makes the point that, before she takes a balanced approach to any information she is given she will take the trouble to inform herself on all matters that are relevant.*"

49. The duty of fairness applies to all bodies exercising statutory functions. Thus, although the PCC is not acting judicially or quasi-judicially, in the case of *R(Crookenden) v Institute of Chartered Accountants* [2013] EWHC 1909, Leggatt J [at 31 -32] recognised that the principles of apparent bias still applied. In *Hall v Bermuda Bar Council* [1983] BDA LR 1 a member of the Disciplinary Committee was elected a member of the complainant or prosecuting body (the Bar Council) and was sitting in a judicial capacity on the Disciplinary Committee. The Court of Appeal found that no actual bias existed on the part of that member but Blair-Kerr P stated [at 71] "*the reasonable bystander might well have said to himself: "Well, well, Mr. Hall has been disbarred; but, after all, the Bar Council could hardly lose; they had one of their number sitting on the Disciplinary Committee."*" That dictum has not been overruled.

50. The rule against bias forms an essential requirement of procedural fairness whether, judicial, quasi-judicial or adjudicative and depends on the specific facts and contexts of the individual case. Where apparent bias is established, the decision is vitiated. A tainted preliminary decision cannot be cured by subsequent adjudication.

Applicant's Submissions

51. Mr. Duncan KC made several submissions:

- a. The test for apparent bias on the part of the PCC should not be any different from that of a person acting judicially or quasi-judicially.
- b. Mr. Froomkin KC made a statement as to what he says was his own involvement, but it is vague as to what documents he considered and what his instructions were.
- c. How does Mr. Froomkin KC know that the information that the Applicant seeks would not assist his defence to the charge in the DT.
- d. Mr. Froomkin KC has not considered that there may be – and the Applicant positively asserts that there is – an explanation that changes the tenor of what the transcript appears to show but that the Applicant is not allowed to give that explanation because it would involve disclosing confidential information in violation of the Order of the foreign Court and the Applicant's undertaking to the Court.
- e. Mr. Froomkin KC's prior involvement in the hearing when he acted for Mrs. F, whose interests were opposed to the Applicant, created a conflict of interest as it related to his role on the PCC, thus demonstrating an appearance of bias. Further, Mr. Froomkin KC did not declare or disclose his conflict, instead concealing his involvement, which in turn amplified the bias.
- f. In *DPP v Clarke*, the statutory role of the Director was a result of necessity, which was not the case of Mr. Froomkin KC, thus, someone else could have fulfilled the role.
- g. A fair-minded and informed observer would conclude that there was a real possibility of bias.
- h. In applying *Hall*, the reasonable bystander might well say to himself "*the Applicant will have to face a Disciplinary Tribunal, after all, Mr. Froomkin KC acted for Mrs.*

F against the Applicant and now he is deciding the Applicant's fate in a related case."

- i. The PCC's Determination is vitiated by apparent bias.

Respondent's Submissions

52. Mr. Potts KC made several submissions:

- a. There was no evidence stating that there was apparent bias on the part of Mr. Froomkin KC. Further, there was no evidence of the Applicant, only that of his counsel Mr. Harshaw.
- b. The Applicant's suggestion that the PCC suffered from 'apparent bias' due to the presence of Mr. Froomkin KC as one of its members does not withstand objective scrutiny. The complainant is TC3. Mr. Froomkin KC had nothing to do with TC3 and nothing to do with the Applicant. Thus, the issue before the PCC was solely the Applicant's conduct. Therefore, to the question as to what is the conflict of Mr. Froomkin KC, the answer is that there is none.
- c. The Applicant had failed to show that Mr. Froomkin KC had a duty to disclose any information, and further, there was no need to disclose any information.
- d. If the PCC's role was adjudicative (contrary to the Respondent's case), the question would be whether a fair minded and informed observer, possessed of all of the relevant facts and a proper understanding of the legal system in Bermuda, would conclude that there was a real possibility that the PCC was biased, recognizing that it is not the PCC but the DT that is, in turn, the relevant decision making body. Mr. Potts KC submitted that clearly the answer would be no. He made reference to the Bermuda Court of Appeal case of *Trew v White* [2025] CA Bda 23 Civ, where Clarke P [at 7] confirmed that the test had been established in England for decades and followed consistently in Bermuda, further naming several cases, and quoting two characteristics of the fair-minded and informed observer, as set out in *Helow*, "*She is not unduly sensitive or suspicious ... her approach must not be confused with that of the person who has brought the complaint.*"

Analysis and Discussion

53. In my view, based on the circumstances of this case, the test in *Porter v Magill* is satisfied in that a fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility of bias for several reasons.
54. First, in my view, the test for apparent bias on the part of PCC is no different from that of a person acting judicially or quasi-judicially, that is, in the present case, in respect of the PCC or the DT. To that point, the PCC is not adjudicating the matter, but it is conducting a filtering exercise as to whether there is a *prima facie* case against a person, for which there can be significant consequences. Thus, the duty of fairness applies to the PCC.
55. Second, in this case, the evidence, mostly documentary, as provided by Mr. Harshaw, is sufficient for the testing exercise to be performed properly. I disagree with Mr. Potts KC that there is a necessity for direct evidence from the Applicant to set out the factors for the assessment of bias. The fair-minded observer would be capable of considering the relevant facts of the matter as provided by Mr. Harshaw, in a detached manner.
56. Third, there is a similarity in that Mr. Elkinson was instructed by parties in opposition to the Applicant and likewise, the evidence shows that Mr. Froomkin KC, was instructed, if only for a short period of time, by way of the retainer by Hurrion & Associates. If it was appropriate for Mr. Elkinson to not chair the PCC in respect of its duty, then by parity of reasoning, the same argument would apply to Mr. Froomkin KC not to chair the PCC.
57. Fourth, the fair-minded and informed observer would appreciate that Mr. Froomkin KC had had conversations with Hurrion & Associates, albeit about a finite application that was to proceed by consent in Chambers. However, although the retainer was limited in scope, a significant factor is that Mr. Froomkin KC did not disclose what information he had reviewed in respect of the Chambers matter. To that point, it would not have mattered that Mr. Froomkin KC had never met with, spoken to, or acted for Mrs. F – he had had access to the documents, mostly likely those which would have set out the basis of the hearing and the reason why Mrs. F was joining as a party. Thus, the fair-minded and informed

observer would consider that Mr. Froomkin KC's role in the PCC's filtering process created a real possibility of bias.

58. Fifth, the fair-minded and informed observer could well consider the point that Mr. Froomkin KC has asserted that, in respect of the Complaint, the facts of the proposed charges had nothing to do with Mrs. F. This point was underscored by Mr. Potts KC when he posed the question as to what is the conflict of Mr. Froomkin KC, the answer being none. However, to those two points, the observer in turn would also consider that Mr. Froomkin KC's prior involvement, and possession of specific, but undisclosed knowledge, still created a real possibility of bias, along the lines set out in *Hall*, where the reasonable bystander might well say to himself, words to the effect that the PCC could hardly decide otherwise than that there is a *prima facie* case, as Mr. Froomkin KC, had previously acted in opposition to the Applicant.

59. In light of the reasons set out above, I conclude that a fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility of bias on the part of the PCC chairman, Mr. Froomkin KC in the duty of the PCC as to whether there was a *prima facie* case as against the Applicant.

Findings and Conclusion

60. In light of the reasons set out above:

- a. The confidentiality order is varied to preserve the Applicant's anonymity while permitting public access to any anonymised proceedings and judgments;
- b. The PCC is amenable to judicial review at this stage;
- c. The participation of Mr. Froomkin KC on the PCC created a real possibility of bias, such that the Determination is void; and
- d. The Determination must be quashed and the matter remitted to a differently constituted, unconflicted PCC.

Relief Sought and Order

61. The Court orders as follows:

- a. Certiorari quashing the Determination of the PCC as communicated by the Letter.
- b. The matter is remitted to a differently constituted, unconflicted PCC for fresh consideration.
- c. The confidentiality order is varied as follows:
 - i. the Applicant's identity shall remain confidential and anonymised;
 - ii. the proceedings, judgments, rulings and orders, should be anonymized;
 - iii. anonymised material shall be publicly accessible; and
 - iv. the Court file shall be sealed and not available for inspection by any person not a party to this cause without the written consent of all parties to this cause or an order of this Court.
- d. All further proceedings in any way related to the Determination of the PCC are stayed until reconsideration by the newly constituted PCC.

62. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Applicant against the Respondent on a standard basis, to be taxed by the Registrar if not agreed.

Dated 29 September 2026 (Anonymised Version)



HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE