



Civil Appeal No. 9 of 2026

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS
ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. JUSTICE ANDREW MARTIN
CASE NUMBER 2024: No. 346**

Dame Lois Browne Evans Building
Hamilton, Bermuda HM 12

Date: 25 September 2026

Before:

**THE HON IAN KAWALEY, PRESIDENT
JUSTICE OF APPEAL THE RT HON DAME ELIZABETH GLOSTER
and
JUSTICE OF APPEAL THE RT HON SIR JULIAN FLAUX**

Between:

**(1) K AMANI LAWRENCE
(2) EUGENE JOHNSTON**

Applicants

-

- and -

**(1) THE PUBLIC SERVICE COMMISSION
(2) THE MINISTER OF THE CABINET OFFICE
(3) THE HEAD OF THE PUBLIC SERVICE
(4) THE ATTORNEY GENERAL OF BERMUDA
(5) THE GOVERNOR OF BERMUDA**

Respondents

-and-

**(1) NALINI SALICK
(2) SHAKIRA DILL-FRANCOIS**

Directly Affected

Appearances: Mr Eugene Johnston and Ms K Amani Lawrence appearing in person
Mr Ben Adamson of Conyers Dill and Pearman Limited for the 1st Respondent

Hearing date(s): 4 June 2026
Date of decision: 9 July 2026
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(remotely)

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Recusal application-whether judge's comments in the course of partially refusing leave to seek judicial review application gave rise to a real risk of the appearance of bias

REASONS FOR DECISION

KAWALEY, P

Introductory

1. At the conclusion of the hearing of the present appeal, judgment was reserved. The appeal was disposed of on 9 July 2026 when this Court ordered as follows:

*“1. The appeal is dismissed.
2. The stay of the Solicitor General’s appointment, imposed by the Order of the Supreme Court dated 24 January 2025, is discharged.
3. Unless any party applies within 14 days by letter to the Registrar to make further submissions as to costs, the costs of this appeal shall be the Respondents’ costs in Supreme Court Civil Jurisdiction No 346 of 2024.”*

2. These are the reasons for that decision.

Background

3. On 24 January 2025, following an *ex parte* hearing, Andrew Martin J (the “Judge”) granted the Applicants partial permission to seek judicial review in proceedings brought to challenge the legality of the administrative processes which resulted in the selection of the parties directly affected to the posts of Chief Parliamentary Counsel (“CPC”) and

Solicitor-General (“S-G”) respectively. He also granted a stay of the impugned decisions (the “Permission Ruling”). The Applicants applied for leave to appeal against the decision to refuse permission to pursue all of their grounds. On 27 March 2025, the Judge refused the leave to appeal application of the 2nd Applicant (“A2”) and adjourned the leave to appeal application of the 1st Applicant (“A1”) to an *inter partes* hearing. On 6 June 2025, almost exactly a year before the present, second interlocutory appeal was heard, the Applicants appeared before this Court (Kawaley JA, Hargun JA and Mussenden JA (Acting)) seeking to set aside the challenged portions of the Permission Ruling. Because A1’s application was made before her *inter partes* leave to appeal application had been disposed by the Supreme Court, only A2’s application proceeded. My Judgment dated 20 June 2025 (with which the other members of the Court concurred) concluded as follows:

“45. The conclusions I have reached on the Appellant’s applications before the Court may be summarised as follows:

(a) the application for leave to appeal the Supreme Court’s 24 January 2025 partial refusal of leave to seek judicial review is granted;

(b) the Appellant’s appeal against the said decision to partially refuse leave is allowed and the Appellant is granted leave to pursue the excluded grounds as against the 1st to 5th Respondents;

(c) the matter is remitted to the Supreme Court to be dealt with in accordance with law; and

(d) unless any party applies by letter to the Registrar within 14 days to be heard as to costs, I would order that the costs of the appeal should be the Appellant’s costs in the cause in Supreme Court Civil Jurisdiction No. 346 of 2024.”¹

4. In remitting the matter to the Supreme Court “*to be dealt with according to law*”, the Court implicitly remitted the matter back to the Judge. When concerns arise about the propriety of the same judge dealing with a matter (typically if the rehearing of a final decision is being ordered), such concerns are invariably raised before this Court and reflected in the order giving effect to the appeal. I did not consider it necessary to set out explicitly this Court’s expectation that the proceedings would be prosecuted with expedition before the same judge in the Supreme Court. In paragraph 2 of the 20 June 2025 Judgment, I noted:

“...The Judge was rightly concerned to avoid undermining the interests of good administration by suspending the effect of the appointment decisions (leaving the appointees in a state of limbo) for more time than was really necessary to fairly

¹ [2025] CA (Bda) 14 Civ.

adjudicate the application. This undoubtedly also prompted him to seek to streamline the scope of the judicial review application which was allowed to pass through the ex parte leave filter.”

5. What transpired after this decision was the converse of what this Court reasonably anticipated would occur. On 15 January 2026, the Appellants issued a Summons for the Judge’s recusal. That application was determined on the papers. It was positively opposed by the 1st-4th Respondents with the 5th Respondent taking no position. The recusal application was dismissed by the Judge on 25 February 2026 (the “Recusal Ruling”)². On 24 April 2026 the Judge granted leave to appeal against that decision. And so a second interlocutory appeal was placed before this Court, almost 2 ½ years after leave to seek judicial review had been initially granted, with implementation of the decisions for the appointment of senior public officers still stayed, and substantive pre-hearing directions still outstanding. As I indicated in the course of the hearing, had the Judge not invited the Applicants to consider whether they wished to make a recusal application (before rather than after the merits had been adjudicated), the application which was made could potentially have been viewed as an abuse of process.
6. Also in the course of the hearing, various members of the Court expressed doubts about the merits of the criticisms made of the comments made by the Judge during the permission hearing and subsequently. At the conclusion of the hearing, Mr Johnston invited the Court to consider giving guidance on the principles governing recusal in cases where apparent bias was alleged otherwise than with reference to a disqualifying connection between the judge and a party to (or the subject-matter of) the dispute. The absence of Bermudian case law on this recusal ground, he suggested, must have informed the Judge’s decision to grant leave to appeal.

The governing principles on recusal

7. In my judgment, the principles governing recusal are so clearly established through highly persuasive (if not binding) case law from other jurisdictions that the law can be summarised quite briefly. The application of those principles to the present case can also be dealt with quite briefly, because once those principles are understood and applied in the interlocutory context, it soon becomes obvious that the threshold for recusal was not met. Of more significance (and in my judgment less clarity as a matter of Bermuda law and practice) is the closely connected question of the proper approach to case management in the context of judicial review proceedings. In order to achieve the Overriding Objective as set out in Order 1A of the Rules of the Supreme Court, it may well be that different case management techniques will need to be applied in public law judicial review proceedings, as opposed to in cases where a private law claim to enforce private law rights is being pursued.

² [2026] SC (Bda) 23 Civ.

8. There was no suggestion that the Judge failed to correctly formulate the governing principles on recusal; merely that he misapplied them. In the Recusal Ruling, the Judge held as follows:

*‘17. The legal test for recusal on the grounds of an appearance of bias is set out in **Porter v McGill**³:*

‘The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.’

18. A fair minded and informed observer is not unduly sensitive or suspicious and always reserves judgment until he or she has seen and fully understood both sides of the argument. Nor is he or she complacent, and will not shrink from the conclusion, if justified objectively, that things that a judge has said or done, may make it difficult for them to judge the case before them impartially.

*19. As to the judge having formed a premature view on the merits of the case, it was said in **Stubbs v R**⁴:*

*‘The appearance of bias as a result of pre-determination or pre-judgment is a recognised ground for recusal. The appearance of bias includes a clear indication of a prematurely closed mind (*Amjad v Steadman-Byrne* [2007] EWCA Civ 625; [2007] 1 WLR 2484 per Sedley LJ at para 16). The matter was expressed by Longmore LJ in *Otkritie International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315 (at para 1) in the following terms:*

‘The concept of bias ... extends further to any real possibility that a judge would approach a case with a closed mind or, indeed, with anything other than an objective view; a real possibility in other words that he might in some way have ‘pre-judged’ the case.’

20. The court is slow to accede to recusal applications on insubstantial grounds for obvious reasons. It would be inimical to the efficient administration of justice to allow parties to raise objections about judges based on personal preference or in order to get the matter before a judge whom a party thinks will be sympathetic to their arguments. The basis for recusal must be based on solid evidence of a real risk of bias, and a recusal is only justified for the maintenance of public confidence in the independence and impartiality of the judiciary.

*21. These principles have been applied in Bermuda cases and are uncontroversial. Recent examples of the application of these principles can be found in **Athene***

³ [2001] UKHL 67 at paragraph 103 per Lord Hope.

⁴ [2018] 3 WLR 1368 at paragraph 15 per Lord Lloyd Jones JSC

Holding Ltd v Siddiqui and Others, Moulder v Cox Hallet Wilkinson and Others and Durham v AG.⁵

9. I gratefully adopt Martin J's above summary of the legal test for recusal. Mr Johnston however in his Skeleton Argument on behalf of both Appellants emphasised the following principles relevant to applying that test, contending that in the present case the third limb ((c)) was critical:

“18. Much of the law in this area should be unobjectionable, but it would be helpful to set out what the courts have said:

- (a) First, the question to be asked is whether the Observer would think there's a 'real possibility' the judge was biased. But in Re H⁶, at [25] and [71], the English Court of Appeal took the view that this test may be too narrow to capture all the forms a challenge to the judge's partiality may come in (after considering Bubbles & Wine Ltd v Lusher [2018] EWCA Civ 468⁷ at [17]). He proposed the test in paragraph [15] above.*
- (b) Second, each case is determined after an exacting focus on both the facts and the context. The process to be followed is this: gather together all the relevant evidence along with the context, then ask what the Observer would think about it all: Lawal at [20]; Bubbles & Wine at [17]; Re H at [25]; and M&P⁸ at [26].*
- (c) Third, the relevant circumstances are whatever the public would know (Gillies v Secretary of State for Work and Pensions [2006] 1 WLR 781. And Mengiste v Endowment Fund for the Rehabilitation of Tigray [2013] 5 Costs LR 841 makes it clear that those circumstances may include consideration of whether the judge has, at an earlier point in proceedings, expressed a view on issues that are to be determined at trial. This is particularly egregious when the judge's findings are extraneous the matters he is sitting to determine. See also R (Alhasan) v Director of Legal Aid Casewatch [2024] EWHC 1676 at [7].*
- (d) Fourth, the relevant circumstances cannot include what was in the judge's head at the time: Gillies at [17]; and M&P at [17] and [27].*
- (e) Fifth, how the judge conducts the proceedings and what rulings he makes is relevant to the appearance of bias: Re H; In re AZ⁹; and M&P.*

⁵ [2019] SC (Bda) 21 (a connection case); [2024] SC (Bda) 14 civ (a connection case) and [2025] SC (Bda) 66 civ (also a connection case).

⁶ [2024] 1 FLR 1235.

⁷ [2018] EWCA Civ 468 (Flaux LJ and Leggatt LJ).

⁸ [2018] EWHC 2665(Ch).

⁹ [2022] 4 WLR 78.

- (f) *Sixth, paragraph [25] of Locabail decides that if the Observer is thought to be in any doubt about whether bias existed, that doubt must be resolved in favour of recusal.*
- (g) *Seventh, the decision to recuse is not discretionary. If the circumstances amount to a real possibility of bias recusal follows automatically: see AWG Group v Morrison at [6]; Riley v AG of Monseratt [2020] ECSC J0917-1; and Smith v A-G of Trinidad and Tobago [2022] UKPC 28 at [73] to [76].*

10. As regards sub-paragraph (c), the passages in *Mengiste* (at [58]-[59]) to which Mr Johnston referred in oral argument bore no resemblance to the prior observations of which he complained in the present case. The impugned *Mengiste* interlocutory judicial comments were “*criticisms of high gravity for a solicitor*” ([59]) which were unrelated to the matters the judge in that case had to decide. However, it is also important to clarify in relation (f) that in *Locabail (UK) Ltd-v- Bayfield Properties Ltd* [2000] QB 451 [25], as Mr Adamson pointed out, the English Court of Appeal in that same paragraph made it clear that:

“...The mere fact that a judge , earlier in the same case, or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or a witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or another, will be obvious...”

11. Those observations in a joint judgment reflected the cumulative experience of Lord Bingham CJ (as he then was), Lord Woolf MR (as he then was) and Sir Richard Scott V-C (as he then was). It will require something obviously out of the norm for previous adverse comments about the merits of a party’s case at the interlocutory stage to give rise to risk of bias sufficient to disqualify the judge from hearing the merits. Such comments are routinely made by judges in the context of managing interlocutory applications of every kind. As Sir Julian Flaux pointed out in the course of argument in the present appeal, the civil justice system would grind to a halt if necessary interlocutory judicial observations gave rise to a need to reassign the trial to a different judge. This explains, in my judgment, why the Bermudian courts have not previously been required to explore the intricacies of the recusal principles otherwise than in cases where the complaints raised relate to an alleged disqualifying connection or relationship between the judge and a party or the subject-matter of the dispute. It is easier to make out recusal grounds in a connection case and almost impossible to do so in other cases absent unusual circumstances. As I observed at first instance in the Cayman Islands when rejecting a not entirely dissimilar recusal application based on statements made in interlocutory proceedings:

“where there is no actual or potentially disqualifying relationship between a judge and one of the parties, the need for a precautionary approach does not usually

*arise... an appearance of bias arising from case management decisions and or judicial observations will generally require more than demonstrating that the judge has become irritated with a litigant or has articulated a provisional view on the merits which might at trial be shown to be wrong. If the recusal threshold was as low as this, judges would be unable to confidently make case management decisions at all...*¹⁰

12. There is another reason of principle as to why there does not appear to be any precedent for a judge inviting a party to consider making a recusal application outside of the context of a potential connection or relationship concern. The ‘Guidelines for Judicial Conduct’ contain a number of provisions which elucidate the position. Firstly, judges should voluntarily recuse themselves if they have doubts about their impartiality or can see that a reasonable, fair-minded and informed observer would have such doubts ([13]-[14]. The Guidelines make it clear that connections create a positive duty to recuse and that expressing provisional views do not:

“78. The most important circumstances in which the Judge should consider disqualification include the following situations:

(i) It is impossible to be categorical about relationships which give rise to disqualification but a Judge should always disqualify himself or herself whenever a party, lawyer or witness of disputed facts is a close blood relative or domestic partner of the Judge or a close relative of the Judge, or where such person is a close friend or business associate of the Judge.

(ii) It is a good rule of thumb for a Judge to consider disqualification in cases where a witness of disputed facts is someone known to the Judge and about whom he or she has opinions. Former clients may well be people about whom the Judge has formed a view in the past...

(iii) Although a Judge may be disqualified for strong views publicly expressed on a matter in issue, the case would have to be extreme before a reasonable observer would think the Judge not able to have an open mind. An expression of opinion in an earlier case is not a ground for disqualification.

(iv) In cases of uncertainty it may be desirable for the Judge to discuss the matter with the Chief Justice or another Judge. Where the Judge is uncertain as to whether disqualification is appropriate it will usually be necessary for the parties to be given an opportunity to make submissions on the point after full disclosure of the circumstances giving rise to the question of disqualification. The consent of the parties is not determinative. The Judge must decide whether disqualification is appropriate. Disclosure of any

¹⁰ *Re International Air Finance Corporation* [2025] CIGC (FSD) 65 (at [52] (a), (d)), a case which was fully argued with leading counsel on both sides. (An electronic copy of this judgment was supplied to the parties in advance of the hearing).

matter which might give rise to objection should always be undertaken even if the Judge has formed the view that there is no basis for disqualification. There may be circumstances not known to the Judge which may be raised by the parties consequentially upon such disclosure. “ [Emphasis added]

13. These Guidelines, introduced in Bermuda in 2006 by Chief Justice Richard Ground, are derived in large part from the 2003 England and Wales Guide for Judicial Conduct introduced while Lord Woolf (a member of the *Locabail* Court of Appeal panel) was LCJ. The conflict of interest principles in the Guidelines are clearly aligned with the principles established by the courts in this field. This is why it is common practice in Bermuda and elsewhere in the common law world for judges to either (1) voluntarily recuse themselves on the grounds of potentially disqualifying connections, and/or (2) to disclose potentially disqualifying connections affording the parties an opportunity to raise an objection to their sitting. Absent “*extreme*” circumstances in relation to “*strong views*” expressed before final judgment, the need to invite a party to consider a recusal application ought not ordinarily arise in relation to views expressed in relation to the merits of a case as part of the process of disposing of an interlocutory application. Such an invitation will be particularly inapposite where a judicial review applicant has succeeded in setting aside the refusal of permission on appeal and failed to invite the appellate court to direct that all further proceedings should be assigned to a different judge.

The judicial review procedural framework

14. Mr Adamson also relied upon the Privy Council’s decision in *Sharma -v-Browne-Antoine* [2006] UKPC 57 where Lord Walker and Lord Bingham emphasised “*the need to address the fundamental merits of the Chief Justice’s application*” in the context of an *ex parte* judicial review leave application (at [23]). Other observations about the need for careful scrutiny of the evidence (at [24]-[26]) were relied upon. This was an application for “*exceptional relief*” (leave and initially staying decisions to prosecute the Chief Justice); surprise was expressed at the fact that leave was granted on an *ex parte* basis at all (at [25]). Nonetheless it cannot be doubted that a judge considering a judicial review permission application on an *ex parte* basis must consider, in particular, matters such as (a) arguability, (b) sufficient interest and (c) alternative more appropriate remedies. Clarifying the procedural framework is a helpful precursor to considering the recusal issue and it is important to understand what function the Judge was performing at the material time and how cases such as this ought generally to be case managed. What follows is a brief descriptive commentary of what I consider to be uncontroversial basic elements of the applicable procedural regime, rather than a judicial determination of any points in controversy. It seeks to explain the legal context of the *ex parte* permission application in which the judicial conduct said to give rise to grounds for recusal occurred. Where the Judge appears to have mischaracterised the statutory regime in a way which has no impact on the disposition of the present appeal, I have simply said so. Where a

mischaracterisation which had a potential impact on the disposition the present appeal has been identified (the test applicable to interim stays), counsel have been afforded an opportunity to file supplementary submissions.

15. Order 53 of the RSC provides:

“53/3 Grant of leave to apply for judicial review

3 (1) *No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.*

(2) *An application for leave must be made ex parte to a Judge by filing in the Registry—*

(a) *a notice in Form No. 86A containing a statement of—*

(i) *the name and description of the applicant,*

(ii) *the relief sought and the grounds upon which it is sought, the name and address of the applicant’s attorney (if any) and the applicant’s address for service; and*

(iii) *an affidavit verifying the facts relied on.*

(3) *The Judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court.*

(4) *Where the application for leave is refused by the Judge, or is granted on terms, the applicant may renew it by applying to a Judge sitting in open Court:*

Provided that no application for leave may be renewed in any non-criminal cause or matter in which the Judge has refused leave under paragraph (3) after a hearing.

(5) *In order to renew his application for leave the applicant must, within ten days of being served with notice of the Judge’s refusal, lodge in the Registry notice of his intention in Form No. 86B.*

(6) *Without prejudice to its powers under Order 20, rule 8 the Court hearing an application for leave may allow the applicant’s statement to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.*

(7) *The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*

(8) *Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceeding which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*

(9) *If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.*

(10) *Where leave to apply for judicial review is granted, then—*

(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;

(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.” [Emphasis added]

16. Order 53, rule 3 firstly mandates that applications for leave must be made on an *ex parte* basis. The Court is expressly empowered to deal with the application on the papers, and leave applications are generally dealt with on the papers unless either (1) the judge, or (2) the applicant, considers a hearing is desirable. Where the applicant requests a hearing, in potentially controversial cases it may be desirable have an *ex parte* on notice hearing to avoid the risk of delay flowing from an application to set aside leave granted on a fully *ex parte* basis. Indeed, in the judicial review context, the need for an *ex parte* hearing to avoid tipping off ‘dodgy defendants’ and undermining the efficacy of an interim injunction does not arise in relation to stays. It is therefore not unusual for applicants seeking interim stays, or making applications which, if leave was granted on the papers, would prompt applications to set aside, to apply for an *ex parte* on notice oral permission hearing¹¹. Contrary to the view expressed by the Judge, in my judgment Order 53, rule 3

¹¹ For instance in *Ming-v-Minister of Education* [2012] SC (Bda) 39 Civ, an *ex parte* on notice application for leave and a stay was made before me. Leave was granted and no stay was ordered, but the Respondents undertook not to implement the impugned educational restructuring proposals pending the determination of the case. The applicant sought leave via an oral hearing on notice to the respondent in *Corporation of Hamilton-v-The Ombudsman* [2014] SC (Bda) 1 Civ (Hellman J). A stay was granted with liberty to apply to discharge as the respondent appeared in person. The stay was subsequently discharged at a subsequent hearing. An application to stay a deportation order pending the determination of a judicial review application was heard on an *inter partes* basis in *Taylor-v-Governor*[2021] SC (Bda) 81 Civ (Mussenden J, as he then was). An *ex parte* on notice leave application took place at the request of the applicant in *MacLean -v- DPP* [2020] SC (Bda) 21 Civ (Subair Williams J); the application was withdrawn before it was substantively heard. In a case where the applicant was a litigant in person, the *ex parte* leave application was listed for an oral hearing on notice to the respondents: *Moulder-v- Commission of Inquiry for Historic Land Losses* [2022] SC (Bda) 60 Civ (Southey JA). These cases were not canvassed in argument, but are set out to demonstrate that my above observations on *ex parte* on notice or *inter partes* leave hearings are not merely ‘plucked from the forehead of Zeus’.

does not mandate *ex parte* leave hearings in the usual sense. It is far more flexible than that. Secondly, it requires an affidavit in support, but permits grounds and relief to be amended. Thirdly, rule 3 only implicitly requires the Court to have regard to arguability of the grounds, but explicitly merely requires the Court to have regard to sufficient interest and alternative appeal remedies. There is no automatic stay and the general powers to (a) adjourn the application (or part of it) to an *inter partes* hearing, or (b) allow a respondent to apply to set aside the *ex parte* grant of leave, are not ousted. Order 3 rule 10 provides “*if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings*” [emphasis added]. The Judge ought not to have found in the Permission Ruling (at [66]), that the default position is that all proceedings will be stayed unless the Court otherwise orders. In my experience, a stay will rarely be granted without hearing from the Crown or other relevant respondent because of the risk that a stay may unduly interfere with ongoing administrative action. This public policy forms a pivotal part of the rationale for making judicial review a discretionary remedy and explains why there is no automatic stay when leave is granted.

17. The merits threshold is generally a low one. The duty of full and frank disclosure will not generally operate in the same way as in general civil litigation because the public respondent will usually be in possession of all material facts and will itself be subject to a duty of candour. It seems obvious that greater scrutiny of the merits will be required in cases where a stay is sought at the *ex parte* stage than when it is not. Save where an urgent stay is essential to prevent the relief sought being rendered nugatory, stay applications are usually best adjourned to an *inter partes* hearing so that the implications of granting a stay (and the need for any stay at all) can be assessed with input from the public authority respondent(s).
18. The main case management concerns in the present context are ensuring that the interests of good public administration are served by identifying flaws in public law decision-making and policies while interfering with ongoing governance to the minimum extent possible. Those goals have not been achieved in the present case thus far due to a series of unfortunate events. Almost 2 ½ years after permission to proceed and an interim stay were first granted, the position of the most senior public service Law Officer of the Crown (the S-G) has been left in limbo while interlocutory skirmishes are still going on.

The merits of the appeal

19. As regards the permission hearing, the Court accepted Mr Johnston’s invitation to listen to the audio recording of the hearing. The Judge’s approach throughout was careful, calm and deliberative with nothing said which came close to suggesting that he would now have a closed mind and, in effect, ignore this Court’s reversal of his partial refusal of the permission application. I reject the criticisms made of the conduct of the hearing. One of things which the Judge was keen to do was to disapprove of the making of somewhat

careless and disrespectful comments about the role of senior public officers involved in the recruitment process (notably the Cabinet Secretary). A2 in her Third Affidavit in support of the recusal application did advance a potentially arguable complaint that the permission Judgment “*looked like a judgment written at the end of a judicial review application...the postscript to the judgment was biting, dismissive and rude...*” However, the complaint does not withstand even superficial scrutiny.

20. Firstly, these criticisms are surprising because both permission applicants were granted not only partial leave but also an interim stay. The complaint might have had more initial resonance had both applications been comprehensively refused. An assertion that the judge was apparently biased because he did not decide every point in the Appellants’ favour falls flat on its face. Mr Johnston did not have the temerity to advance this type of complaint when appealing the permission refusals. The bare assertion that a judge is “*dismissive and rude*” does on its face potentially support an apparent bias finding. But that assumes that the complaint is well-founded. The present complaint is manifestly misconceived and would never have been advanced if the Applicants had been represented by competent independent counsel. The postscript complained of merely criticised the Appellants for filing unsolicited further submissions on the issues which were properly pursued by way of appeal and confirmed the findings previously reached. A complaint that, in effect, it is “*dismissive and rude*” for a judge to criticise a litigant for procedural improprieties only has to be articulated to be rejected. It is the sort of argument one could forgive lay litigants-in-person for advancing. Less so in the case of lawyers who are lawyers and officers of the Court.
21. Complaint is next made about remarks made in the course of the leave to appeal hearing which were, fairly read, entirely unremarkable. In effect, the substance of the complaint is that the Judge was wrong to find that he was not arguably wrong. By logical extension, on this hypothesis, any judge who refuses leave to appeal on grounds which ultimately succeed on appeal should be disqualified from further involvement with the case in the trial court. In my judgment no reasonable, fair minded and informed observer would infer that the way in which the Judge dealt with the leave application suggests that he would ignore the Court of Appeal’s findings on the susceptibility of policies to judicial review, at the trial of these applications. Two high-level observations must be made based on the audio recording of the hearing. Firstly, the hearing opened with complaints being made about the delays in listing the hearing, the Judge acknowledging that the processing of documents had not been smooth and the Judge raising ultimately invalid concerns about whether the refusal was amenable to appeal. The merits of the leave application were only considered after a somewhat fractious opening in which the Judge was on any view being diligent to ensure that he was acting within his jurisdiction and Mr Johnston manifested mild irritation that the Judge was raising what to him was a surprising point. The second high-level point is that the mere length of the hearing (just over an hour) is inconsistent with the proposition that the Judge was prone to having a closed mind. One

Chief Justice was noted for summarily dismissing leave to appeal applications by observing: “*No, I haven’t changed my mind...*” The Judge in this case could perhaps be criticised for excessive fairness, but not for demonstrating a closed mind even though he started and concluded with the view that no arguable ground of appeal was being advanced.

22. The audio recording suggests the Judge was struggling to understand the point Mr Johnston was advancing. What ensued was in effect a verbal ping pong match between the Judge and Mr Johnston which in hindsight was unproductive but not indicative of bias. A leave to appeal application is very much an evaluative inquiry quite distinct from substantively determining legal issues before or at trial. The Appellants had an unfettered right to renew their application before this Court which was in no way bound by the Judge’s initial findings on leave. A trial judge is entitled to take a somewhat impressionistic view as to whether leave should be granted, which is why, in most circumstances, a very short leave to appeal hearing before the judge who initially heard the matter is all that will usefully be required.
23. Complaint was finally made about the Recusal Ruling itself. Bearing in mind that the recusal application was made at the eleventh hour and at the prompting of the Judge who ultimately granted leave to appeal, this did not appear at first blush to be promising argument. Although Mr Johnston advanced intricate arguments, on examination they only had a thin veneer of arguability. Three main points made in the Appellants’ Skeleton Argument, and my assessment of them, may be summarised as follows:
 - (a) firstly, various complaints were made about the Judge’s commentary on the permission hearing and his defence to the Appellants’ complaints which it is said, without any real coherence, the “*Observer would find...troubling*”. But the main purpose of a recusal judgment or ruling is to evaluate the grounds said to require recusal. There was nothing in the Judge’s evaluation of those complaints which plausibly suggested an appearance of bias;
 - (b) secondly and more coherently, on superficial analysis, the Appellants suggested that use of the phrase “*at least at this initial leave stage*” in relation to this Court’s findings suggested that the Judge was willing to re-open issues this Court has determined. But in fact this Court’s 20 June 2025 Judgment was dealing with the issue of the scope of leave. We made no final determination on any merits issues. As the Judge correctly noted (at [50]) in relation to this Court’s findings, “*there is no concern being expressed about my ability as the judge to approach the proceedings with an independent and impartial mind. This can be contrasted to the situation where a judge has made factual findings which were overturned on appeal, which usually requires that the case be remitted for re-hearing before a different judge*”.

The contention that adverse inferences as to partiality can be drawn from his explanations as to why he criticised the Appellants' conduct is hopeless;

- (c) thirdly, it was argued that no support can be derived from this Court's Judgment on leave that it was appropriate for the Judge to continue with the matter to trial. But this submission ignored the point made by Mr Adamson on behalf of the 1st Respondent, that the appropriate time for the Appellants to raise any concerns about the matter being remitted to the Judge was at the time of that appeal hearing. Neither the word "bias" nor "unfair" appear in this Court's 20 June 2025 Judgment. The complaints made in the present appeal about the recusal hearing could have been advanced as further grounds of appeal. Making the counterfactual assumption that such complaints were valid, this Court would have automatically remitted the matter to be dealt with by another judge. Accordingly, the Judge was entirely correct to consider that this Court implicitly decided in its 20 June 2025 Judgment that it was appropriate for the matter to have been remitted him.

- 24. In summary, the recusal application was unmeritorious and it was properly considered and rightly dismissed by the Judge. It follows that the Appellants' appeal against that dismissal must itself be dismissed.

The stay of the appointment of the Solicitor-General

- 25. In the permission Ruling, the Judge explained his decision to grant a stay as follows:

"69. The Court has acceded to the application for a stay of the making either appointment permanent until the determination of Mr. Johnston and Ms Lawrence's applications for judicial review on the grounds briefly set out below.

70. First, the express terms of RSC Order 53 rule 3 (10) contemplate that a stay will be granted automatically on the grant of leave. Even though the relevant decisions that are subject to review are not 'proceedings' within the express terms of the rule, I can see no meaningful distinction that would justify in refusing a stay on the basis that the permanent appointments are not 'proceedings'.

71. Second, there is obvious potential prejudice to each of the applicants if the appointments of Ms Dill-Francois and Ms Salick are made permanent before the determination of the judicial review applications. If the applications are successful, it may very well render the grant of relief moot, or at least make a difficult situation even more complicated. It also seems to me that the only prejudice to Ms Dill-Francois and Ms Salick is delay (and the understandable anxiety that the uncertainty over their position may give rise to). However, I am satisfied that the balance of justice clearly falls on the side of maintaining the position as it stands until the Court can adjudicate on the matter.

72. The effect of the interim stay relief is akin to an interim injunction restraining the PSC from confirming the respective appointments of Ms Dill-Francois and Ms Salick under PSCR 2001 Regulation 21(6) pending the determination of the judicial review proceedings.

73. In the light of the effect of the stay, taking into account the impact on Ms Dill-Francois and Ms. Salick, the PSC and the intrusion into the ordinary administration of the Attorney General's Chambers that this interim stay will undoubtedly cause, the Court has set out below a tight timetable for the progress of these proceedings on an expedited basis. The times allowed for steps to be taken set out below are intended to be the maximum periods in which the steps to prepare for the hearing each of the applications must be taken. They are not to be regarded as general guidance or aspirational targets."

26. Those directions required the Originating Motions to be filed within 14 days, and for service with evidence 7 days thereafter, responsive evidence within 14 days, with an application for supplementary directions to be filed 14 days thereafter. The matter was to be set down for trial within 14 days after the final directions were ordered. Had that schedule not been interrupted, a final hearing ought to have taken place over the summer of 2025. This was commendable case management by the Judge, save that it could potentially have been shortened further by conducting the initial *ex parte* hearing on notice (as the Appellants initially sought) so appropriate directions and the merits of the stay could have been addressed at the outset. The present appeal was heard and determined almost 2 ½ years after the stay was granted. It was clear to this Court that a material change of circumstances had occurred and that the prejudice identified in the Permission Ruling at [73] was far greater than it was when the stay was initially granted. The selected Chief Parliamentary Counsel had, we were told, now left Bermuda. The selected S-G, however, was still in limbo, her appointment challenged by an Applicant who had not even applied for the post. In addition, it seemed obvious that under Order 53 rule 3 (10) a stay will not be granted unless a positive case for a stay is made out, contrary to the view formed by the Judge.
27. This was a striking change from the circumstances in which the stay had been granted in January 2025. It appeared to justify this Court, of its own motion, exercising its broad discretion in disposing of an appeal to "*make such other order as the Court may consider just*" by discharging the stay of the S-G appointment decision. Senior law officers, like judges, require certain minimum levels of security in their tenure to be able to effectively discharge their duties in a suitable independent and dispassionate manner. If I had anticipated what has occurred since this Court allowed A2's appeal a year ago, I might well have considered making such relief conditional upon Mr Johnston consenting to a discharge of the stay he initially obtained. The stay was initially granted on the mistaken assumption that the default position under Order 62 rule 3 (10) was that there should be a stay unless the Court directed otherwise. The contrary is the correct legal position. The case for a stay (which had never been required to be positively made out) appeared now

to be clearly outweighed by the countervailing prejudice to the interests of good administration flowing from the S-G position being in limbo for such a long period of time.

28. Based on these provisional views, on 16 June 2026 the Court invited the parties to submit written submissions within seven days, limited to one page, as to why the stay should not be discharged, under the Court's jurisdiction under section 13 of the Court of Appeal Act 1964 to "*make such other order as the Court may consider just*". The invitation which I caused to be sent mistakenly described the year date of the Permission Ruling as 2024, suggesting the proceedings had been on foot for one year longer than was actually the case.
29. On 17 June 2026, the 1st Respondent's attorneys emailed the Court supporting the discharge of the stay and indicating that they did not propose to file any submissions. The submissions filed on behalf of the Applicants provided as follows:

"1. The Appellants oppose the discharge of the stays. Section 13 of the Court of Appeal Act 1964, properly construed, does not allow this court to make orders disconnected from the issues raised by the particular appeal the court is determining. And even if the court has the power to discharge a stay granted by the Supreme Court in this appeal, it is not appropriate to do so in the circumstances for three reasons:

- (a) First, Martin J exercised his discretion correctly when granting the stays.*
- (b) Second, expedition supplemented the stays; it was not the reason for them: see the Permission Judgment at [73]. Here, time does not alter the essential balancing exercise. And the Appellants should not be penalised because interim appeals were either necessary or appropriate.*
- (c) Third, a stay is a substantive order, it is not a case management decision that should be disturbed simply because the court considers it would be right in its eyes to do so, and without a substantive application.*

2. It is also important to note that permission was not granted in 2024. It was granted on 24 January 2025. There is a substantial difference between 16 months (1.5 years) and 30 months (2.5 years). The proper thing to do here is to make directions to ensure the fair and expeditious conduct of the judicial review proceedings; not to discharge the stay and allow the case to meander along at the pace the government wants. After 16 months, nobody knows what the government's legal position is in response to the public law complaints.

3. Also, the timing of the Court of Appeal's request for responses on this is unhelpful. If at the end of the appeal Martin J is recused, it is arguable that all his decisions will fall away (requiring 'any and all consequential directions to ensure

the fair resolution of the JR’). If the judge is to remain, he should be the one to entertain arguments about the stays; if the parties wish.”

30. The Applicants also submitted in footnote 1 that: “*Martin J conducted a balancing exercise when granting the stay: see the Permission Judgment at [67]-[73]. He was wrong to say, at [70], that RSC 53/3(10) implied ‘that a stay will be granted automatically’—that was not an argument made to him—but that was only a minor part of his analysis.*” In my judgment it is impossible to fairly conclude that the discretion to grant a stay was properly exercised with an appropriate balancing exercise if that exercise was founded on the incorrect premise that the relevant rule created a presumption in favour of a stay. Absent that mistaken starting position, one would have expected explicit attention to be given to the likelihood of A2, who did not even apply for the post, not just succeeding on the legal merits of the claim in establishing a case for declaratory relief, but also succeeding in establishing an entitlement to an order of certiorari quashing the impugned appointment decision. It is far from obvious that if the correct balancing exercise were to be carried out on a renewed application for a stay by A2, that a stay would be granted particularly in circumstances where (1) he did not apply for the S-G position and (2) it was positively asserted to the Judge that the Appellants are public interest applicants.
31. The submissions made to the Judge in relation to the stay upon which the Appellants rely only addressed the merits element of the stay analysis in a one dimensional way. Although reference was made to the “*balance of convenience*”, in the judicial review context, a broader approach is taken to the risk of injustice in which the wider public interest comes into the reckoning, not merely justice measured as between the parties¹². I adverted to the distinction between arguability as regards merits and the likelihood of obtaining quashing orders, (without considering the implications of this distinction for the stay), in this Court’s 20 June 2025 Judgment on Mr Johnston’s successful initial interlocutory appeal:
- “33. Even if a prima facie case of invalidity is ultimately made out, it bears noting, it does not follow that the Appellant will be entitled to an order quashing the relevant administrative decisions, delegated legislation and/or policy documents. Public law relief will usually be informed by the interests of good administration and are discretionary in any event.”*
32. In summary, a legally valid case for a stay has never been properly made out and the prejudice to the public interest by reason of delay as weighed against the benefits of granting a stay (properly identified by the Judge 17 months ago) is greater than it was when the stay was initially granted on an *ex parte* basis. In my judgment the appropriate

¹² See e.g. *Matthie-v- Minister for Education* [2015] SC (Bda) 64 Civ at [6]-[7], [19] (where I refused a stay on public interest grounds although leave was granted on the basis of an arguable case on the merits of the judicial review application).

course to take is to discharge the stay without prejudice to A2's right to renew his application for a stay to the Judge, assuming a proper basis for doing so can be identified and advanced.

33. While the same legal analysis applies to the stay granted in favour of A1, the merits of the stay analysis is on the face of it materially different in her case, in that:

- (1) she applied for the relevant post as a Bermudian under a statutory scheme mandating positive discrimination in favour of Bermudians (Public Service Commission Regulations 2001, regulation 19 (6));
- (2) a non-Bermudian was preferred to A1;
- (3) we were told during the hearing that the successful candidate is no longer in Bermuda so that the personal prejudice which was self-evident when the stay was granted on A1's application 17 months ago is no longer self-evident; and
- (4) the 1st Respondent is the best judge of whether any public interest considerations now exist which justify applying to the Judge to discharge the relevant stay.

Costs

34. Because the Judge granted leave to appeal, and the Appellants had foreshadowed making an application for a Protective Costs Order in the Supreme Court, I considered that the following provisional costs order was appropriate. Unless any party applies within 14 days by letter to the Registrar to make further submissions as to costs, the costs of the present appeal shall be the Respondents' costs in the cause in the Supreme Court proceedings.

Gloster JA

35. I agree with the above disposition of this appeal.

Flaux JA

36. I also agree.