INAPPROPRIATE RECUSALS

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I. INTRODUCTION

This article examines the problem in common law jurisdictions of judicial recusals for inappropriate, wrong or inadequate reasons. It will be argued that there are circumstances in which it would be wrong or inappropriate for an adjudicator to recuse himself or herself, that recusals are inappropriate when not objectively justified, or when employed for improper purposes, and that inappropriate recusals are potentially damaging to the justice system. It will thus be submitted that adjudicators need to adopt a robust approach in the application of the relevant recusal standards, and ought to resist the temptation to succumb to the pressure to recuse themselves if, viewed objectively, and apart from their own feelings, there is no valid ground for recusal.

Andrew Smith J. warned in *Dar Al Arkan v Majid Al-Sayed Bader Hashim Al Refai*,[1] that a judge "should decline to hear a case only for proper and sufficient reason to do so" and that "recusal is not an excuse for avoiding embarrassment". A Commonwealth judge similarly warned against an adjudicator using a recusal as a "possibly convenient course of retiring from difficult litigation merely because one of the litigants asked him to do so."[2]

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[1] [2014] EWHC 1055 (Comm), at [33].

[2] Schutz A.J.A. in *Lesotho Electricity Corporation v Forrester*, 1979 (2) L.L.R. 440, at 454-455 (CA, Lesotho).

There is a tension in the common law on bias, between adjudicators' responsibilities to withdraw when disqualified, and, to sit when not disqualified. For Rix L.J. in *JSC BTA Bank v Ablyazov and others (No 9)* [3] ("*Ablyazov*") this tension is "between the principles that justice must be seen to be done and that litigants must not be allowed to pick their own judges or disrupt proceedings unfairly". Keane C.J. in *Rooney v Minister for Agriculture*[4] saw it as a "dilemma" arising from the "need to ensure [that] the appearance, as well as the reality, of impartiality [is] reconciled with the proper functioning of the judicial system".[5] The tension inheres in the propositions that the application of the bias principles is "extremely"[6], or highly[7], or "wholly"[8] fact-sensitive[9] or fact-specific[10], that judges have a "duty to sit"[11], that "real" doubts must be resolved in favour of recusal,[12] and that a judge "would be as wrong to yield to

[3] [2012] EWCA Civ 1551, at [19].

[4] [2001] 2 I.R.L.M. 37, at 40-41 (SC, Ireland).

[5] Compare Cameron A.J. in *SACCAWU v Irvin & Johnson*, 2000 (3) S.A. 705, at [18] ("*SACCAWU*").

[6] Longmore L.J. in *Otkritie Finance Limited v Urumov* [2014] EWCA Civ 1315, at [13] ("*Otkritie*").

[7] *Wewaykum Indian Band v Canada* [2003] 2 S.C.R. 259, at [77] (SC, Canada) ("*Wewaykum*").

[8] Rix L.J. in *Ablyazov*, at [65].

[9] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451, at [25] ("*Locabail*"); compare Fennelly J. in *Kenny v Trinity College* [2008] 2 I.R. 40, at 45 (SC, Ireland) ("*Kenny*"); Lord Steyn in *Man O'War Station Ltd & Anor v Auckland City Council* [2002] UKPC 28, at [11].

[10] *Wewaykum*, ibid; *US v Spangle*, 626 F. 3d 488, at 495 (9th Cir. 2010); *US v Holland*, 519 F.3d 909, at 913 (9th Cir. 2008).

[11] The Lord Justice-Clerk in *Robbie The Pict v Her Majesty's Advocate* [2002] ScotHC 333, at [16]. Also, *Locabail*, at [24]*; Bienstein v Bienstein* [2003] HCA 7, at [35]-[36] (HC, Australia), *SACCAWU*, at [13]; Denham J. in *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 I.R. 412, at 449 (SC, Ireland) ("*Bula*"); Hammond J in *Muir v C.I.R.* [2007] 3 N.Z.L.R. 495, at [35] (CA, NZ); D. Goldberg et. al., "The Best Defense: Why Elected Courts Should Lead Recusal Reform" (2007) 46 Washburn L.J. 503; generally, J.W. Stempel, "Chief William's Ghost: The Problematic Persistence of the Duty to Sit" (2009) 57 Buff. L. Rev. 813.

[12] *Locabail*, at [25]; compare Keane C.J. in *Rooney*, above, fn.4, at 40.

a tenuous or frivolous objection as he would to ignore an objection of substance".[13] In *Laird v Tatum*,[14] Rehnquist J. spoke of "the equal duty concept". Referring to federal cases dealing with disqualification, he noted that "[t]hose federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified".[15] Notwithstanding a 1974 amendment to 28 US Code s.455, aimed at tempering the impact of the duty to sit (and which some federal courts have treated with caution[16]), US federal courts continue to affirm this duty.[17] Stempel[18] is scathing in his criticisms of Rehnquist J. in *Laird v Tatum*, of the "pernicious" form of the duty to sit doctrine, and of the courts that continue to apply it despite the 1974 legislation, but accepts that "[t]o the extent one views the duty to sit as a general and rebuttable obligation to preside over a case *unless disqualified*, it is unobjectionable". This accords with what Stempel calls the "benign" version of the duty to sit,[19] and with the statement in *Locabail* that real doubts should be resolved in favour of recusal. It is the sense in which the "duty to sit" is employed in this article. The difficulty lies in how adjudicators should strike the correct balance between the duty to sit (or the "duty not to recuse"[20]) and the duty to recuse themselves.

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[13] *Locabail*, at [21].

[14] 409 US 824 (1972).

[15] At 837.

[16] See eg, *Travelers Ins. Co. v Liljeberg Enterprises, Inc.*, 38 F.3d 1404, at 1409 (5th Cir.1994); *Sensley v Albritton*, 385 F.3d 591, at 598-99 (5th Cir. 2004). Rehnquist C.J. himself recognised in *Liljeberg v Health Services Acquisition Corp*. (486 US 847, at 871 (1988)), the impact of 28 USC s.455(a) on the duty to sit.

[17] See eg, *US v Holland*, 519 F.3d 909, at 912 (9th Cir. 2008); compare *Sensley v Albritton*, above, fn.16; *US v Allen*, 587 F.3d 246, at 251 (5th Cir. 2009).

[18] J.W. Stempel, above, fn.11, at 821 (emphasis supplied).

[19]Ibid, at 814 and 824.

[20] Rooney J. in *Cline v Sawyer*, 600 P.2d 725, at 729 (Wyoming, 1979) said; "Without a valid reason for recusal, a judge has a duty not to recuse himself"; compare *Simonson v General Motors Corp*, 425 F. Supp. 574, at 578 (E.D. Pa. 1976).

The "rule against bias" is instrumental, and also an end.[21] Apparently, applying it strictly reduces the risk of erroneous decisions.[22] Nevertheless, a strict test is recognised as costly, indirectly impacting on public confidence in the administration of justice.[23] While commentators have rightly expressed concern about wrongful denials of recusal motions, similar concern about wrongful recusals is warranted. Despite a paucity of compelling empirical evidence, it seems accepted that wrongful failures to recuse *are* damaging to the justice system. But if an inappropriate non-recusal would taint the justice system in the eyes of parties or the general public,[24] so could inappropriate recusals, which, in addition to the additional costs and burdens that they inflict on the parties, can beget unintended consequences. In particular, they might encourage abuse and manipulation of the justice system, parties might ultimately succeed in judge-shopping, and the proper functioning of the justice system might be at risk of being undermined. There is another dimension. Inappropriate recusals have been described as being "an encouragement of procedural abuse",[25] "an abdication of judicial function",[26] "irresponsible",[27] and "being untruthful to one's oath to do right by all manner of persons".[28] Thus, the problem of

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[21] See S. Atrill, "Who is the 'fair-minded and informed observer'? Bias after Magill" (2003) C.L.J. 279, at 283; A. Olowofoyeku, "Sub-Regional Courts and the Recusal Issue: Emergent Practice of the East African Court of Justice" (2012) A.J.C.I.L. 365, at 368.

[22] S. Atrill, ibid.

[23] Ibid.

[24] Compare J. Goudkamp, doubting, in "Facing up to actual bias", (2008) C.J.Q., 27(1), 32, at 38.

[25] *Livesey v New South Wales Bar Association* (1983) 47 A.L.R. 45, at 48 (HC, Australia).

[26] Ibid.

[27] *Reeder v Delaware Department of Insurance*, Case No. 1553-N, February 24 2006, p.52 (available at http://courts.delaware.gov/Opinions/download.aspx?ID=72540 – (Delaware Chancery Court) (accessed 23 June 2015); cited with approval by Cooch R.J. of the Delaware Superior Court in *State of Delaware v Desmond*, Case No. 91009844DI, January 5 2011, p.21 (available at http://courts.delaware.gov/Opinions/download.aspx?ID=148810 – accessed 23 June 2015).

[28] Kirriwom J. in *Supreme Court Reference No 1 of 2012* [2012] 5 L.R.C. 633, at 780 (SC, PNG).

inappropriate recusals is not simply a matter of concern about potential mischiefs. It goes to the heart of whether judicial officers are failing to perform their duty.

II. THE ISSUES

The right to a fair hearing requires, among other things, that an adjudicator compromised by interest or favour must withdraw from the case. The disqualification extends beyond actual bias, to perceived,[29] apparent,[30] or objective[31] bias, and the standard in such cases is "purely"[32] or "strictly"[33] objective. Although parties are entitled to object to their case being heard by a biased or otherwise relevantly compromised judge, they are not entitled to choose their own judges. Judges enjoy a presumption of impartiality in the performance of their judicial functions.[34] This presumption is rebuttable - but not

[29] On this term, see generally Birmingham J. in *Keegan v Kilrane* [2011] 3 I.R. 813, at 819 (HC, Ireland).

[30] Lord Steyn in *Man O'War Station Ltd*, above, fn.9; also Arden L.J. in *Geveran Trading Co Ltd v Skjevesland* [2002] EWCA Civ 1567, at [32], [48].

[31] See eg, Auld L.J. in *Aaron v Law Society* [2003] EWHC 2271 (Admin), at [4]; *Kenny*, above, fn.9; *Kennedy v DPP* [2012] IESC 34 (SC, Ireland).

[32] See *United States v. Cooley* 1 F.3d. 985, 993 (10th Cir. 1993); *Liteky v US*, 127 L. Ed.2d. 474, at 486 (1994); *Liljeberg v. Health Services Acquisition Corp.* 486 US 847 (1988); *Microsoft Corp. v US* 147 L. Ed.2d. 1048, at 1049 (2000).

[33] Fennelly J. in *O'Callaghan v Mahon* [2008] 2 I.R. 514, at 666 (SC, Ireland).

[34] *Hauschildt v Denmark* (1989) 12 E.H.R.R. 266; *Kyprianou v Cyprus* (2007) 44 E.H.R.R. 27; *US v Morgan*, 313 US 409, 421 (1941); *Wewaykum,* above, fn.7, at [59]; *President of the Republic of South Africa v South African Rugby Football Union* ("*SARFU*"), 1999 (4) S.A. 147, at [40] (Constitutional Court, SA); *Prosecutor v Furundzija*, Case No. IT-95-17/1-A, 21 July 2000, [196]-[197] (ICTY); *R v Manyeli* [2008] LSCA 29, at [11] (CA, Lesotho).

easily so.[35] Displacing it requires "cogent evidence"[36], since it "carries considerable weight".[37] Adjudicators must recuse themselves in appropriate cases, either *mero motu* or in response to a recusal application, must resolve real doubts in favour of recusal, and must sit when not disqualified. Therein lies the tension.

Academic comment on inappropriate recusals is scant,[38] yet it is a phenomenon that raises a new set of issues; but why should it be of concern? One answer is because the duty of fairness and the right to a fair trial apply to all parties in legal proceedings,[39] who may have expended significant resources in a trial that then has to be started *de novo* if the judge is discharged. Therefore, a party may have very strong financial reasons for not wanting the case to stop, especially in a long-running trial. The risk of depleted financial resources is real. This may even threaten the ability of parties to continue the case, hence a real danger of injustice being perpetrated. Also real is the risk of injustice due to undue delay.[40] Additionally, where the bias point is only taken after substantive rulings in the case, an inappropriate recusal may require the victorious party to re-litigate issues that had already been won in a fair fight. These factors may bring the justice system into disrepute. A second answer lies in the need to preserve judicial

[35] McLachlin C.J. in *Cojocaru v British Columbia Women's Hospital and Health Centre* [2013] 2 S.C.R. 357, at [22] (SC, Canada). J. Sample, et. al., *Fair Courts: Setting Recusal Standards* (Brennan Center for Justice, 2008), at 18, described the burden on the applicant as "heavy".

[36] McLachlin C.J., ibid. Also, *R v Teskey* [2007] 2 S.C.R. 267, (Charron J at [21], Abella J, at [28] (SC, Canada).

[37] Ponnan J. in *General Council of the Bar of South Africa v Geach,* 2013 (2) S.A. 52, at [93] (SCA, SA).

[38] See eg, D.Heaton, "Bias and previous determinations: four recent decisions in the Court of Appeal and Privy Council" [2015] C.J.Q., 34(2), 138, at 152-153; G.McCoy, "Judicial Recusal in New Zealand", in H.P. Lee (ed.) *Judiciaries in Comparative Perspective*, (Cambridge, Cambridge University Press, 2011) 322, at 327-328, 344.

[39] See eg, *Sun Exploration and Production Co v Jackson* (1989) 783 SW.2d 202, 206 (Texas, 1989).

[40] See generally, G. Mansfield et al (eds), *Blackstone's Employment Law Practice 2014*, (Oxford, Oxford University Press, 8th Revised edition, 2014), ch10.

independence. Inappropriate recusals may encourage "fishing expeditions" that harass judges, to the detriment of judicial independence and the administration of justice. Sir Stephen Sedley has noted that "independence and impartiality are the twin pillars without which justice cannot stand, and the purpose of recusal is to underpin them".[41] He also noted that recusal law provides "a field of opportunity for manipulation".[42] It remains therefore crucial that independence is not sacrificed at the altar of impartiality, and that application of the bias standards does not impinge on either pillar.

Mason J captured the issues and tensions when he said in *Re JRL; Ex parte CJL*[43]:

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."[44]

III. **SHOULD AN APPELLATE/REVIEW COURT INTERVENE**?

Before examining the emergent case law, I will address briefly the issue of the correct response to an inappropriate recusal. While few would object to the notion that an adjudicator's denial of a recusal application should be appealable, it might seem odd for an appellate court to intervene in a decision of a

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[41] S. Sedley, Foreword to G. Hammond, *Judicial Recusals: Principles, Process and Problems* (Oxford, Hart, 2009), ix; compare Cameron A.J. in *SACCAWU*, above, fn.5, and text.

[42] Ibid.

[43] (1986) 66 ALR 239.

[44] At 246. Compare *Bernert v Absa Bank Ltd*, 2011 (3) S.A. 92, at [35]; *Ebner v Official Trustee* [2000] HCA 63, at [19]; Longmore L.J. in *Otkritie*, [32].

judicial tribunal to recuse itself[45] - after all, the tribunal is arguably best placed to know when it might struggle to demonstrate its impartiality. But should different considerations apply to a decision to withdraw, vis-à-vis a decision to continue to sit?

It has been said that a judicial officer who continues to sit when recusal is required commits an "irregularity" throughout the rest of the proceedings.[46] However, it seems that the contrary is not necessarily true.[47] In *S v Motlhabane*[48] the court accepted the view that, even if the review court does not share the trial judge's view that recusal was in the circumstances necessary, "it should be very slow indeed to hold that such recusation constitutes an irregularity".[49] In its view, since the *bona fides* of the presiding officer had not been questioned by any party, the conclusion was that, as the presiding officer had already recused himself, "he [was] now *functus officio*", and the matter should start *de novo* and proceed before another presiding officer. In *Begraj v Heer Manak Solicitors*[50] Langstaff J. dismissed an appeal against a decision of an Employment Tribunal to recuse itself. He noted[51] that the parties were aware of only one case (*WestLB AG London Branch v Pan*, discussed below) in which an appellate court had overturned a decision by a tribunal to recuse itself, and, that this was not surprising, given then observation in *Locabail* that doubts should be resolved in favour of recusal. He was however of the view

[45] Contrast Denham J. in *Bula*, above, fn.11, at 442 – "The judge's decision to sit or not may be reviewed by a higher court".

[46] Centlivres J.A. in *R v Milne and Erleigh* 1951 (1) S.A. 1 (AD), 6H; cited with approval in *SARFU*, at [32], by the South African Supreme Court of Appeal in *Moch v Nedtravel (Pty) Ltd*. 1996 (3) S.A. 1, at 9, and by the Lesotho Court of Appeal in *Sole v Cullinan* [2004] LSHC 153, at [14] (Gauntlett J.A.).

[47] Thompson J.A. in *S v Suliman*, 1969 (2) S.A. 385, 390-393 (AD); followed in *S v Motlhabane*, [2008] ZANWHC 39, at [3], [9] (North West High Court, SA).

[48] Above, fn.47.

[49] At [9].

[50] [2014] I.R.L.R. 689 (EAT, 17 June 2014); cited with approval in *East of England Ambulance Service NHS Trust v Sanders*, 2014 WL 5833885, UKEAT/0217/14/RN (EAT, 17 October 2014).

[51] At [17].

that the authorities "are clear that an appeal court is generally in as good a position as a tribunal to assess what the fair-minded and informed observer would think."[52] He did not see "why this principle should apply differentially depending on whether that tribunal decided to refuse an application to it to recuse itself, or to accede to it." He nonetheless felt that there would be a difference in the "information" which the informed observer would have. Such an observer:

> "would know in the latter case that the tribunal itself took the view that there might be a risk of bias … It also conveys the tribunal's own concern that it may not fully be able to keep the matters out of the minds of its members. Finally, but importantly, where the parties are told by a tribunal that it accepts it may not be able to appear to give the case the icy impartiality which is a prerequisite of justice, for them then to be told that despite that tribunal's own view of its limitations they should none the less face a hearing before it is to risk public disrespect for the system that requires this."[53]

So, on one view of the matter, a decision by a tribunal to recuse itself constitutes "evidence" that there might be a risk of bias. While reasonable, this proposition must be qualified, for there must be a sound objective basis for the tribunal's decision, otherwise there is no "evidence" at all. While a recusal on proper grounds is rightly the end of the matter,[54] an inappropriate recusal is not necessarily the end of the matter,[55] nor should it be, as that would just convert a wrong decision into a *fait accompli*.

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[52] At [20].

[53] Ibid.

[54] See eg, *S v Gwala,* 1969 (2) S.A. 227 (N), 229; *Magubane v Van der Merwe N.O.*, 1969 (2) S.A. 417 (N), at 419; *S v Skhosana* [2014] ZAGPJHC 223, at [13]-[14] (South Gauteng High Court, SA).

[55] See eg, Banda C.J. in *Attorney General v Chipeta* [1996] 1 L.R.C. 459, at 462 – "Having wrongly recused himself in the first instance we find that he was not *functus officio* and was entitled to resume hearing the case" (CA, Malawi).

The discussion that follows, wherein the various categories of inappropriate recusal which I have identified are examined, will hopefully demonstrate that the threat of inappropriate recusals is not academic.

IV. CATEGORIES OF INAPPROPRIATE RECUSAL

1. Appeasement

The case law demonstrates that appeasement is not an appropriate ground for recusal. In *Arab Monetary Fund v Hashim and Others (No 8)*, Sir Thomas Bingham M.R. noted that:

> "Dr Hashim had applied to the then Vice-Chancellor, Sir Nicolas Browne-Wilkinson, for the judge to be discharged from further conduct of the case. The Vice-Chancellor had concluded that no grounds were shown for a change of judge but as an indulgence to Dr Hashim he directed that a different judge [Chadwick J.] be appointed to conduct the trial".[56]

As it transpired, the litigant subsequently went on to apply for the recusal of Chadwick J. himself – an application which the Court of Appeal felt should never have been brought – and which demonstrates the futility of appeasements.

A recusal decision based on appeasement (described as a "reasonable adjustment") was rightly overturned in *WestLB AG London Branch v Pan*.[57] The judge considered that the requirements for recusal had not been satisfied, but decided to recuse herself anyway, in order to save costs on both sides, enable to parties to concentrate on the substantive issues in the run up to the hearing, and to ensure "that any upset that this issue is causing to the Claimant, who is unwell, does not continue." On appeal to the EAT, HHJ Richardson said that it was "plain that the Employment Judge did not decide the application

[56] (1993) Times, 4 May.

[57] 2011 WL 2747817, UKEAT/0308/11/DM (EAT, 19 July 2011).

to recuse herself upon correct principles".[58] Among other things, she did not give sufficient weight to the authorities, and seemed to have decided to order a fresh panel almost on medical grounds.[59] It was clear that her decision to recuse herself on grounds of bias "was without foundation", and her decision to order a fresh panel was set aside.[60]

The recent Court of Appeal decision in *Otkritie*[61] is also in point. Eder J. faced an application[62] to recuse himself on grounds of alleged pre-judgment and "actual bias". He rejected the arguments based on prejudgment,[63] but felt that the claim of actual bias was "more problematic".[64] He thought that the specific points relied on were "entirely groundless", and that to recuse himself in the face of such "spurious allegations" would arguably be similar granting an "indulgence". He however felt that, regardless of his own views, the allegations were "so serious that the appropriate course is that I should recuse myself".[65] He reached this conclusion "with extreme reluctance", but felt that this was the more appropriate course of action.[66] He thought that the decision was consistent with the principle in *Locabail* that doubts must be resolved in favour of recusal. On appeal to the Court of Appeal[67], Longmore L.J. said that the mere elevation of the allegation from imputed bias to actual bias did not make a critical difference.[68] With respect to Eder J.'s reliance on the statement in *Locabail* about how to resolve doubts,

[58] At [28].

[59] At [32].

[60] At [33]-[34].

[61] Above, fn.6.

[62] [2014] EWHC 1323 (Comm).

[63] At [15]-[16].

[64] At [17].

[65] Ibid.

[66] At [18].

[67] [2014] EWCA Civ 1315.

[68] At [23].

Longmore L.J. said[69] that Eder J. did not explain what "the real ground for doubt" was in this case. Rather, the judge "specifically said" that the allegations of bias were "groundless" and "spurious".

Longmore L.J. noted[70] that Eder J. appeared not to have been referred to the remarks of Chadwick L.J. in *Triodos Bank NV v Dobbs*[71] ("*Dobbs*"), where Chadwick L.J. said:

> "It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so."[72]

Longmore L.J. felt that, had Eder J. been referred to these remarks, he might very well have decided that he ought not to recuse himself.[73] According to him, while the Court of Appeal will usually be astute to support judges who are exercising "this delicate jurisdiction" of recusal, it is important that judges "do not recuse themselves too readily in long and complex cases otherwise the convenience of having a single judge in charge of both the procedural and substantial parts of the case will be seriously undermined".[74] The recusal decision was overturned and the matter was remitted to Eder J.

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[69] At [25].

[70] [2014] EWCA Civ 1315, [27].

[71] [2005] EWCA Civ 468.

[72] At [8].

[73] [2014] EWCA Civ 1315, [27].

[74] At [32].

2. Mere allegations

In *Ansar v Lloyds TSB Bank Plc*[75] the Court of Appeal emphasised that "a mere complaint cannot give rise to an automatic decision to recuse".[76] An applicant's argument that his case is "unassailable" is likewise insufficient,[77] and, as Denham J. said in *Talbot v McCann Fitzgerald Solicitors*, the applicant's "belief in the strength of his case does not establish any bias by the Court".[78] In the *Dobbs* case (above) the Court of Appeal rejected the proposition that the mere fact that someone is criticising judges renders the judges bound to recuse themselves for bias. Chadwick L.J. explained:

> "The reason is this. If judges were to recuse themselves whenever a litigant … criticised them … we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases."[79]

The mere fact that a party claims to have "no confidence in the fairness" of the court is similarly insufficient. In *Automobile Proprietary Ltd. v Healy*,[80] an industrial tribunal had purported to order a rehearing before a different tribunal after more than one day of the hearing of a case of unfair dismissal. Despite rejecting allegations of bias, it said that, if the employee had "no confidence in the fairness of the hearing he is getting we cannot proceed and the case will need to be heard by another tribunal". On

[75] [2006] EWCA Civ 1462.

[76] Waller L.J. at [20]. See also Underhill J. in *The Queen on the Application of Mayo-Denman v Secretary of State for Communities and Local Government* [2007] EWHC 3529 (Admin) – upheld on appeal ([2010] EWCA Civ 473, at [9]-[10], Sullivan L.J.); Cooch R.J. in *State of Delaware v Desmond,* above, fn.27; Guni J. in *Sole v Cullinan* [2003] LSHC 19, 19 (HC, Lesotho).

[77] See Denham J. in *Talbot v Hermitage Golf Club* [2009] IESC 26, at [9], [16]-[19] (SC, Ireland).

[78] [2009] IESC 25, at [37] (SC, Ireland).

[79] Above, fn.71, at [8].

[80] [1979] I.C.R. 809.

appeal to the EAT, Talbot J. noted[81] that the tribunal had stated that they were unable to see any ground upon which the application could be made. That being so, he found it "difficult to see how they could correctly in law have sought to exercise a discretion and grant the application". The employee's stated lack of confidence was, by itself, "no ground which would entitle an industrial tribunal to discontinue the hearing and to order a rehearing".[82] The appeal was allowed, and the matter was remitted to the industrial tribunal to continue the hearing.

3. Personal attacks (and broad backs)

One issue emerging from the case law concerns personal attacks against adjudicators, and the "broadness" of the adjudicators' "backs". Strongly-worded personal attacks against adjudicators do not by themselves constitute appropriate grounds for recusal. Neither do threats, designed 'to force recusal and manipulate the judicial system', rather than arising from actual malice. [83] Otherwise, a defendant could:

> "readily manipulate the system, threatening every jurist assigned on the 'wheel' until the defendant gets a judge he preferred. Also, the defendant could force delays, perhaps making the cases against him more difficult to try, perhaps putting witnesses at greater risk. Such blatant manipulation would subvert our processes, undermine our notions of fair play and justice, and damage the public's perception of the judiciary."[84]

This buttresses the need for a robust application of the standards. The Supreme Court of Papua New Guinea similarly confirmed in *Yama v Bank South Pacific*[85] that it "is not the law that a Judge should

[81] At 812.

[82] Ibid.

[83] See *US v Cao*, No. 11-50200 (9th Cir. May 31, 2013); *US v Holland*, above, fn.10, at 915; *US v Spangle*, above, fn.10.

[84] *US v Holland*, *ibid*.

[85] [2008] PGSC 41, at [27].

disqualify himself just because a litigant has been or continues to be adversely critical of him even to the point of being defamatory and contemptuous."

In *Aziz v Crown Prosecution Service*[86] an Employment Tribunal ("ET") recused itself despite rejecting as unfounded the allegations of actual or apparent bias. The members decided to recuse themselves because the prior conduct of the respondent, which had become an issue by being raised by Ms Aziz, had put them in an "impossible situation". In their view, the issue could not now be disregarded, especially seeing that the respondent proposed to resist that part of the complaint.[87] On appeal to the EAT, Slade J. pointed out that the ET did not outline the legal basis for recusing themselves other than describing it as a "conflict of interest"[88]. In her view, even if counsel had challenged the integrity of the judge as alleged, "without more, that challenge, even if felt to be personally offensive, would not justify the EJ or the ET recusing themselves".[89] In the event, the conclusion was that "the basis on which the ET recused themselves was not well founded in law and on the material before them was one which no reasonable ET properly directing themselves could have reached".[90] While personal attacks on judges do occur, courts and tribunals do need to have "broad backs"[91]. The recusal decision was set aside, and the case "remitted for determination by the same Employment Tribunal".[92]

[86] 2013 WL 6148258, UKEAT/0027/13/LA (EAT, 21 November 2013).

[87] At [14] of the ET's decision, as reproduced in the judgment of Slade J. in the EAT, at [34].

[88] At [57].

[89] At [67].

[90] At [74].

[91] At [86].

[92] At [89].

On the issue of "broad backs", Stempel rightly said in a slightly different context, that "[a] judge who is unduly sensitive to criticism needs to find another line of work".[93] In *Osonnaya v Queen Mary - University of London*[94], the EAT said that the tribunal "must be robust in the face of applications for recusal".[95] A recent decision of the Constitutional Court of South Africa indicates the kinds of issue at stake. *Turnbull-Jackson v Hibiscus Court Municipality*[96] involved an allegation of bias against an administrator, whose duties were subject to the same principles of bias as the ones under discussion.[97] Counsel for the applicant coined the term "reactive bias" for the argument that he was to put before the Court, which the Court as "rather peculiar". According to the Madlanga J:

> "It is articulated thus. Throughout [the administrator's] involvement in the approval process, the applicant has levelled insults at him that were calculated to impugn his integrity. He accused him of bias, corruption and incompetence. From this, the applicant sought to convince this Court that the natural human reaction to repeated insults of this nature is to be biased against the person hurling them. And, because the applicant insulted [the administrator] beyond some threshold, the exact location of which I have no idea, it is reasonable to believe that [the administrator] was not impartial. The conclusion is that [the administrator] ought to have recused himself as the decision-maker."[98]

[93] J.W. Stempel, "Playing Forty Questions: Responding to Justice Roberts' Concerns in *Caperton* and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process", 39 Sw. L. Rev. 2009-2010, 1, at 62.

[94] 2013 WL 4788720, UKEATPA/1207/12/SM (EAT, 17 July 2013).

[95] At [18].

[96] [2014] ZACC 24.

[97] See Madlanga J. at [30].

[98] At [31].

Unsurprisingly, the Court rejected the argument. According to Madlanga J., this "would be the easiest stratagem for the unscrupulous to get rid of unwanted decision-makers: if I insult you enough – whatever enough may be – you are out."[99]

In *Siemer v Heron*[100] the Supreme Court of New Zealand likewise highlighted a major concern about inappropriate recusals. McGrath J. noted that the informed observer "will, amongst other considerations, recognise that the public is entitled to be reassured that parties to litigation are not able unilaterally to create situations of apparent bias that enable them to require change to the composition of courts hearing their cases, or to have cases reheard following an unfavourable decision".[101] In this context, it is also useful to recall the words of Douglas J. in *Mayberry v Pennsylvania*[102] that "brazen efforts to denounce, insult, and slander the court and to paralyze the trial are at war with the concept of justice under law", and that "A judge cannot be driven out of a case".[103]

Of particular concern is *Bennett v Southwark London Borough Council*.[104] An employee's lay representative in a lengthy case involving allegations of racial discrimination against the employer, had said to the ET in response to their denial of his requests for an adjournment: "If I were a white barrister I would not be treated in this way" and "If I were an Oxford-educated white barrister with a plummy voice I would not be put in this position" (these comments were subsequently labelled by Ward L.J. in the Court of Appeal as "inexcusable petulance"[105]). The ET thereupon took the view that that it could not continue to hear a case on race discrimination in which it had itself now been accused of racism, and recused itself. The case was heard by another tribunal, which struck out the case. On appeal, the EAT

[99] At [32].

[100] [2011] NZSC 116.

[101] At [13]. See also *Maletzky v Zaaruka* [2013] NAHCMD 389, at [46]-[48] (HC, Namibia).

[102] 400 US 455, 462 (1971).

[103] At 464.

[104] [2002] EWCA Civ 223; [2002] I.C.R. 881.

[105] At [39].

held[106] that the ET was wrong to recuse itself. The Court of Appeal reversed the EAT on other grounds, but agreed with this decision on the recusal. Counsel for the employer (on a cross-appeal) argued before the Court of Appeal that the ET had been right to recuse itself, because once a tribunal forms the view that it cannot continue to handle a case with impartiality, nothing the parties say can enable it to resume with an impartial mind. Sedley L.J. said that this argument "assumes that the tribunal has reached the point at which it can properly form such a view".[107] This statement, in emphasising the need for proper grounds for a recusal, is significant. Sedley L.J. continued:

> "Courts and tribunals do need to have broad backs, especially in a time when some litigants and their representatives are well aware that to provoke actual or ostensible bias against themselves can achieve what an application for adjournment cannot. Courts and tribunals must be careful to resist such manipulation, not only where it is plainly intentional but equally where the effect of what is said to them, however blind the speaker is to its consequences, will be indistinguishable from the effect of manipulation."[108]

Ward L.J. said that the judicial duty must be "performed both without fear as well as without favour", and that the ET did not "act fearlessly when it capitulated to the inexcusable petulance and insolence" displayed by the lay representative.[109] According to him, the ET was wrong not to listen to the diatribe "with phlegmatic fortitude, retiring, if necessary, to compose itself and to cool the advocate's ardour, and then calmly continuing". On the deleterious effects of the inappropriate recusal, the following comments of Ward L.J. are poignant:

> "This case fills me with despair. First there is the inexcusable petulance displayed by … the applicant's legally untrained advocate. Secondly there is the unfortunate capitulation by the …

[106] 2001 WL 15098, EAT/1273/97 (EAT, 26 January 2001).

[107] At [17].

[108] At [19].

[109] At [42].

> tribunal to his insolence. Thirdly there is the five-year delay between the … decision and this judgment. Finally there is the horrific prospect of rehearing events some already over a decade old."[110]

This is requires no elaboration, but demonstrates the need for a robust approach.

4. Intellectual difficulty

Intellectual difficulty is an inappropriate ground for recusal. *In re B (Children) (FC)*[111] is in point. A judge had recused himself *mero motu*, on the basis that he had instigated a particular test in relation to the existing law, and that others might perceive that he would find it difficult to put his view of the law out of his mind. Baroness Hale in her leading speech responded thus:

> "[A]ll judges are from time to time required to apply legal principles with which they have intellectual difficulty. The problem which the judge saw in this case will arise in any other care case in which allegations are made but not found on the balance of probabilities to be true. If the judge is not fitted to try this case, it might be said that he is not fit to try any case in which the same problem could arise, and that would be absurd. For all the reasons given earlier, the same judge should hear the whole case".[112]

Baroness Hale pointed out[113] that this case was "a good illustration" (presumably of a situation wherein a recusal would be inappropriate or of the potential damaging impact of inappropriate recusals) because any subsequent judge might well have difficulty in extracting the really important findings from such a long and complicated judgment on the factual issues.

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[110] At [39].

[111] [2008] UKHL 35; [2009] A.C. 11.

[112] At [81].

[113] Ibid.

5. Pragmatism

In *AWG Group Ltd v Morrison*[114] Mummery L.J. said, in respect of cases where the hearing had not yet begun, that there was "scope for the sensible application of the precautionary principle", if the court had to "predict what might happen if the hearing went ahead before the judge to whom objection is taken and to assess the real possibility of apparent bias arising". In such cases, "prudence naturally leans on the side of being safe rather than sorry". While these statements may appear to promote a pragmatic approach, the better view is that they simply reflect the proposition that real doubts should be resolved in favour of recusal. Clearly, the courts do not advocate a blanket pragmatic approach. In *Balamoody v Nursing and Midwifery Council*[115], Burton J. summarised the decision of Court of Appeal in *Ansar*[116] as being that "recusal by an employment judge or chairman or any judge or tribunal should be the exception, and should only arise where there was, or was perceived to be, a real risk of bias, and that pragmatic withdrawal or standing down was consequently not advisable".[117] In *Balamoody* an employment judge had transferred a pre-hearing review to another judge, as a matter of convenience, but upon objections raised by one of the parties. This seemed to have been considered as a recusal by both judges. Burton J.'s view of what the employment judge had done was that he "simply took the *de facto* step of finding someone else to take over, in order to avoid any argument".[118] In short, he had "simply pulled out on *pragmatic* grounds".[119] The question was whether, having thus "recused" himself from the earlier proceedings, he ought to have recused himself from further proceedings in the case. Answering in the negative, Burton J. said[120], *inter alia*, that the EAT was "entirely satisfied" that "there was no

[114] [2006] EWCA Civ 6, [9].

[115] 2008 WL 5044410, UKEAT/0115/08/JOJ (EAT, 1 December 2008).

[116] Above, fn.75.

[117] At [10].

[118] At [26].

[119] Burton J., at [31] (emphasis supplied).

[120] At [33].

conceivable basis" for the earlier recusal by the EJ. Highlighting some of the possible consequences of inappropriate recusals, Burton J. referred to a fax sent to the ET by counsel for the applicant, wherein he listed six Chairmen "who had heard any application concerning his client, in front of whom he said any hearing should not be listed." This emphasised "the need for there not to be the kind of pragmatic standing down which occurred in this case, with all good intentions",[121] and illustrates the type of unintended consequences referred to earlier.

6. Avoiding a conundrum unrelated to bias

A subset of the general pragmatic approach concerns recusals aimed at circumventing problems unrelated to bias. The recent decision of a South African High Court is illustrative. In *Lelaka v S*[122] a man had hit another man on the head with a bottle, causing the victim to be hospitalised. The assailant pleaded guilty to a charge of assault with intention to do grievous bodily harm in the magistrates' court, and was found guilty on his plea. Pending the sentencing hearing, the victim died in hospital from his injuries, the post-mortem report identifying the cause of death as "severe blunt force head trauma". The prosecution thereupon informed the court of its intention to refer the case to the DPP for further instructions. The lawyer for the accused argued that, as the accused was already convicted, he was entitled to be sentenced and have the matter finalised. The magistrate was in a quandary. There was no provision in the Criminal Procedure Act that covered the factual situation of this case, but if she followed the law as it stood, she would be compelled to sentence the accused for an assault with intention to do grievous bodily harm, when the facts pointed to a murder having been committed. So she recused herself from the case, "to enable the case to be taken on review with the hope that the review court may decide that the matter be commenced *de novo*". On review before the High Court, Matlapeng A.J., delivering the unanimous judgment of the court, had "no doubt that to proceed to sentence the accused on a lesser charge when there is evidence that the deceased died of the injuries inflicted by the accused, would be a

[121] At [41].

[122] [2014] ZANWHC 34.

serious travesty of justice"[123], and therefore set aside the criminal proceedings before the magistrates court. However, he was unhappy about the decision of the magistrate to recuse herself, saying:

> "I feel constrained to comment on the conduct displayed by the learned magistrate. Whilst she displayed a good understanding of the law, recusing herself *mero motu* with the sole intention to have the matter sent on review, is to be discouraged. Once a presiding officer is seized with a matter, he or she is legally obliged to finalise it unless there are good grounds not to do so."[124]

This was a difficult situation for the judge; but recusal was an inappropriate response. Rather, the matter should have been referred to the High Court for special review.[125]

V. ANALYSIS

In this discussion I have sought to demonstrate that there is such a thing as an "inappropriate recusal". I have also sought to spotlight the problematic nature of inappropriate recusals and the difficulties that they can beget. The cases discussed herein have provided insights on considerations that should not lead to a recusal. It is easy to be wiser with the benefit of hindsight - but these judges were confronted with the tension described at the beginning of this article. Adopting a "better safe than sorry" approach in such circumstances is understandable. Nevertheless, the problem of inappropriate recusals is not primarily a concern about wilful judicial abdications of responsibility. An inappropriate recusal is no less so because the adjudicator was mistaken, rather than wilfully shirking his or her duty, and the consequences for the parties remain the same. A mistaken failure to withdraw renders the ensuing judgment liable to be set

[123] At [24].

[124] At [9].

[125] Matlapeng A.J., ibid.

aside on appeal, and a rehearing/re-trial to be ordered.[126] Likewise, a mistaken decision to withdraw can, as has been seen, have a similar outcome.[127] In the cases discussed, the errors of the inappropriately recusing judges were corrected on appeal; but those were cases wherein there was an appeal. On one view, it could be said that, on a successful appeal, the system has corrected itself, no damage has been done, and "what is the problem?" However, a discussion on inappropriate non-recusals would also reveal wrongful failures to recuse being corrected on appeal. So, again, the system would have corrected itself, no damage has been done, and "what is the problem?" Clearly, the latter scenario would, if the case is assigned to another judge for rehearing, involve significant additional costs, delay, etc. On the other hand, if on a finding of an inappropriate recusal the case is remitted to the recusing judge/court to continue the hearing, these costs and delays would largely be avoided. But this matter is not so straightforward.

The prospect of a case being remitted to a court that had initially recused itself raises difficulties. The view of Langstaff J. in *Begraj v Heer Manak Solicitors* that a decision by a tribunal to recuse itself indicates that there might be a risk of bias has already been discussed above.[128] If it is not a compelling reason against the intervention of a higher court, then it is probably not a convincing rationale against remittal to the recusing judge. However, the parties and the "informed observer" would know that the judge had (even if wrongly) considered that there was a risk of bias. How would this impact the confidence of the parties (or the public) if the judge then continues with the hearing? Langstaff J. rightly noted in *Begraj* that this would "risk public disrespect for the system". While exoneration by a review/appellate court may cast the judge in a positive light, there may well be niggling suspicions about a judge who has had to be reassured that he or she can be impartial. And, if the judge got that decision wrong, what else could he or she get wrong? Was the judge truly conflicted, or just trying to escape a hard case? Neither would promote confidence. Additionally, if the recusal decision was taken in response

[126] See generally, Lord Kerr in *Lesage v The Mauritius Commercial Bank Ltd* [2012] UKPC 41, at [57]-[60].

[127] See eg, *S v Motlhabane*, above, fn.47.

[128] Above, fn.53 and text.

to an application by one of the parties, that party may be concerned that, having (wrongly) challenged a judge who was then moved to take a decision that has now been overturned, he or she may have incurred that judge's disfavour.[129] Similarly, it has rightly been noted that "[t]he lawyer considering whether to raise the recusal issue risks the judge's retribution if the motion is unsuccessful".[130] Thus, while vindictiveness is not an attribute of judicial office, it may still be problematic to return to the same judge.

Remittal to the recusing judge may be considered a natural consequence of a decision that recusal was inappropriate; but there is no consensus on this matter, as has been seen above. If the view is taken that a recusing judge has *eo ipso* become *functus officio* even if the recusal is erroneous[131], and/or that an appellate/review court should not intervene[132], then there would be no prospect of remittal, producing identical outcomes for inappropriate recusals and inappropriate non-recusals (rehearing before a different judge/court). In both instances, the parties would face re-litigating the same issues, and would be subjected to similar additional costs and delay; the parties may struggle to finance the extended, protracted litigation, and important evidence may be irretrievably lost or suffer reduced credibility. Injustice may be perpetrated. The parties would end up frustrated and aggrieved, and the image of justice would suffer. As one commentator has noted, "slow administration of justice will undermine the confidence society has in the *peaceful* settlement of disputes", and also admits of other evils.[133] In short, the impact of an inappropriate recusal on the parties, the public, and their perceptions of the justice system, may be not much different in cases of non-remittal to an inappropriately recusing judge from the impact of an inappropriate non-recusal. This would be particularly so when the recusal takes place after

[129] Compare J. Goudkamp, "Facing up to actual bias" [2008] C.J.Q. 32, at 35.

[130] M. Crowell, "Publication Review Judicial Recusal: Principle, Process and Problems" [2010] P.L. 836.

[131] *S v Motlhabane*, above, fn.47 and text.

[132] US Federal Circuit Courts of Appeals are split on this issue – see *Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144* (Federal Judicial Center, 2002), at 70.

[133] M. Kuijer, "The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings", Human Rights Law Review (2013) 13(4): 777, at 777-778 (emphasis supplied).

substantive rulings have been handed down in the case, or after the case has been part-heard. Inappropriate recusals at early stages may not raise some of these concerns, but would carry the risks of unwittingly encouraging "fishing expeditions" or judge-shopping, and their potential negative implications for judicial independence and the administration of justice.

This inquiry has been assisted by the fortune of having appellate courts reject inappropriate recusals. However, such opportunities only arise when someone chooses to challenge the recusal. Not all recusals are challenged, and it would be unusual if they were all appropriate;[134] hence there may be any number of hidden inappropriate recusals where the parties have simply cut their losses.[135] It is not satisfactory to say that, since they have not actually been adjudged inappropriate, they do not matter, for their being "hidden" in one sense still leaves their harmful impacts unchecked, and arguably more insidious. Furthermore there are cases where no appeal is possible (eg, decisions of judges of final courts, or jurisdictions that do not permit recusals to be challenged), wherein the reasons for a recusal are unknown.[136] For example, the recusal practices of the US Supreme Court have been thus described:

> "When a litigant files a motion to recuse, the Justice's decision is memorialized as a one page, typically one-sentence, unpublished order directed to the parties. When a Justice recuses sua

[134] Examples of recusals which became *fait accompli*, but which are arguably questionable include *Sos-Save Our St. Clair Inc. v Toronto* (City) (2005) 18 C.P.C. (6th) 286 (Ontario Divisional Court); *Law Society of Lesotho v Ramodibedi* [2003] LSHC 28 (HC, Lesotho, Full Court); *S v Stevens*, 1961 (3) S.A. 518 (CPD); *Reekers v R* [2011] NZCA 125 (CA, New Zealand).

[135] See generally, S.L. Buhai, "Federal Judicial Disqualification: A Behavioral and Quantitative Analysis" [2011] Oregon L.Rev. 69, at 71.

[136] With respect to the US Supreme Court, Mauro cites a source who claimed that "Only the former law clerks have inside information on why the justices recuse …" – see T. Mauro, "Decoding high court recusals", Legal Times (1 March 2004) 1.

sponte, a short statement appears in the case report that the Justice took no part in the decision being reported."[137]

Combine this with the result of a 2004 survey[138], which found that "Between them, the justices on the Court during the 2003 term registered 2,816 career recusals", with O'Connor J. having the largest number overall with 675, but Breyer J. having the highest rate, with an average of 42 per year[139], and the potential scale of hidden possibly inappropriate recusals emerges.

Thus, inappropriate recusals are problematic both when not caught (whether because appellate review is unavailable or not sought), and when caught by an appeal/review process. Remittal to the recusing court/judge is problematic, and rehearing before another court/judge is also problematic. So, "hidden" or not, inappropriate recusals are undesirable.

VI. CONCLUSION

Inappropriate recusals are potentially very damaging - perhaps no less than failures to withdraw when required. The difficulties inherent in the resolution of inappropriate recusals demonstrate that the key is to avoid them in the first place. Therefore, the emphasis here, as with inappropriate non-recusals, must be on prevention. While commentators have rightly engaged with analyses of how to avoid inappropriate non-recusals, that kind of effort has been lacking in this area. Judges and parties in the cases discussed above would have benefited from clear parameters as to how to balance properly the competing duties of the judges. As long as recusal applications fall to be decided by the impugned judges themselves

[137] K. Henke, "If it's not Broke, Don't Fix It: Ignoring Criticisms of Supreme Court Recusals" [2013] St. Louis University L.J. 521, at 535.

[138] T. Mauro, above, fn.136.

[139] S.E. Graves, "Recusal Refusal and Reform: Disqualification Decisions of US Supreme Court Justices", (Georgia State University, American Politics Working Papers Series, December 2005), at 8.

(something entrenched in the common law, which is unlikely to change without external intervention) the potential exists to get the balance wrong, meaning that there may always be as much risk of inappropriate recusals as there are of inappropriate non-recusals. Even when a strictly objective approach is tightly applied, what the "informed observer" might be taken to perceive or apprehend would still be subject to interpretation – and disagreement. It may be that the ultimate solution is to take recusal decisions away from the impugned judges. However, this is not generally accepted common law jurisprudence. In my view, it should be; but that change is not required to address the problems discussed herein, because an effective solution can be accommodated within the current law.

It has been said that "an understanding of impartiality cannot be discerned through any overarching normative proposition".[140] Similarly, providing such a proposition to regulate what is essentially a fact-driven inquiry can be elusive. However it is possible to provide a framework within a set of principles – (a) that adjudicators have a duty to sit and adjudicate on cases allocated to them, displaced only when there are objectively justifiable grounds for recusal; (b) that litigants cannot judge-shop and judges cannot case-shop; and, (c) that the administration (and image) of justice is served as much by a fearless and confident judiciary as by a fair judiciary. It is right that "real" doubts should be resolved in favour of recusal. Here, I use the term "real" to mean (by analogy with the apprehensions of the informed observer of a "real possibility" of bias) not fanciful, tenuous, fantastic, or superficial.[141] I would extend the analogy and argue that an "over scrupulous, fanciful or fantastic apprehension or a vague worry is not sufficient".[142] There must be an objectively sound basis for any supposed doubt that the adjudicator might entertain, for it cannot be sufficient for an adjudicator merely to state that a real doubt exists without setting forth the basis for that doubt. What this means is that, just as the doubts of the informed

[140] G.I. Hernandez, "Impartiality and bias at the International Court of Justice", C.J.I.C.L., 2012, 1(3), 183, at 188-189.

[141] Compare Ward L.J. in *Feld v London Borough of Barnet* [2004] EWCA Civ 1307, at [44]; Warby J. in *Adu v GMC* [2014] EWHC 1946, at [13]; *Idoport Pty Limited v National Australia Bank Limited* [2004] N.S.W.S.C. 270, at [18] (SC, NSW).

[142] McGuinness J. (talking about the apprehensions of bias) in *Bula*, above, fn.11, at 509.

observer about the judge's impartiality need to be objectively justified,[143] an adjudicator's doubt as to whether his or her own impartiality can reasonably be questioned likewise needs to be objectively justified. It is instructive that the Court of Appeal in *Locabail* referred to a "real ground for doubt".[144] This emphasises the *ground*, rather than the *doubt*, which makes the inquiry objective, and de-emphasises the judge's personal feelings.

On normative propositions, my first would be that recusals ought only to be resorted to for the proper purposes - that justice must be done and be seen to be done, "to maintain public confidence in the impartiality of judges", and to "help maintain impartiality as a matter of fact".[145] The second would be that judge-selection/judge-shopping by litigants ought to be resolutely disallowed, for this is a big enemy with the potential to subvert the justice system. Ultimately, the challenge is to "protect the independence of those exercising a judicial function, assure confidence in the administration of justice and prevent a flood of groundless conspiracy theories."[146] It is not clear how one would definitively or even credibly test "public confidence" following a recusal decision either way.[147] But while this remains the primary concern of bias and recusal law, we have to proceed with the fiction that we can confidently gauge it. My prescription for addressing the threat of inappropriate recusals follows. Judges need to respond to allegations of bias with consideration, described as "a particularly careful exercise of the faculty of judgement" which must be carried out "with great care and circumspection".[148] But they must show some

[143] *Hauschildt v Denmark*, above, fn.34, at [48]; *Kyprianou v Cyprus*, above, fn.34, at [118]; Lord Hope in *Davidson v Scottish Ministers* [2004] UKHL 34, at [47].

[144] [2000] Q.B. 451, at [25].

[145] A. Higgins, "BATAS v Laurie: apprehended bias and actual failure of case management" (2011) C.J.Q., 30(3), 246, at 260; J. Goudkamp, "The rule against bias and the doctrine of waiver' (2007) C.J.Q. 310, at 327.

[146] B. Rayment, "Bias After Dallaglio" [1996] 1(2) J.R. 102, at 102.

[147] See generally, C. Campbell, "Judges, Bias and Recusals in Australia", in H.P. Lee (ed.), *Judiciaries in Comparative Perspective,* 279, at 285, 290-292.

[148] Fennelly J. *in Kenny*, above, fn.9, at 45-46.

"backbone" in the process – ie, be robust and strictly objective in their application of the applicable jurisprudence, which I will now reiterate. The objective inquiry (for the UK at least) focuses on "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[149] Stout describes the "test to be applied by a judge who recognises a possible apparent bias issue" as a "double real possibility" test, in that the judge must ask "whether or not there is a real possibility that the fair-minded and informed observer might think that there was a real possibility of bias".[150] Southern African courts have formulated a helpful "double reasonableness" test, based on Canadian jurisprudence,[151] which postulates that "Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable".[152] A robust application of these standards, which all postulate a high threshold, should assist adjudicators to avoid acceding "too readily" to recusal applications.

The notional observer with whose apprehensions the common law is concerned is a paragon of virtue, thus described:

> "The informed observer is reasonable, right-minded, thoughtful, not necessarily a man nor necessarily of European ethnicity or other majority traits, neither complacent nor unduly sensitive or suspicious, not unduly compliant or naïve, not entitled to make snap judgments, and would not reach a hasty conclusion based on the appearance evoked by an isolated episode of temper or remarks to the parties or their representatives, which was taken out of context. He or she does not have a very sensitive or scrupulous conscience, can be expected to be aware of the

[149] Lord Hope in *Porter v Magill* [2001] UKHL 67; [2002] 2 A.C. 357, at [103].

[150] H. Stout, "Bias" [2011] 16(4) J.R. 458, at 479.

[151] De Grandpré J., dissenting, in *Committee for Justice and Liberty et al v National Energy Board* (1976) 68 DLR (3d) 716, at 735 (SC, Canada).

[152] See *SACCAWU*, above, fn.5, at [15]; *SARFU*, above, fn.34, at [45]. Also *African Echo (Pty) Ltd v Simelane* [2014] 3 L.R.C. 583, at [53] (SC, Swaziland); *Gaetsaloe v Debswana Diamond Co Pty Ltd (No 4)* [2010] 1 B.L.R. 132, at 133 (CA, Botswana).

legal traditions and culture, but may not be wholly uncritical of this culture, and would adopt a balanced approach."[153]

The apprehensions of bias by this perfectly balanced individual must, in addition to being reasonable, be objectively justified.[154] Adjudicators ought, in their objective analyses and application of the standards to the construct, to lay aside their own feelings about the case. It is possible that certain heuristics and the cognitive illusions engendered thereby may render the required objectivity herculean[155]; but, so long as the common law apportions the recusal decision to the impugned judges, the objectivity quest is obligatory. Practically, a possibly fruitful approach to pure objectivity is for judges to envisage that they are making a decision in respect of another judge (perhaps as a review/appellate court), but in the context of the same factual circumstances. If that purely objective inquiry reveals a sound basis for apprehending bias, the judge must withdraw.[156] Where the objective inquiry does not tilt the scales one way or another (ie, there are real *grounds* for doubt), the judge should withdraw, for, in such cases, it might be preferable to err on the side of caution.[157] Where such an inquiry does not reveal a clear risk of bias, the judge has no right to withdraw. As Quirke J. said in *DD v Gibbons*, a judge is "'*not entitled* to accede to [a recusal] application unless he was satisfied on the balance of probabilities that an objective and informed person, occupying the applicant's position would reasonably apprehend that the respondent would not bring an impartial mind to the adjudication of the case".[158]

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[153] See generally, A. Olowofoyeku, "Bias and the informed observer: a call for a return to Gough" (2009) C.L.J. 388, at 394-395.

[154] Ibid, at 395-396.

[155] See generally Buhai, above, fn.135, at 82-98.

[156] The Lord Justice-Clerk in *Robbie The Pict v Her Majesty's Advocate*, above, fn.11, at [16].

[157] See Fennelly J. in *Kenny*, above, fn.9, at 46; compare Hedigan J. in *EPI, NAI v The Minister for Justice, Equality and Law Reform* [2009] 2 I.R. 254 (HC, Ireland).

[158] [2006] 3 I.R. 17, at 22 (HC, Ireland) (emphasis added).

In sum, accedence to an ill-founded claim of bias can be harmful to fairness and due process. The relevant policy objectives should prefer neither the party requesting recusal nor the opposing party, each of which can be taken to represent a sector of "the public" whose confidence the law seeks to maintain. The statements, that "the right to fair procedures does not belong solely to the applicants", and that "[t]he respondents, too, have a right to fair procedures"[159] merit accentuation. Inappropriate recusals can produce mischief, just as inappropriate non-recusals, and can also induce undesirable manipulations or subversion of the justice system and of judicial independence.[160] Stout rightly notes that "[t]he consequent loss of court time and costs to the parties are plainly contrary to the public interest, as is the fact that one party has effectively had the opportunity, without good cause, to at least partly select its tribunal."[161] Such ability to judge-select is "contrary to justice".[162] Furthermore, adjudicators ought to avoid giving "the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done."[163] Finally, it is essential to heed the exhortations of Kirby P. that "Judges should resist being driven from their courts by the conduct or assertion of parties, including assertions of actual or imputed bias."[164]

[159] McGuinness J. in *Bula*, above, fn.11, at 509.

[160] See also, *Hongu Ltd v National Executive Council* [1999] PGNC 115 (National Court, PNG); Hammond J. in *Muir v C.I.R.*, above, fn.11, at [35].

[161] H. Stout, above fn.150.

[162] See Lord Neuberger in his F. A. Mann 2015 lecture, "Judge not, that ye be not judged: judging judicial decision making", [36] (available online at https://www.supremecourt.uk/docs/speech-150129.pdf; accessed 22 June 2015).

[163] Slade J. in *R v Camborne Justices, ex. p. Pearce* [1955] 1 Q.B. 41, at 52.

[164] *Australian National Industries Ltd v Spedley* (1992) 26 N.S.W.L.R 411, at 418; *Raybos Australia Pty Ltd v Tectran Corporation Pty Ltd (No 4)* (1986) 6 N.S.W.L.R. 674, at 689 (CA, NSW).