

## Judicial independence: upholding the integrity and robustness of the Cayman Islands judicial system

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Judicial independence is a core pillar of the Cayman Islands' legal system. The judges' ability to perform their duties free of influence or control by other actors, whether governmental or private, is integral to ensuring the proper administration of justice. A judge may exercise the duty to recuse themselves from sitting in a case when there is concern that they may not be able to fulfil their role as a fair-minded observer, free from actual or perceived bias.

In the last six months, we have seen two cases in which a judge of the Grand Court recused himself from sitting in order to preserve the integrity of the Cayman Islands judicial system, ensuring not only that justice is done - but also seen to be done. [1]

### The legal test for apparent bias

In the Cayman Islands, the relevant test for apparent bias in respect of recusal applications is well-established: whether the fair-minded and informed observer, having considered all the facts, would conclude that there was a real possibility the judge was biased. [2] This test involves a two-stage approach: [3]

1. first, the court must ascertain the relevant facts and circumstances. The authorities stress that the context and the particular circumstances are of supreme importance, and the process requires an intense focus on the essential facts of the case and the issues to be determined
2. the court must then ask whether those facts and circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the judge was (or would be) biased

In determining whether there is a "legitimate doubt as to the judge's impartiality", [4] the following principles should be considered:

- a. the need to guard against judge-shopping [5]
- b. the need for timely applications on proper grounds to ensure, if a judge is recused, it is done early in the proceedings to limit disruption, delay and additional costs to the parties
- c. their duty to sit absent grounds for recusal, particularly in small compact jurisdictions with limited numbers in the judicial pool [6]
- d. attributes and presumed knowledge of the fair-minded and informed observer
- e. how it would look to a reasonable onlooker if the judge does not withdraw [7]
- f. to err on the side of caution and recuse if there is a risk that apparent bias could arise at a later stage, otherwise known as the "precautionary principle" [8]

Weighing up these factors, if the grounds for recusal are established, the judge must recuse themselves. But if the grounds for recusal have not been established, the judge is duty bound to continue to preside. [9]

## Two recent authorities considering recusal applications

The Honourable Justice Doyle sitting in the Grand Court has recently considered two recusal applications, both of which ultimately resulted in his recusal in recognition of the importance of the appearance of impartiality (and notwithstanding the absence of any evidence or allegations of actual bias).

*In the matter of Principal Investing Fund I Limited et al* (Unreported Judgment, Doyle J, 21 November 2022), there were four grounds which formed the basis of the recusal application, namely:

1. the judge being employed by, and act as a consultant for, a law firm which acted for one of the parties in the proceedings, in relation to matters which are relevant to issues in dispute in the proceedings
2. the judge, through his engagement with the said law firm, was involved in discussions concerning the fund structure and transactions, both of which are at issue in the proceedings
3. the judge's overall conduct of the proceedings, including the judge's response to the conflict of interest being raised
4. the judge had already considered, read, reviewed and relied on ex parte filings which should not inform any element of the judge's decision making in relation to current proceedings

Doyle J was not satisfied that grounds 1, 3 or 4 were good grounds for recusal, but ultimately decided to recuse himself on the basis of the precautionary principle. His Lordship considered it

wise to recuse himself at an early stage of the proceedings, rather than risk an issue developing further at trial requiring his recusal at a later stage. To recuse at a later stage would be highly detrimental to the parties - causing delay and further costs, and a waste of limited judicial resources. [10]

Doyle J emphasised that a decision to recuse is not taken lightly, particularly in a jurisdiction with limited replacement judges available.

More recently, in *Jian Ying Ourgame High Growth Investment Fund*, [11] Doyle J again recused himself from acting. In this case, the application for recusal, which was not made until four days before the scheduled hearing, was based on three grounds:

1. his role as the liquidation judge
2. he was privy to certain ex parte filings by the plaintiff's liquidators that have never been provided to the applicant, including the first report of the joint provisional liquidator
3. it was alleged that he already appeared to have made a finding in his judgment without hearing any evidence or submissions on behalf of the applicant

In this instance, Justice Doyle was satisfied that through the eyes of a fair-minded and informed observer, having considered all the facts and circumstances, he had a duty to recuse himself due to his role as liquidation judge. While he was reluctant to do so out of concern for the delay and additional expenditure that his recusal would cause the parties, his Lordship ultimately considered this concern outweighed by the right to a fair trial by an impartial and independent judge. This right is a fundamental principle of justice, both at common law and under the Constitution. [12]

The Judge noted a recent uptick in recusal applications in the Cayman Islands. As a jurisdiction that deals with high value financial services disputes which are hotly contested, there are significant amounts at stake. Due to this, the parties endeavour to pursue all conceivable (and indeed some inconceivable) points which they think may assist their respective cases. [13] Within this context, a judge must consider a recusal application and balance this against proper administration of justice and the need for judicial independence in a small compact jurisdiction with a limited pool of specialist judges available to deal with financial services litigation.

## Conclusion

This developing jurisprudence reinforces the integrity and reliability of the Cayman Islands and its judicial system.

The Cayman Islands has long been recognised as a reputable financial centre, with a judicial system characterised by courts that are "competent and able to resolve any complex dispute that may arise in an efficient and just manner". [14]

[1] *Jian Ying Ourgame High Growth Investment Fund* (Unreported Judgment, Doyle J, 19 July 2022) at [39]. See also: *In the matter of Euro Bank Corporation* [2001 CILR 114] at [5] per Smellie CJ: “the test favoured in the Australian courts and may be more in keeping with the requirement that justice must objectively be seen to be done.”

[2] *Perry v Lopag Trust Reg. and others* (Unreported Judgment, CICA, 19 November 2021) at [152]).

[3] *In the matter of Principal Investing Fund I Limited et al* (Unreported Judgment, Doyle J, 21 November 2022) at [92]).

[4] *Smith v Attorney General of Trinidad and Tobago* [2022] UKPC 28 at [1].

[5] *Mohanty v Health Services* [2003 CILR 40] at [20] - [27].

[6] *Jian Ying Ourgame High Growth Investment Fund* (Unreported Judgment, Doyle J, 19 July 2022) at [35]. See also: FA Mann Lecture 2015 per Lord Neuberger at [36].

[7] *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451 at [58].

[8] *Morrison v AWG Group Limited* [2006] EWCA Civ 6. See also: Cayman Judicial Code of Conduct at [19].

[9] *Jian Ying Ourgame High Growth Investment Fund* (Unreported Judgment, Doyle J, 19 July 2022) at [29].

[10] *In the matter of Principal Investing Fund I Limited et al* at [147] “...refuse to stand down now and to continue with the trial only to discover say in week 4 or 5 of a 6 week trial that the way in which issues ... developed meant that I must recuse would be a terrible waste of time, money and limited judicial resources.”

[11] (Unreported Judgment, Doyle J, 19 July 2022)

[12] *Jian Ying Ourgame High Growth Investment Fund* (Unreported Judgment, Doyle J, 19 July 2022) at [39].

[13] *Jian Ying Ourgame High Growth Investment Fund* (Unreported Judgment, Doyle J, 19 July 2022) at [37]-[38]. See also: *In the matter of Principal Investing Fund I Limited et al* (Unreported Judgment, Doyle J, 21 November 2022) at [148].

[14] *KTH Capital Management Limited v China One Financial Limited & Others* [2004-5 CILR 213] at [23]; *Daiwa Capital Markets Europe Limited v Mr Maan Abdul Wahed Al-Sanea* (Unreported, Smellie CJ, 19 August 2019) at [21].

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